

Coronavirus Q&A: A Legal Resource Guide for Employers

Guidance on Paying Employees

(Based on guidance from the United States Department of Labor)

Employers should bear in mind state and federal laws may be modified as the United States deals with this pandemic. Check back for additional updates for this information.

Do I have to pay non-exempt employees during a business closure?

While employers may implement policies that allow payment to employees during a business closure, under the FLSA, employers are obligated to pay non-exempt employees only for the hours worked, not hours the employee otherwise would have worked if the employer's business had not closed. If telecommuting or working from home is provided as a reasonable accommodation, the employer must pay non-exempt workers the minimum wage, and at least time and one half the regular rate of pay for overtime hours.

How do I pay exempt employees during a business closure?

Under the FLSA, employers are generally obligated to pay exempt, salaried employees their full salary in any week in which they perform any work, with limited exceptions. FLSA does not require employer-provided vacation time. Where an employer offers a bona fide vacation plan, the employer may require salaried employees to use accrued leave or vacation days as long as the employee still receives payment equal to the employee's guaranteed salary. If an employee does not have enough accrued time to cover the absence, the employer must still pay the employee the full guaranteed compensation amount in order for them to remain exempt. Employers may not deduct from the predetermined compensation amount for absences occasioned by the office closure during a week in which the employee performs any work. Employers are not required to pay exempt, salaried employees in weeks in which they perform no work.

Does the employer have the authority to change work duties and work schedules because of restrictions associated with COVID-19?

- **Hours/Days.** The FLSA does not limit the number of hours per day or per week that employees aged 16 and over can be required to work. Again, employers should be mindful of other restrictions, such as state and local laws and wage requirements.
- **Job Duties.** Employees aged 18 and over may be asked to perform work outside of their job description. The DOL notes that employers may wish to consult bargaining unit representatives if they have a union contract. Employers may also want to consult their human resource teams if they anticipate assigning employees work outside of their job description during a pandemic.
- **Use of Volunteers.** Private sector employers who are short-staffed may seek to use volunteers to perform business tasks. The DOL notes that the FLSA has "stringent

requirements with respect to the use of volunteers.” In general, under the FLSA, covered, non-exempt workers working for private, for-profit employers have to be paid at least the minimum wage and cannot volunteer their services. Employers that are private, not-for-profit organizations or public agencies may fall under certain exceptions, and are encouraged to check the DOL rules governing the circumstances where volunteering in the public and private, non-profit sectors may be allowed.

- **Temporary Employees.** If an employer brings on temporary employees from a staffing agency to supplement its workforce during staffing shortages, an employer may be jointly and severally liable for any unpaid wages if the employer is deemed a joint employer. The DOL recently updated and revised its joint employer guidance.
- **Offering Alternative Work Arrangements to Quarantined Employees.** Employers are encouraged “to be accommodating and flexible with workers impacted by government-imposed quarantines. Employers may offer alternative work arrangements, such as teleworking, and additional paid time off to such employees.” The DOL specifically notes that telecommuting may be offered as a reasonable accommodation, and employers must provide such employees with the same hourly rate or salary.

Can an employer require an employee to return to the worksite during the time the business is closed on an emergency basis?

Generally, employers can designate who are essential and non-essential workers during a natural disaster event. Employers should follow their own policies and consult with state and local laws as well as consulting with their collective bargaining agreement. Often times, collective bargaining agreements require premium pay for these types of call backs.

Can the employer alter the stop and start times of employee work hours?

Employers may alter the stop and start times of employees subject only to their collective bargaining agreement and state and local laws. Often times, there are Force Majeure clauses in collective bargaining agreements that allow freedom to make necessary changes in emergency situations.

Can an employer allow an employee to use accrued leave time during an emergency shutdown?

An employer can allow an employee to use leave time in accordance with their employee handbook and in accordance with their collective bargaining agreement.

Can an employer force an employee to work remotely (telework) and if so, what are the guidelines?

An employer may encourage or require employees to telework as an infection control or prevention strategy. In doing so, employers must not single out employees in violation of any Equal Employment Opportunity (EEO) laws. If teleworking is not being provided to an employee pursuant to a contractual requirement or as part of a reasonable accommodation, the employer must pay the employee for the hours actually worked and at least at the minimum wage for regular hours worked and at least time and half the regular pay for hours worked in excess of 40 hours in a workweek. Employers are still required to maintain an accurate record of hours worked for all hourly employees, and are encouraged to work with employees to establish hours

of work for employees who telework and a mechanism for recording each teleworking employee's hours of work.

