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FAQs for Employers During the Coronavirus Pandemic



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To help employers grappling with how to respond and handle a variety of challenges caused by the coronavirus (COVID-19) pandemic in the United States, we have compiled some answers to frequently asked questions (FAQs) about the latest guidance from federal agencies when it comes to managing your employees. We have also noted where state laws may also be applicable to certain situations.

Wage and Hour Considerations

Can I pay my employees a portion of their salary if they are exempt?

Under the federal Fair Labor Standards Act (FLSA), exempt employees must be paid their entire salary if they work any amount of time during a workweek. Therefore, an employer may not reduce an employee's guaranteed salary without losing their exempt status. Employers are permitted to direct employees to take accrued vacation in the event of an office closing, so long as employees are paid their full salary for the time away from work.

I may have to reduce hours and provide fewer hours for my hourly employees. Am I permitted to do so?

Yes. Under the FLSA, and subject to any employer policies and collective bargaining agreements, employers can generally reduce hours for non-exempt employees at any time. Non-exempt workers do not need to be paid if they are not working. However, employers should pay attention to state and local regulations regarding notice of unemployment, COBRA and other benefits. Of course, employers should also note applicable minimum wage laws.

Our company has asked certain employees to stand by as we determine what work we can provide them, if any. Do we need to pay them for the time they are standing by?

It depends. Under the FLSA, if an employee is engaged to wait, they are paid, while if they are waiting to be engaged, they are not. Remote working arrangements do not change the analysis. If you have an employee who is, for example, expected to be at her computer throughout the day to answer messages, they are engaged to wait and must be compensated. However, if you have an employee who is permitted to leave a message on how to reach her should you need her to work, she is waiting to be engaged.

Our company is pivoting – and quickly. Can we require an employee to take on work that is outside the scope of her normal responsibilities?

With some exceptions, yes. The FLSA does not limit the type of work that an adult can perform. However, if your employee claims that the new role is not possible due to a disability, it will be important to document your efforts to attempt to find a reasonable accommodation.

Our company needs to bring in temporary workers for certain projects. Who is liable for their wages and benefits?

The answer depends on the work arrangement. Unrelated to the COVID-19 outbreak, on March 16, 2020, the U.S. Department of Labor announced its final rule on joint employment, providing a four-factor test to determine who is an employer for purposes of the FLSA by looking at 1) who hires or fires the employee; 2) who supervises and controls the employee's work schedule or conditions of employment to a substantial degree; 3) who determines the employee's rate and method of payment; and 4) who maintains the employee's employment records.

Can we pay bonuses to employees who show up, given our recent struggle with absenteeism?

Yes. However, remember that under the FLSA, guaranteed bonuses might be considered as wages for purposes of calculating overtime. However, discretionary bonuses that are provided after the crisis as a thank you to workers will be excluded from the regular rate.

Family and Medical Leave Act (FMLA) Considerations

Can an employer require that an employee provide a medical note before returning to work onsite?

Yes. An employer may require a doctor's note before permitting an employee who has been ill to enter the workplace. However, the sheer impact of COVID-19 on the health care industry may require that employers waive the requirement of a medical note due to the amount of time it may take an employee to receive one. Employers should check local laws to ensure they are permitted to ask for a note in the case of shorter absences. Employers should also follow CDC and state public health agency guidelines to ensure that they are maintaining a safe workplace.

Can an employer reduce its paid sick leave policy in light of COVID-19?

It depends. Until COVID-19, there was no federal right to paid sick leave. There is now a **new federal law** requiring certain employers to provide a limited amount of paid sick leave to deal with the effects of COVID-19 on employees and their family members. Additionally, there may be state or local laws requiring paid sick leave. However, should a company offer paid sick leave beyond that required by local, state and federal law, the company may reduce it, provided that it does so in a nondiscriminatory manner and in compliance with its policies.

Is there any way to control how my employees use FMLA during the COVID-19 crisis?

FMLA leave must be used for a qualifying reason. In the case of illness, FMLA provides leave for a serious health condition or to care for a child, spouse or parent with a serious health condition. The act requires 30-days' notice when the need for the leave is reasonably foreseeable. In the case of COVID-19, it is clear that many employees will not have 30 days' notice of their – or their family's – illness. However, employees who know they will need to take care of a parent, for example, can be asked to provide as much notice as practical of their plans to do so. Note that the FMLA Expansion (potentially applicable to employers with 1-500 employees) will only require that eligible employees show that they are unable to work (or telework) in order to care for a child if the child's ordinary place of care (including a school) is unavailable.

National Labor Relations Act (NLRA) Considerations

Can I discipline a worker for disparaging the company as providing unsafe working conditions in the COVID-19 crisis?

