

## COVID-19 Frequently Asked Questions

Stinson LLP is regularly updating these FAQs, as the COVID-19 situation is constantly changing, with new laws and guidance being issued rapidly. Employers should consult with their counsel for current guidance and best practices on the topics covered here.

These FAQs address common employment law questions that have arisen in the midst of the COVID-19 pandemic. While these FAQs are intended to assist you to navigate challenging legal issues, we urge you to follow all guidance provided by the federal government, state or local governments, the CDC, official health agencies, and to contact legal counsel for any questions you may have.

### **CAN AN EMPLOYER SEND SICK EMPLOYEES HOME?**

Yes. Because a pandemic illness like COVID-19 could affect many employees, the U.S. Department of Labor (DOL) and the CDC encourage all employers to implement pandemic preparedness response plans. A plan may allow employers to send employees home if employees show symptoms of a pandemic illness. Employers should share this plan with employees as early as possible. If an employee becomes sick while at work, an employer can send the employee home immediately. If an employee becomes sick while away from work, an employer can tell the employee not to come to work, or if they show up to work, an employer can send the employee home immediately. However, employers are still subject to laws that prohibit discrimination, as well as to laws regarding the confidentiality of medical information. Employers should take extra caution to implement any plan uniformly.

Whether an employer sends an employee home or tells the employee not to come into work, an employee with a presumptive or confirmed COVID-19 diagnosis should not return to the workplace for 14 days. At the end of the 14-day period, the employee should contact HR or another person in a supervisory role before returning to work to confirm quarantine requirements were followed and that the employee is no longer symptomatic.

The CDC states that COVID-19 manifests with the [following symptoms](#), which may appear 2-14 days after exposure:

- ◆ Fever
- ◆ Cough
- ◆ Shortness of breath

An employee with a presumptive COVID-19 diagnosis who has not received a test can typically return to work after:

- ◆ The employee has had no fever for at least 72 hours without the use of medicine that reduces fevers.
- ◆ Other symptoms have improved (for example, cough or shortness of breath have improved).
- ◆ At least seven days have passed since symptoms first appeared.

An employee with a confirmed case of COVID-19, can typically return to work after:

- ◆ The employee no longer has a fever (without the use of medicine that reduces fevers).
- ◆ Other symptoms have improved (for example, cough or shortness of breath have improved).

## COVID-19 Frequently Asked Questions

- ◆ The employee has received two negative tests in a row, 24 hours apart.

At the end of the quarantine period, the employee should contact HR or another person in a supervisory role before returning to work to confirm quarantine requirements were followed and that the employee is no longer symptomatic. We recommend that employers consult with legal counsel prior to returning employees with a presumptive or confirmed COVID-19 diagnosis to work.

### **Related Resources:**

[What should an employer do if an employee is diagnosed with COVID-19?](#)

[OSHA's Emergency Preparedness and Response Guide](#)

[Centers for Disease Control and Prevention's Interim Guidance for Businesses and Employers](#)

*Updated: April 3, 2020*

### **CAN AN EMPLOYER MONITOR EMPLOYEES' TEMPERATURES AT WORK?**

Generally, measuring an employee's body temperature is an unlawful medical examination under the ADA. The EEOC has issued guidance indicating that temperature taking may be lawful in a pandemic, if recommended by the WHO, CDC, or a state or federal department of health. Effective March 18, the EEOC updated its guidance to state that the CDC and state/local health authorities have acknowledged community spread of COVID-19. As a result, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

### **Related Resources:**

[CDC's Interim U.S. Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with Coronavirus Disease \(COVID-19\)](#)

### **CAN AN EMPLOYER REQUIRE SICK EMPLOYEES TO QUARANTINE?**

Yes. If an employer has a reasonable belief, based on objective evidence, that the employee's present medical condition would either (i) impair his or her ability to perform essential job functions with or without reasonable accommodation, or (ii) 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, the employer may require the employee to stay home for a specified period of time. The DOL states that employers are allowed to require an employee to self-quarantine for a certain period to be sure the employee shows no symptoms.

