

## Labor and Employment

# Guidance for Employers Addressing the Workplace Impact of COVID-19

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The current COVID-19 pandemic has created numerous, and in some instances unprecedented, challenges for employers. In addition to taking preventative steps to minimize the risks of workplace exposure, companies have to confront a host of employment-related issues.

As noted below, there are few laws that directly address many of the questions employers may have. But that does not mean employers lack guidelines for navigating these uncertain times. The same principles that drive sound human resources practices should govern an employer's response to the current situation:

- Transparency
- Clarity
- Consistency
- Adaptability

This article provides some general guidance regarding many of the commonly-occurring questions we have fielded in recent days. Since each workplace presents different circumstances, employers should make sure that their response to these or other issues takes into account all relevant business and human resources considerations.

### Applicable Legal Requirements

There are no legal standards that impose employment obligations specific to dealing with COVID-19. However, employers must continue to make decisions in compliance with all existing federal, state and local employment laws.

For example, employers must ensure that their workplaces are operated in compliance with the Occupational Safety and Health Act. The law's "general duty" clause, 29 U.S.C. § 654(a)(1), requires employers to provide "employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm."

The Occupational Safety and Health Administration (OSHA) has issued no specific standards governing exposure to COVID-19. However, OSHA has created a [webpage](#) for employers and employees with recommendations for reducing workplace risks, including:

- Development of an infectious disease and preparedness and response plan
- Establishment of basic infection prevention measures
- Implementation of response protocols for addressing possible workplace exposure
- Consideration of temporary adjustments to workplace policies (e.g., sick and family care leave allotments, telecommuting, attendance policies)

Beyond workplace safety, employers must also comply with employment laws, such as wage and hour requirements and anti-discrimination laws. It is important that an employer does not lose sight of these obligations, particularly when fast-changing developments require prompt action.

## Compensation and Benefits

The current situation has led some employers to cease, curtail or relocate operations. Each of these occurrences implicates different employment law issues that may vary depending on whether an employer is dealing with exempt or non-exempt employees.

### Non-Exempt Employees

In general, an employer is not required to pay nonexempt employees who are not performing any work. Thus, an employer who closes is not required to continue to pay non-exempt employees. To the extent an employer decides to provide compensation given the current circumstances, it retains a fair amount of discretion regarding the terms of payments it is providing to employees who are not performing services.

On the other hand, if an employer is having nonexempt employees work remotely, employers need to ensure that nonexempt employees are being paid for all hours worked, as well as all hours where such employees are required to be “on call.” Employers must also compensate nonexempt employees for any overtime hours worked. All these requirements make it critical that employers keep records of all compensable hours a nonexempt employee working remotely is performing.

### Exempt Employees

Unlike nonexempt employees, exempt employees typically must be paid their full salaries regardless of the specific hours worked as long as some work is performed during a given time period. For example, under the Fair Labor Standards Act, exempt employees typically must receive their full salary if they perform any work in a given workweek. There may be circumstances when an employer may curtail pay for exempt employees. However, employers should consult any applicable laws and regulations (federal and state) to determine when such circumstances may arise, as well as the possible impact certain actions may have on the individual’s continued exempt status.

### Healthcare Benefits

In general, employers are not required to provide health insurance to employees who do not meet the plans’ eligibility requirements. These requirements typically may include working a sufficient number of hours or paying the required contributions. However, in these times of ambiguous employment status, the impact of the Affordable Care Act needs to be assessed in determining whether an employer needs to offer healthcare coverage and when COBRA may commence. This evaluation should be conducted in conjunction with employee benefits counsel.

### Paid Time Off

Unlike health insurance, an employer typically has greater flexibility in how to handle employee’s use of vacation and paid time off (PTO). For employers with less than 500 employees, this has changed due to COVID-19 under the Families First Act just signed into law Wednesday, March 17, 2019. For a more detailed summary of the Families First Act, go to the Jenner & Block [COVID-19 Resource Page](#).

For employers with 500 or more employees: Because employers typically fund such benefits out of general assets, they can elect to maintain or modify such benefits as they see fit. Similarly, if an employee is not eligible for PTO, or has exhausted their time off benefits, an employer has discretion to extend PTO benefits to such individuals.

