

FAQs on Coronavirus (COVID-19) Issues for Employers

On March 14, 2020, the House of Representatives passed the Families First Coronavirus Response Act (H.R. 6201), which could dramatically impact how employees will be treated with respect to mandatory sick leave, paid family and medical leave, and other relief measures. The Administration expressed full support for the bill. However, due to pressure from small businesses, on March 16, 2020, the House revised the bill with so called “technical amendments” which appear to restrict the eligibility for certain types of leave. The Senate has yet to begin deliberations. We are continuing to monitor that legislation, which could impact our answers to the FAQs below. We will alert you to any changes brought about by new federal laws. Updates can be found on Saul Ewing Arnstein & Lehr’s COVID-19 Resource page [here](#).

Frequently Asked Questions on Various Workplace Scenarios

Below are questions that we received during our recent “Coronavirus (COVID-19) Prevention and Preparedness for Employers” webinar as well as additional common questions. In an effort to provide practical advice in this fast-changing pandemic, we have omitted extensive legal analysis or the nuances of the various laws. Facts make a difference, and you should consult your lawyer before taking action. Please also note that these responses may be different for public employees, whose rights are set by state or local laws or union agreements, and for private sector union employees.

Travel Issues

Q: Can an employer ban employees from engaging in personal or business international travel, or any cruises, except for certain limited, pre-authorized work trips?

A: Probably. Some state and local laws restrict employers from regulating outside activities of employees, or punishing them for those activities. Public employees also have Constitutional rights. In response to the pandemic, employers can clearly prohibit business travel as long as the policy is applied equally to all employees, in a non-discriminatory manner. Employers may be able to justify limiting personal travel, especially international travel, if the risk of exposure or the need for quarantine will affect essential personal (such as hospitals and other health care facilities). Employers are not required to reimburse employees for any financial losses suffered from personal trip cancellations.

Q: Can I require my employees to tell me about all of their business and personal travel? Both domestic and foreign?

A: Yes. You have a right (and maybe an obligation in case the information is requested as part of a public health agency investigating) to track business travel during this pandemic. Requiring notice of personal travel also allows you to decide if additional precautions are needed before the employee returns to work.

Q: Can an employer require business travel, including to areas with a high risk of exposure?

A: Yes, assuming that the areas are not subject to quarantine or other government-mandated restrictions.

Employers can require business travel, subject to any travel rules and restrictions set by the CDC and other applicable governmental and public health agencies. If employees violate these rules, they are subject to discipline or discharge if they are at-will. No public health agency has presently prevented employers from continuing to require business travel even if the employee or a family member is at higher risk. Generally, however, employers should be mindful that the CDC now has recommendations for limiting mass gatherings and that state and local governments are increasingly placing temporary restrictions on mass gatherings, as well as certain business operations in the private and public sectors that

must be followed in such locations. If an employee is exposed to COVID-19, the employee may or may not have a workers' compensation claim under state law, which would require (among other things) that the employee demonstrates that he/she became infected with the virus while performing company business. You need to balance your legal rights against the impact on your employees and their families, and whether the travel is really necessary.

Q: Can employers require employees coming from high-risk areas to self-quarantine on their return?

A: Yes. There is a very expanded [list of Level 3 countries](#) identified by the CDC that includes most of Europe. Following CDC guidance, anyone traveling from those countries should be required to stay home for 14 days and monitor symptoms. For other countries, the employer can, but is not required to, mandate employees to stay home for 14 days, but they would need to do this for all international travel to avoid discrimination issues. Some employers are also starting to restrict employees from returning to the office when they have visited communities that have been impacted by the virus.

Q: Do I need to pay those employees? What if they do not want to use PTO?

A: This is the same as the answers below for sick employees. You do not need to pay them unless they have paid leave under your policy or laws. If employees do not want to use their PTO, then they do not get paid. Depending on your policies, you may be able to require employees to use PTO or other paid leave for the absence, which is what the FMLA permits.

Q: Are employees being self-quarantined based upon foreign travel or possible exposure due to contact with someone who is COVID-19 positive covered under the FMLA?