Employers may also require employees to provide a doctor's note or a medical examination before returning to work. However, it is important to remember that an employee may face difficulties in obtaining a doctor's note or receive a medical examination during a pandemic outbreak.

The CDC's recommended self-quarantine practices include:

- ◆ Stay home for 14 days
- ◆ Take your temperature with a thermometer two times per day and monitor for fever
- ◆ Watch for cough or trouble breathing
- ◆ Do not take public transportation, taxis or ride-shares

## COVID-19 Frequently Asked Questions

- ◆ Avoid crowded places and limit your activities in public
- ◆ Avoid contact with and keep your distance (about 6 feet) from others

If the employee needs to seek medical treatment while in quarantine, the employee should contact their own physician and/or follow the guidelines of their local health department. Many agencies are recommending that individuals who think they may be infected with the virus call first before showing up at a healthcare facility.

### **CAN AN EMPLOYER REQUIRE QUARANTINE DUE TO AN EMPLOYEE'S TRAVEL?**

Yes. An employer is within its rights to ask employees who travel internationally or domestically to any high risk areas to self-quarantine for 14 days before returning to work. Employees should follow the same self-quarantine protocols identified above. At this point, high risk areas may be defined as all international locations, all cruise ship travel, and domestic hot spots that have 100+ confirmed cases, as well as potentially including any travel on a common carrier.

Employees should be notified that because domestic hot spots are changing rapidly, that any domestic travel may subject them to the risk of quarantine upon return.

To reduce risk, employers should recommend that employees take extra precaution for all leisure travel and should restrict or prohibit business travel to domestic hotspots and countries labeled as a Level 2 or higher.

#### **Related Resources:**

[CDC's Up-to-Date Data on Confirmed Cases in the U.S.](#)

[U.S. Department of State Travel Advisories](#)

*Updated March 22, 2020: Effective March 19, 2020, the US State Department issued a Level 4 travel advisory cautioning US citizens to avoid all international Travel. Effective March 18, 2020, the State of Kansas issued a mandate that anyone who travels to a "state with known widespread community transmission," defined by the Mandate as of its effective date to include California, Florida, New York, Washington and certain counties in Colorado, will be required to self-quarantine for 14 days upon return to Kansas.*

### **WHAT PAID LEAVE AND BENEFITS ARE AVAILABLE TO EMPLOYEES WHO ARE ABSENT FOR COVID-19 RELATED REASONS?**

Effective April 1, 2020, under the Families First Coronavirus Response Act (FFCRA), private employers with fewer than 500 employees are required to provide qualifying employees with up to 80 hours of paid sick time pursuant to the [Emergency Paid Sick Leave Act \(EPLSA\)](#), and up to 10 weeks of leave paid at 2/3 the normal rate of pay if needed to care for a minor child whose place of school or care has been closed due to a public health emergency pursuant to the [Emergency Family and Medical Leave Expansion Act \(EFMLEA\)](#). Employers providing paid leave under the FFCRA will be 100% covered by a dollar-for-dollar refundable tax credit. The Department of Labor published an FAQ with additional information [[here](#)]. On April 1, 2020 the Department of Labor issued a Temporary Rule promulgating regulations on the Families First Coronavirus Response Act (FFCRA) available [here](#). In addition, covered employees should post a notice of employees' rights under the act. The poster is [[here](#)].

Employers who are not covered by the EPLSA or EFMLEA, or whose employees have exhausted EPLSA or EFMLEA leave, may require employees to use paid sick leave or PTO that the employer provides separately if the employee is required to quarantine, becomes sick, or must stay home to care for a family member. If the employee no longer has available PTO, we recommend that employers exercise leniency with leave and PTO policies.

## COVID-19 Frequently Asked Questions

Generally, if an employee needs to be quarantined, they should either (a) be allowed to work from home if possible, (b) be allowed to use any applicable paid leave or (c) be allowed to use PTO donations from other employees.

If possible, employers should create a Payroll Code for absences specifically relating to coronavirus, and those absences should be tracked to properly account for EPLSA, EFMLEA, or other leave entitlements.