- **Reimbursement for Telework Expenses.** If an employee is required to work from home, an employer may not require an employee to pay for or reimburse the company for business expenses of the employer where doing so reduces the employee's earnings below the required minimum wage and overtime compensation.
- **Telework or Home Office Requirements.** OSHA does not have regulations regarding telework in home offices. In February 2000, OSHA issued a directive stating that it "will not conduct inspections of employees' home offices, will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees." If OSHA receives a complaint about a home office, it may informally let employers know about such a complaint but will not follow up with the employer or employee. Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for maintaining such records, even if injuries or illnesses occur in the home office.

Family Medical Leave Act Implications (FMLA)

Can an employee take FMLA to cover the absence due to illness associated with the coronavirus?

Employees infected with Coronavirus may be entitled to FMLA. Employees who are infected with Coronavirus or who are caring for a family member who is sick with Coronavirus "may be entitled to leave under the FMLA under certain circumstances" "where complications arise that create a 'serious health condition'" as defined by the FMLA. To be eligible for up to 12 weeks of unpaid, job-protected FMLA leave, employees must meet certain requirements if they work for a covered employer, including (1) employment by their employer for at least 12 months, (2) at least 1,250 hours of service over the previous 12 months and (3) work at a location where at least 50 employees are employed by the employer within 75 miles. "Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period." The guidance further notes that workers who are ill with pandemic influenza or have a family member with influenza are urged to stay home to minimize the spread of the pandemic, and employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.

Does the FMLA cover absences related to avoiding exposure?

The guidance states that "FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under FMLA."

Does the employer have to provide employees leave to take care of children sent home from school or otherwise provide paid leave?

At this time, no federal law requires an employer to provide non-government employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or child care. That being said, the DOL encourages employers to “review their leave policies to consider providing increasing flexibility to their employees and their families” “given the potential for significant illness under some pandemic influenza scenarios.”

Federal law does not require employers to provide paid leave to employees who are absent from work because they are sick with pandemic flu, have been exposed to someone with the flu or are caring for someone with the flu. Although pursuant to Executive Order 13706, some federal contractors may be required to provide paid leave to employees under certain circumstances. Again state and local laws should be independently considered.

Can employers send employees home?

Employers may send employees home if they show symptoms of pandemic influenza. Employers must be sure to apply any policies or protocols in a uniform, neutral manner and in compliance with laws prohibiting discrimination in the workplace on the basis of race, sex, age, color, religion, national origin, disability, union membership, veteran status, and other categories that may be protected under state and local laws. Employers must obtain objective evidence that the employee poses a direct threat (i.e., a significant risk of substantial harm) and determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat. Employers’ policies on sick leave as well as any applicable employment contracts or collective bargaining agreements could determine whether employers must pay employees who are not at work.

Is the Employer entitled to seek medical information from employees returning to work?

Employers may require an employee who is out sick with pandemic influenza 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; however, the DOL asks that employers bear in mind that during a pandemic, “healthcare resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious.” Employers are required to notify employees in advance if the employer will require a fitness for duty certification to return to work. If state or local law or terms of a collective bargaining agreement govern an employee’s return to work, those provisions should be applied.

Is an employer allowed to modify leave policies during the pandemic?

Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a non-discriminatory manner. Before making any changes to their leave policies, employers should consult state and local laws and any applicable collective bargaining agreements and employee contracts. Employers whose employees are covered by the FMLA must have a sick leave policy that complies with the FMLA.

Under FMLA, employers may require employees seeking to use FMLA leave to provide 30-day advance notice of the need to take leave when the need is foreseeable and such notice is practicable. Employers may also require employees to provide:

- Medical certification supporting the need for leave due to a serious health condition affecting the employee or a covered family member, including periodic re certification;
- Second or third medical opinions at the employer's expense;
- Periodic reports during leave regarding the employee's status and intent to return to work;
- Consistent with a uniformly applied policy or practice for similarly situated employees, a fitness for duty certification. Employers should note that such certifications may be difficult to obtain during a pandemic.

In certain circumstances, employers may be permitted to require the use of paid sick and paid vacation or personal time as a substitute for FMLA leave. Employers should keep in mind that under the ADA, qualified employees may be entitled to unscheduled or unpaid leave, or modifications to the employer's sick leave policies as reasonable accommodations.

Are layoffs appropriate during this time?

If an employer temporarily closes because of a pandemic and chooses to lay off some but not all employees, employers must bear in mind that federal laws that prohibit discrimination still apply. Employers may not discriminate against an employee because he or she has requested or used FMLA leave or similar leave under state or local laws. The Worker Adjustment and Retraining Notification Act (WARN) helps ensure advance notice in cases of qualified plant closings and mass layoffs. The DOL encourages employers to "consider other options such as telecommuting" "[i]n lieu of laying off employees" who are taking leave to care for sick family members.