A: By definition, they do not have (yet) a serious health condition that we know of. If they develop symptoms, then they may have COVID-19, which would be covered. If they are caring for a sick family member with COVID-19, that would be covered. They could also have the virus and be symptom-free, but are not able to get tested. Given the uncertainty, it would not be surprising if DOL says that employers should treat these employees as covered under the FMLA, with reinstatement rights. New federal legislation may address this.

Sending Sick Employees Home

Q: Can an employer question an employee about symptoms if the employee exhibits signs of illness?

A: Yes. Per EEOC guidance, managers may ask employees about the flu and/or cold-type symptoms they are exhibiting as long as the questions are consistent, non-discriminatory and confidential. This inquiry is distinct from asking employees questions that may require an employee to disclose a disability, which are generally prohibited by the ADA. If employees report having respiratory symptoms, employers may order them to stay home.

Unless required by federal, state or local law, or if the employee has accrued and unused PTO/sick time, there is no requirement that employers compensate employees for time not worked due to illness. However, developing federal and local legislation may provide additional relief for employees who become sick with COVID-19, if passed into law.

Q: Can employers send sick employees home? Or require sick employees to stay home?

A: Yes, so long as these rules are enforced equally for employees with similar symptoms.

Q: If a company has not always done this in the past, can it start now?

A: Yes. With certain exceptions (such as the duty to bargain with unions), work rules can be changed at any time, or old rules enforced, provided that such rules are enforced equally for all similarly situated employees. Public health officials say that COVID-19 appears to be more dangerous than the flu based upon its communicability, potential death rate and the lack of a vaccine. So there is a reasonable basis to establish or enforce these types of rules.

Q: Do I have to pay employees that I send home sick?

A: That depends. You need to follow any applicable state or local paid leave laws, and follow your own leave policies or any contracts. Once those rights are exhausted, you are not required to pay employees who are sick (unless new laws change

that). If you allow salaried exempt employees to work from home, you will be obligated to pay them under the FLSA. The same applies to any hourly employees you allow to work from home.

Q: *If I have employees who I know are in a more vulnerable population, and at much greater risk if they contract COVID-19, can I require them to work from home?*

A: No. That would violate the ADA unless there is competent medical evidence that staying in your workplace would be a direct threat to their health. If the reason they are more vulnerable is due to a medical condition, that is probably an ADA-covered disability. The ADA prohibits treating people with disabilities differently because of speculative risks. The possibility of higher workers' compensation costs is not enough.

If you are following all other WHO and CDC recommended practices in your workplace, it may be difficult to prove that being at work is a direct threat, which is the standard that you would have to demonstrate to show that this action was lawful under the ADA.

Q: *I'm considering offering additional paid emergency leave, and being more flexible with my sick leave policies, regardless of what Congress passes. Can I do that for a temporary basis and go back later?*

A: Yes. Like all of your benefits, you can change them at any time so long as you do not take away accrued benefits. You should state the parameters of these adjusted policies in writing, tell employees this change is temporary, and perhaps put an initial deadline.

Telework

Q: *Can I control whether or not employees work while at home sick or under quarantine?*

A: Yes. You do not have to allow telework. If you do not want to pay employees, you need to make it clear that employees are not supposed to do any work, and that includes checking work emails. For example, during federal government shutdowns many agencies locked employees out of their emails to prevent them from working. But they are entitled to any paid leave they have under your policies or that may be required by existing or new laws.

Q: *Can I require employees to telework?*

A: Yes. You can close offices and require remote work for those who are able to do so.

Q: *Do I have to pay or reimburse employees for expenses related to telework?*

A: Maybe. Under the FLSA and state wage laws you cannot require employees to pay for business expenses if this reduces their compensation below minimum wage.

Q: *How can I monitor telework to deter abuse?*

A: There are many methods and best practices that employers have developed surrounding telework in the last decade, which may include telecommuting agreements, regularly scheduled telephone or video conferences, or other tools to monitor employee responsiveness. The options depend on the nature of the work. Ultimately, there will need to be a lot of trust.