### **Related Resources:**

[DOL Issues Temporary Rule Promulgating Regulations on the FFCRA](#)

[IRS and Other Federal Agencies Provide New Guidance on Paid Leave Tax Credits](#)

[Federal Families First Coronavirus Response Act: Employer Leave Requirements](#)

*Updated April 3, 2020*

### **DO QUARANTINED EMPLOYEES QUALIFY FOR FMLA LEAVE?**

If an employee is actually infected, the CDC recommends the employee quarantine for 14 days or until the symptoms are gone, whichever is longer. The employee may be entitled to paid sick time for this leave under the Emergency Paid Sick Leave Act (EPLSA). Under these circumstances, the employee also may qualify for FMLA leave. If an employee is absent due to the need to care for a minor child whose place of school or care has been closed due to a public health emergency, the employee may qualify for up to 12 weeks of leave paid at 2/3 the normal rate of pay under the EPLSA (which provides two weeks paid leave) and the EFMLEA) (which provides an additional 10 weeks).

### **Related Resources:**

[DOL Issues Temporary Rule Promulgating Regulations on the FFCRA](#)

[IRS and Other Federal Agencies Provide New Guidance on Paid Leave Tax Credits](#)

[Federal Families First Coronavirus Response Act: Employer Leave Requirements](#)

*Updated April 3, 2020*

### **CAN AN EMPLOYER REQUIRE EMPLOYEES TO WORK FROM HOME?**

If the employee is able to work from home, yes. Requiring employees to work from home when possible supports social distancing practices recommended by the WHO and CDC. Employers should make plans to assure employees have access to the necessary resources to work from home, such as internal intranet access. Telework is also an option to permit continued work under many of the Shelter-in-Place Orders being issued by state and local authorities. Employers should also assess security risks to their systems that are associated with work from home, such as the use of personal computers and laptops to access an employer's system. Employers in California (and potentially other jurisdictions) may be required to provide reimbursement to employees for employee-provided facilities used in remote work.

### **CAN AN EMPLOYER IDENTIFY WHETHER AN EMPLOYEE HAS BEEN INFECTED?**

No. An employer should not disclose the identity of an infected employee. However, the employer may inform the office that someone who was present in the workplace was diagnosed with or exposed to Coronavirus. An employee may voluntarily disclose their own exposure or infection.

## COVID-19 Frequently Asked Questions

### **CAN AN EMPLOYER REQUIRE AN EMPLOYEE TO OBTAIN A MEDICAL CERTIFICATION BEFORE RETURNING TO WORK AFTER STATING THEY HAD SYMPTOMS, TESTED POSITIVE, OR WERE SUBJECT TO A QUARANTINE?**

While an employer has the right to request a medical certification before an employee returns to work, the CDC recommends employers do not make this request so as to not overwhelm the health system. Some employers are using return to work certifications that may be completed by a treating health care provider or the employee, where applicable, to provide some reassurance to the employer that the employee can safely return to the workplace.

Current CDC guidance for determining when it is appropriate to release someone from isolation, relies on a case by case analysis that includes meeting all of the following requirements:

- ◆ *If an individual is not being tested* to determine if they are still contagious, they can leave home after these three things have happened:
  - ◆ They have had no fever for at least 72 hours (without the use of medicine that reduces fevers).
  - ◆ Other symptoms have improved (for example, cough or shortness of breath have improved).
  - ◆ At least seven days have passed since symptoms first appeared.
- ◆ *If an individual is being tested* to determine if they are still contagious, they can leave home after these three things have happened:
  - ◆ They no longer have a fever (without the use of medicine that reduces fevers).
  - ◆ Other symptoms have improved (for example, cough or shortness of breath have improved).
  - ◆ They have received two negative tests in a row, 24 hours apart.

We recommend that employers consult with legal counsel prior to returning employees with a presumptive or confirmed COVID-19 diagnosis to work.