Americans with Disabilities Considerations

We have an employee who recently went on a cruise and says they took a coronavirus test and that it came back negative. Can we ask for more information before allowing them to return to work?

Yes. According to the U.S. Department of Labor, during a pandemic health crisis, under the Americans with Disabilities Act (ADA), an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would (1) impair their ability to perform essential job functions (i.e., fundamental job duties) with or without reasonable accommodation, or, (2) pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

We have an employee who recently returned from Europe and is displaying coronavirus-like symptoms. Can we send them home?

Yes. Since the CDC has identified specified locations, including China, Iran, South Korea, Europe and the United Kingdom, as being countries with widespread or ongoing community

spread, you can ask employees to leave the workplace and stay home for a period of 14 days from the time they left the area. Advising such workers to go home is not a disability-related action if the illness is serious enough to pose a direct threat to safety in the workplace. An employer may ask whether employees are returning from these locations, even if the travel was personal.

The US DOL has announced new guidelines to protect the American workforce from exposure to COVID-19. However, Florida Department of Equal Opportunity, who deals with unemployment benefits, has not yet acted. Likewise, it does not appear that the Florida legislation has acted in connection with unemployment compensation. Lastly, the US House has passed a bill called the Families First Coronavirus Response Act which has been sent to the Senate. If the bill passes the Senate, business will be required to pay two weeks of paid sick leave to employees. I have not read the detail of the bill and I'm sure there will be exceptions.

Remote Work Policies

Should our employees work remotely?

Some businesses, like hospitality and service-oriented businesses, simply cannot have employees work remotely. Those that do, however, may still face challenges. Businesses that already employ employees working remotely should be able to transition more seamlessly to full-time remote work. For others that have either not had employees work remotely in the past, or have done so sparingly, the transition may be more difficult. Ultimately, companies must weigh the risks associated with bringing employees into a physical office where diseases are more easily spread versus the potential business disruption posed by having employees work remotely. Even if remote work poses challenges, businesses should account for the potential disruption posed by large numbers of employees being unable to work due to illness.

How should a company implement remote work?

First, a company must determine whether or not it has the technological capabilities to support large numbers of employees working remotely. Even if a company believes it has such a capability, it should be realistic about the possible technological difficulties it will face if it has never tested its remote-work capabilities on a large scale. Second, companies should ensure that employees have the equipment necessary to work remotely and understand how to utilize remote-access software. If an employee does not have equipment necessary to work remotely, the company may want to consider loaning equipment to the employee. Finally, and perhaps most importantly, the company should implement a good remote work policy.

What should be included in a remote work policy?

Businesses should provide employees clear expectations and guidelines. For example, identify which employees will work remotely (or have the option to work remotely) and which employees will not work remotely. Businesses should also tell employees whether they are expected to work their normal hours, or whether employees have the option of working different hours. Finally, employers should ensure that hourly employees have a method for accurately recording their time.

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Unemployment Benefits

If I am showing no symptoms of coronavirus but impose a self-quarantine to stay healthy, will I be eligible for unemployment benefits?

Probably not, at least in most cases. Unemployment benefits are available to individuals who are partially or totally unemployed due to no fault of their own. In this scenario, the individual—not the employer—is choosing not to work. Because of this, you would probably be ineligible. However, the facts of each circumstance are important. If you left work due to a risk of exposure or infection or to care for a family member, Congress has expanded unemployment benefits to cover you in the process of the corona outbreak.

However, if your employer allows you to work remotely, you would not be eligible for unemployment benefits because you would not actually be “unemployed.” In the event your employer requires you to stay home, but does not offer a remote-work option, then you might be eligible for benefits if you meet the monetary and weekly eligibility criteria.

I told my employer that I need to self-quarantine for the next two weeks because I may have been exposed to the coronavirus. Will I be eligible for unemployment benefits?

Yes, so long as there is an expectation that you return to work for your employer after the quarantine is over and you meet the other eligibility criteria.

Will I qualify for unemployment benefits if the coronavirus (COVID-19) causes my employer to shut down operations?

Yes. The new federal guidance allowing for flexibility in administering unemployment insurance programs allows states to pay benefits where an employer temporarily ceases operations due to COVID-19, which prevents employees from coming to work.

However, if you are given the option to work remotely, you probably are not eligible.

My employer terminated me because I didn't show up to work. I could not go because the schools are closed and I had no other caretakers for my children. Am I eligible for unemployment benefits?

In accordance with new federal guidelines, federal law allows states to pay benefits where an individual leaves employment due to a risk of exposure or infection or to take care of a family member. Additionally, federal law does not require an employee to quit in order to receive benefits due to COVID-19 impact. The most important thing is to stay healthy and keep your family healthy.