Q: *My company wants to close down for several weeks to help social isolation, or is preparing for government required closures. I have a number of employees who I don't think can do their jobs at home, or the work they can do is not a full-time job. What can I do?*

A: If they are salaried exempt employees, and you allow them to work, they will typically get paid for the entire week in which any work is performed; although you can draw down on their accrued paid time off if they cannot work part of the week due to illness or other reasons covered by state or local sick leave laws. For your hourly workers you can monitor their time, or limit the number of hours they can work each day. Employees in many industries will not be able to do their jobs remotely, and do not have to be paid once they exhaust any paid leave.

Q: Some states are initiating or considering mandatory quarantines for more vulnerable populations (such as those over 65). Do I have to allow these employees to work from home?

A: You cannot discriminate on the basis of age in deciding which employees can telework. However, unless the government mandate or other laws include protections for quarantined employees, you can decide whether to allow telework, and if so how much.

Q: Can I have some people or teams stay in the office if that is the best way for them work?

A: Yes. Unless there has been an official order to close your business, it is up to you whether to close. You can require telework for some employees who can do so effectively, and have other employees in the office. That will not be as effective as self-isolation, and does present some increased risk of those employees traveling to and being in a group, but that is a business decision.

Q: We are keeping our business open for now. If I have employees who are healthy but fearful of coming to work, do I have to let them stay home?

A: The legal answer is usually going to be no. But you need to consider CDC and other public health warnings about the risks for more vulnerable populations. For people in those groups, the heightened concern is real.

Return to Work

Q: If an employee has reported being out sick, can I require a return to work release?

A: Yes, if you do so for all illnesses with similar length or symptoms.

Q: Can I require documentation if they have been out caring for a sick relative?

A: Yes. You can require documentation similar to that under the FMLA that they were caring for a family member with a serious health condition. But also recognize that the increase of work and services for health care providers during this pandemic means that it will likely take longer than expected for many providers to produce a doctor's note. You can also ask the employee who is providing care to for someone with a contagious illness (cold, flu, COVID-19) whether they have symptoms and, if so, who can require a doctor's note from their doctor.

Q: Does it make a difference if their family member is positive for COVID-19?

A: If you know that the family member has COVID-19, it is reasonable to have the employee stay home until the 14-day incubation period is over. But in this type of case you might not know when the family member first became infected, so the amount of time that the employee should stay home will depend also in part on whether the employee develops any symptoms and if the employee also tests positive for the virus.

Q: Can I require that employees who have been out ill provide a negative test for COVID-19?

A: The gold standard set by the CDC is that individuals diagnosed with COVID-19 have been symptom-free (including fever), without medication, for 24 hours, plus two negative tests taken 24 hours apart.

There is not enough testing available now for those who are sick, and public health officials have not given other advice. Until widespread testing is available, the next best thing is a doctor's note that the employee is symptom-free and released to return to work.

If doctors become overwhelmed with cases, and cannot see patients just to give them fitness for duty releases, employers will need to decide whether to accept employees' representation that they have been symptom-free, or implement requirements such as taking employees' temperatures before they come back to work.

Q: How long will sick employees be out?

A: No one knows, and that is likely to vary. Symptoms may last for weeks, and the virus might remain after that. Follow the advice of your local public health officials.

School Closures

Q: My state/county/city just closed schools for multiple weeks as a containment/mitigation measure. Do I have to provide additional leave? Provide flexible schedules? Allow tele-work?

A: Unless new laws or regulations have been passed, you only need to follow your current policies and contracts. Some state or local laws permit employees to use accrued sick time for school closures due to public health emergencies. In general, this is an extended version of schools being closed for snow days when your business is open. You can choose to provide liberal leave, and dock their paid leave (if any). You do not have to permit paid telework if you do not want to.

Layoffs and Terminations

Q: My company is in the hospitality/restaurant/entertainment/transportation business and we have had a significant drop in customers. Can I furlough, lay off or terminate employees? What rights do they have?