#### **Related Resources:**

[CDC's Frequently Asked Questions](#)

*Updated April 3, 2020*

### **IF AN EMPLOYER FACES A REDUCTION IN DEMAND, CAN IT REDUCE AN EMPLOYEE'S SALARY, CUT HOURS, OR LAY OFF EMPLOYEES?**

As a general rule, employers can reduce the days or hours of work for non-exempt employees as business demand dictates. Time not worked by hourly employees generally does not have to be paid. Many employers are considering furloughs, layoffs or even reductions in force in light of the economic impact of the COVID-19 pandemic. When considering reducing hours or furlough of exempt employees, employers should analyze the impact of doing so. Exempt employees must meet the salary basis test (in addition to the duties tests), which requires that they are paid on a salary basis at a rate currently set at not less than \$684/week (\$35,568 per year), unless specific state laws require a higher salary. Subject to certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. Where exempt employees are

## COVID-19 Frequently Asked Questions

furloughed, employers should clearly direct them to perform no work in a given week (such as checking emails) to avoid liability for payment of wages.

One option to consider is to reduce the salary of exempt employees for an indefinite period of time or a significant period of time, which is permissible so long as the reduction is not simply an effort to avoid the purpose of the FLSA, and assuming the reduced salary continues to exceed the minimum threshold to meet the salary basis test. The DOL has stated that "deductions from salary due to day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis requirement is intended to preclude." However, a reduction in pay for a period of months, due to the need to reduce expenses through year-end, would likely be permissible.

This solution may be more palatable if the reduced salary comes with a reduced workweek, e.g., 80% hours for 80% pay. The DOL has previously indicated that it is permissible to reduce an exempt employee's salary in connection with a reduction in the workweek, so long as the reduction is permanent or indefinite. As indicated above, such a reduction cannot be done on a week to week basis, or it will look like an attempt to evade the salary requirement.

If the reduced schedule is voluntary, there is no obligation to pay an exempt employee the full salary, even if the reduced schedule is for less than a full workweek. However, the choice must be truly voluntary, and should be documented in a writing signed by the employee.

Whether a furloughed employee is entitled to unemployment benefits is determine on a state by state basis. Some states have reduced or eliminated waiting periods during the COVID-19 pandemic providing no wait for unemployment insurance benefits, and may also provide benefits for a reduction (but not a complete loss) of wages in a given week.

*Updated April 3, 2020*

### **IF AN EMPLOYER TEMPORARILY SHUTS DOWN ITS BUSINESS, DOES THE WARN ACT APPLY?**

WARN stands for Worker Adjustment and Retraining Notification and may require an employer to provide a 60-day advanced notice to employees before closing a location. WARN is triggered when an employer with 100 or more employees, (generally not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week) initiates one of the following events:

- ◆ 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. A plant closing also occurs when an employer closes an operating unit that has fewer than 50 workers but that closing also involves the layoff of enough other workers to make the total number of layoffs 50 or more.
- ◆ Lays off 500 or more workers (not counting part-time workers) at a single site of employment during a 30-day period; or 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 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.
- ◆ Reduces the hours of work for 50 or more workers by 50% or more for each month in any 6-month period. Thus, a plant closing or mass layoff need not be permanent to trigger WARN.

## COVID-19 Frequently Asked Questions

WARN is not triggered when the following various thresholds for coverage are not met:

- ◆ If a plant closing or mass layoff results in fewer than 50 people losing their jobs at a single site of employment.
- ◆ If 50-499 workers lose their jobs and that number is less than 33% of the employer's total active workforce at a single site.
- ◆ If a layoff is for 6 months or less.
- ◆ If work hours are not reduced 50% in each month of any 6-month period.

There are three exceptions to the full 60-day notice requirement, which may apply to closures related to the Coronavirus outbreak. However, notice must be provided as soon as is practicable even when these exceptions apply, and the employer must provide a statement of the reason for reducing the notice requirement in addition to fulfilling other notice information requirements.

- ◆ **Faltering company:** When, before a plant closing, a company is actively seeking capital or business and reasonably in good faith believes that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period.
- ◆ **Unforeseeable business circumstances:** When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required (i.e., a business circumstance that is caused by some sudden, dramatic, and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order).
- ◆ **Natural disaster:** When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature. In this case, notice may be given after the event.