For employers with fewer than 500 employees: **The Families First Act**, among other things, provides employees access to: (i) 12-weeks of job-protected leave under an emergency expansion of the Family and Medical Leave Act (“FMLA”) and (ii) 2-weeks of paid sick leave pursuant to adoption of new paid sick leave requirements. The provisions related to expanded FMLA leave and paid sick leave apply only to (a) **private employers with fewer than 500**

**employees**, and (b) **covered public employers**. Employers are given payroll tax credits to offset the cost of the FMLA and sick leave expansion.

In a related vein, employers typically have discretion to limit or cancel vacation if necessitated by business conditions. However, many state laws also prohibit employers from taking action against employees who engage in lawful off-duty activities. Employers need to proceed cautiously in deciding how to implement restrictions in order to strike the right balance in light of all relevant factors.

## **Staffing**

As discussed above, if an employer has exempt or nonexempt employees who can work remotely, an employer must still make sure it is complying with any applicable wage and hour requirements. Some states also require employers to reimburse employees for any expenses they may incur, such as internet or phone access.

There are also numerous operational considerations employers need to evaluate, including data security, insuring reliable remote communications, maintaining schedules, and other business continuity issues. For employers who do not have existing telecommuting policies, they should consider establishing consistent parameters that address issues relevant to their workplaces.

For those operations and employees who cannot perform their work remotely, employers should implement measures, such as enhanced cleaning and social distancing, that can reduce the risk of workplace transmission. Again, OSHA and the Centers for Disease Control (CDC) have helpful guidance for employers dealing with such issues.

In cases where an employer cannot allow employees to work remotely or where travel is necessary, it must recognize that employees have the right to refuse to work if they have reasonable concerns regarding their personal safety or the safety of their working conditions. Employer must avoid knee-jerk responses that do not appear to reasonably evaluate such concerns.

## **Dealing with Suspected Illness**

There are no hard and fast rules on how to address unconfirmed concerns or reports that an employee may be exhibiting symptoms and/or has been exposed to COVID-19. Employers need to proceed with due regard for the rights of everyone involved.

Employers may need to question employees who are exhibiting symptoms. And in general employers are within their rights to direct an employee to leave work if the employer reasonably believes the employee is creating risk for themselves or other employees.

However, the manner and scope of such questions, and how an employer handles information the employee may provide, needs to still comply with laws such as the Americans with Disabilities Act and the Health Insurance Portability and Accountability Act's Privacy Rule governing "personal health information." (PHI). Therefore, for example, employers should carefully evaluate the need and risks associated with "on site" assessments and, in any event, avoid any disclosure of PHI in addressing concerns that an employee may be ill.

In the current environment, employers should also keep aware of employees who may be returning from travel to other locations (whether for business or pleasure) or who may be dealing with illness within their family. Whatever level of scrutiny an employer chooses to establish in evaluating the workplace risk, it must do so in a consistent and transparent fashion. Ad hoc approaches increase the risk of discrimination claims.

Finally, if an employee ends up being diagnosed with COVID-19, an employer should require that employee to stay at home, along with any employees who may have interacted with that individual. If applicable, employers need to make sure employees are given any rights they have under leave laws

such as the Family and Medical Leave Act. The CDC has also posted [guidance](#) for employers on how to mitigate and assess workplace exposure. Those steps include:

- Actively encourage sick employees to stay home
- Separate sick employees
- Emphasize respiratory etiquette and hand hygiene
- Perform environmental cleaning

## Other Considerations

In the current rapidly-changing environment, employers can best serve their workforces by staying informed. Employers should continue to monitor [information posted by the CDC](#) and similar state or local organizations in the jurisdictions where they operate.

As information becomes available, employers can assist employees by keeping them informed of relevant developments. Proactive communications is the best way to minimize employee concerns and anxiety. While employees may not agree with every decision an employer makes, transparency, consistency and adaptable policies will go a long way towards helping everyone navigate these uncertain and unprecedented times.

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