A: The rules are no different this time than post 9/11, or major recessions, or any other financial struggles. There are some federal and state laws requiring advanced notice in the event of closing or mass layoffs, notably the federal and state WARN acts, which can result in steep penalties if not properly followed. Your contracts, policies or collective bargaining agreements may include provisions for severance and other benefits for layoffs or terminations due to financial hardship. Absent such provisions, those employees would have rights under state law for unemployment compensation, usually with a waiting period.

Many employers will choose to consider furloughs and/or terminating part-time employees or reducing hours, before a mass layoff. Under the federal WARN act, a furlough of up to six months does not trigger the warnings. Since the duration of reduced customers or closures is uncertain, furloughs allow employees to seek unemployment compensation, which may include partial benefits for employees whose hours have been reduced due to lack of work (as permitted by state law).

Unless there are laws or contracts that specify otherwise, a layoff or furlough does not guarantee the employee that he/she will be rehired if the economic condition improves. Employers should make that clear to employees. Promises that are made to employees that they will be brought back when the crisis is over could be enforceable contracts.

Q: Should I give notice under the federal or state WARN Act?

A: If your business is large enough to be covered by the federal or a state WARN Act, you should give as much notice as practical for any furloughs, layoffs or terminations. There is an exception to the notice requirements under federal WARN for unforeseen circumstances that logically should apply to COVID-19, but you should give whatever notice you can.

Confidentiality

Q: Is medical information about sick employees confidential? What about their family members?

A: Yes, you should treat all medical information from sick employees or their family members confidential. This information may be protected by HIPPA if it is received in connection with your group health plan. It is also confidential medical information under the ADA. For larger employers, it may be protected under the FMLA. It may also be confidential under state laws.

Q: Can I disclose to other employees that one of their co-workers was exposed to or has COVID-19?

A: The general rule is that you should not disclose the identity of the employee who has been exposed or any confidential medical information without the consent of the employee. You can and should provide notice to employees who might have had contact that an employee is under self-quarantine after possible exposure, or has been diagnosed.

But in a pandemic, you will be contacting your public health authorities for guidance. If they do not do contact tracing, they may ask you to do so, or provide other notifications so that employees with possible exposure can be tested or quarantined.

Customer Issues

Q: Can an employee refuse to serve a customer who is exhibiting symptoms of respiratory illness?

A: Generally, no. The employer may ask the customer about symptoms and then decide whether to ask the customer to leave the premises (if this policy is applied equally to all customers demonstrating similar symptoms). The employer is not required to make such inquiries, and may order the employee to continue to serve.

If the employee is at an increased risk for illness due to being part of a more vulnerable population designated by the CDC or a similar public health agency, the employer may want to consider reassigning the customer to a different employee. Employers should continue to monitor local public health agency guidance on these matters, which are frequently updated.

Q: What about employees who need to go into customers' homes (such as cleaning crews, electrical, HVAC repairs or other contractors)?

A: You could have a policy that asks all customers to advise in advance whether anyone in the house has COVID-19 or cold/flu-like symptoms, and then decide whether those individuals can be isolated from your employees. You could empower your employees to leave a home where a customer is visibly ill. But just as in the prior example, you do not have to.

Customer Discrimination

Q: My customers are complaining that they don't want to be served by someone who is Asian/Korean/Italian/Other. Can I let that employee go?

A: No. That would be illegal discrimination based upon ethnicity or national origin. Customer discrimination is not a defense.

Third-Party Service Providers

Q: We use other companies for security/cleaning/maintenance/other services. How can I make certain that they are taking the same precautions and keeping sick employees out?

A: This may or may not be expressly addressed under your current contract. But you have a right to ask them to describe the procedures they are using, and to tell them that you will send back any employee who is sick. They will probably want to know your procedures.

OSHA Recordkeeping

Q: How can I comply with new OSHA guidance to track employees who contract COVID-19 at work?

A: That is going to be difficult, and OSHA will likely provide additional guidance. You can and should keep track of all employees who have COVID-19, symptoms like a cold or flu, or possible exposure; when they were sent home and for how long; and any return-to-work documentation. Down the road you may be able to determine which employees may have contracted COVID-19 at work.

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