If a business is temporarily closing due to COVID-19, it would likely be classified as a business circumstances that was not reasonably foreseeable at the time that 60-day notice would have been required (i.e., a business circumstance that is caused by some sudden, dramatic, and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order).

Note that some states have similar, but notably different, notification laws that require a case-by-case analysis.

### **IF AN EMPLOYEE CONTRACTS COVID-19 AT WORK OR WHILE ON A BUSINESS TRIP, IS THE EMPLOYER LIABLE, AND WHAT SHOULD EMPLOYERS DO TO KEEP EMPLOYEES SAFE AT WORK?**

It depends. It is possible that the employer could have liability if an employee catches COVID-19 (or any other illness) during work travel as it may be considered an "occupational illness." If it is, coverage under the employer's worker's compensation no-fault insurance would likely be triggered.

The other set of laws that may apply are the OSHA laws, which govern workplace safety and require employers to provide a safe and healthful work environment, free of recognized hazards. OSHA has issued [general guidance for employers regarding COVID-19](#). If an employee contracts COVID-19 while at work or on a business trip, it can be an OSHA reportable injury if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

## COVID-19 Frequently Asked Questions

- ◆ The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19).
- ◆ The case is work-related, as defined by 29 CFR 1904.5.
- ◆ The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

*Updated April 3, 2020*

### **Related Resources:**

[OSHA's Guidance Specific to International Travelers](#)

[CDC's Guidance to Travelers](#)

### **CAN AN EMPLOYEE, WHOSE JOB REQUIRES TRAVEL, REFUSE TO TRAVEL?**

If the employee expresses concern for their own health, and does not want to travel, there could potentially be retaliation concerns if the employer takes adverse action against the employee..

From an OSHA perspective, if an employee is infected with coronavirus on the job, this can be an OSHA reportable injury. An employer should also be aware of the following:

- ◆ Under OSHA, employees are entitled to refuse work if they believe they are in "imminent danger," which is defined as: any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.
- ◆ OSHA also has a General Duty Clause that is essentially a catch-all that employers must provide employment that is free from recognized hazards that cause or are likely to cause serious injury or death. COVID-19 is not a "recognized hazard" yet, but that standard is fluid and is based, in part, on industry standard.
- ◆ The majority of states have OSHA programs, so an employer should be aware of state-specific compliance requirements.

### **BEST PRACTICES**

- ◆ Develop an Infectious Disease Preparation and Response Plan to begin establishing workplace controls. Communicate a plan of action with employees that emphasizes employees' health and safety as the top priority. Encourage employees to be open and ask questions.
- ◆ Provide extra tissues, sanitizer, and wipes at frequently used workspaces and encourage employees to exercise good hygiene practices.
- ◆ Consider designating a point person or group in charge of planning for coronavirus developments. This individual or group should be tasked with items such as monitoring CDC, State Department, and state health department guidance daily, implementing and communicating new policies to address the pandemic, providing employees periodic updates; and considering any need for cross-training employees in the event of increases absences.
- ◆ Require employees to stay at home, or go home if they are at work, if they feel sick.
- ◆ Avoid close contact with anyone who is sick; consider limiting or eliminate handshaking; consider increasing your use of telephone and video conferencing for communications.
- ◆ Encourage employees to practice good hygiene, such as:

## COVID-19 Frequently Asked Questions

- ◆ Wash hands often with soap and water for at least 20 seconds. If soap and water are not available, use a hand sanitizer that contains at least 60% alcohol.
- ◆ Avoiding contact to eyes, nose, and mouth with unwashed hands.
- ◆ Cover coughs and sneezes with a tissue, throw tissue in the trash, and then wash or use sanitizer on your hands.
- ◆ Clean and disinfect frequently touched objects and surfaces.
- ◆ Practice other good health habits: get plenty of sleep, be physically active, manage stress, drink plenty of fluids, and eat nutritious food.

[View more best practices from the CDC.](#)