Employee complaints about workplace conditions may be protected under the NLRA. Employers should be careful to document any such complaints and consider the details before disciplining or terminating an employee for making that complaint.

Americans With Disabilities Act (ADA) Concerns

Do the ADA's existing rules continue to apply?

Yes, but according to the EEOC, those rules do not interfere with or prevent employers from following the [guidelines and suggestions made by the CDC or state/local public health authorities](#) about steps employers should take regarding COVID-19. Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves.

Therefore, employers should continue to follow the most current information on maintaining workplace safety.

How much information can an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

Under the EEOC's pandemic guidance, employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Can an employer take an employee's temperature?

The EEOC is stating that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure an employee's body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. According to the EEOC, the ADA does not interfere with employers following this advice.

When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

Yes. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. The EEOC notes that new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp or an email to certify that an individual does not have the pandemic virus.

If an employer learns an employee tests positive, what can it say or not say?

First, the employer should contact the local public health agency for guidance on any steps to take. The employer will need to warn others who had contact, but they should not identify the employee (pursuant to the ADA, which is very strict on maintaining confidentiality of medical info). We note that the EEOC is operating on a sliding scale of what is permissible and is taking guidance from the CDC.

As for the CDC's stand on confidentiality, it currently states (emphasis added):

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 maintain confidentiality as required by the Americans with Disabilities Act (ADA)*.

It's important to note that employers can discuss with the affected employee the option to voluntarily notify those with whom they had contact or whom they know might be high risk.

If an employer learns an employee has taken a test, can the employer ask them to reveal the results?

Most likely yes. In its [pandemic guidance](#), the EEOC states, "If (the) pandemic ... becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic ... poses a direct threat."

Working With the Federal WARN Act

The federal WARN Act requires a 60-day notice when a business with 100 or more full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) does any of the following:

- Closes a facility or discontinues an operating unit permanently or temporarily, affecting at least 50 employees, not counting part-time workers, at a single site of employment;
- Lays off 500 or more workers (not counting part-time workers) at a single site of employment during a 30-day period;

- Lays off 50-499 workers (not counting part-time workers), and these layoffs constitute 33% of the employer's total active workforce (not counting part-time workers) at the single site of employment;
- Announces a temporary layoff of less than 6 months that meets either of the two layoff criteria above and then decides to extend the layoff for more than 6 months. If the extension occurs for reasons that were not reasonably foreseeable at the time the layoff was originally announced, notice need only be given when the need for the extension becomes known. Any other case is treated as if notice was required for the original layoff; or
- Reduces the hours of work for 50 or more workers by 50% or more for each month in any 6-month period.

Are there exceptions that might apply now?

Likely yes (at least under the federal WARN Act). The WARN Act allows for shortened notice in the event of an unforeseen business circumstance or a natural disaster. Layoffs or a plant closing due to the coronavirus may well trigger these exceptions. It is important to note that notice to employees is not excused under these exceptions; rather, it can simply be given with less than 60 days' notice (or even after the fact).

What about state or mini-WARN Acts?

Several states have what are known as "mini-WARN Acts" that, while similar to the federal WARN Act, can operate differently. For example, the Illinois mini-WARN Act applies to layoffs of: (1) 250 or more people, or (2) 25 or more people if they constitute 33% of the workforce at the single site of employment. Note that some states with mini-WARN laws are updating them currently in light of the coronavirus outbreak. Note, not all state mini-WARN laws contain the unforeseeable business circumstances exception for shortened notice.

If notice is required, what must the notice contain?

1. A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
2. The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
3. An indication whether or not bumping rights exist; and
4. The name and telephone number of a company official to contact for further information.

Note that the notice *may* include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

OSHA Concerns

What are OSHA's record-keeping requirements?

Employers with more than 10 employees are generally required to keep a record of serious work-related injuries and illnesses. That includes any work-related illness that results in loss of consciousness, days away from work, restricted work, or transfer to another job or requiring medical treatment beyond first aid. If an employer suspects that an employee contracted COVID-19 due to exposure at work, then that illness would be recordable.

When must an employer report an injury to OSHA?

Employers must report all work-related fatalities to OSHA within eight hours. In addition, employers must report all work-related inpatient hospitalizations to OSHA within 24 hours. If an employer suspects that a hospitalized employee contracted COVID-19 due to exposure at work, then that hospitalization or death must be reported to OSHA.

An employer can report to OSHA by calling 1-800-321-OSHA (6742), by calling the closest OSHA Area Office during normal business hours or by using OSHA's online form (<https://www.osha.gov/pls/ser/serform.html>).