Employment & Labor Guidance
Related to Coronavirus (COVID-19)

COVID-19
Frequently Asked Questions for Employers

May 2020
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*Given the rapid developments in this area of law, it is important to consult with legal counsel to obtain the most up-to-date legal information and advice that is appropriate for your particular factual situation. These Frequently Asked Questions are for general informational purposes only and should not be construed as legal advice.*
COVID-19 FAQs for Employers

GENERAL

Can employees refuse to come to work due to coronavirus?

Generally, no. If employees refuse to come to work due to concerns about COVID-19 they may be disciplined, up to and including, termination. That said, if an employee has an Americans with Disabilities Act (ADA) protected disability, the employer should consider whether working remotely is a reasonable accommodation. Employees also cannot be forced to work in unsafe conditions that put them in imminent danger but must engage with their employer about fixing perceived unsafe conditions before refusing to work. Imminent danger under the Occupational Safety and Health Act (OSH Act) means a danger that could reasonably be expected to cause death or serious bodily harm immediately. While it remains to be seen whether or not COVID-19 is considered an imminent danger, practically, employers should take steps to keep the workplace clean and follow federal, state, and local guidelines to prevent the spread of the virus.

Can employers restrict employees’ personal travel during the pandemic?

Generally, an employer cannot prohibit otherwise legal activity, such as an employee’s personal travel, including travel abroad. While a federal court of appeals recently held that it is not necessarily a violation of the ADA to terminate an employee who refuses to cancel personal travel to an area of the world with a high risk of exposure to a deadly disease, the employer still could risk legal exposure, reduced employee morale, and negative publicity. However, employers can monitor those employees returning from travel to high-risk areas for signs of illness.

Can employees refuse to travel as part of their job duties during the pandemic?

While the answer to this question is generally no, there are factors an employer should consider before disciplining or reprimanding employees who refuse to travel as part of their job duties. First, employees may be covered under the Occupational Safety and Health Administration (OSHA) rule that employees cannot be forced to work in unsafe conditions or conditions that put them in imminent danger. To the extent that an employee is being asked to travel to a location that has been placed under a travel advisory, this rule may be implicated. Second, if the employee has a disability that places the employee at a greater risk of severe illness if they contract COVID-19 or is pregnant, then the employee may be entitled to a reasonable accommodation under the ADA. In this case, a reasonable accommodation may be not traveling and instead carrying out duties through other means, such as video conferences. Finally, practical considerations may advise against disciplining or terminating an employee who refuses to travel during the pandemic. Reprimanding or terminating an employee who does not want to travel given the numerous warnings may have a negative effect on employer-employee relations and general morale. Additionally, given the numerous travel restrictions, employees may have difficulty returning home after a trip. Thus, the employer may want to consider alternatives to travel during the pandemic.

WARN ACT

What is the WARN Act?

Generally, the Worker Adjustment and Retraining Notification Act (WARN Act) is intended to protect workers by providing them with advance notice of plant closings and mass lay-offs. Employers with 100 or more employees, not counting part-time employees who have worked less than six months in the last twelve (12) months or who work less than twenty (20) hours a week, are covered by the federal WARN Act and may also be covered by similar state mini-WARN Acts.
**Which states have enacted mini-WARN Acts?**

The list of mini-WARN states includes California, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Wisconsin.

**What are an employer’s notice requirements under the WARN Act?**

Under the WARN Act, employers are required to provide sixty (60) days advance notice to employees, unions, and government officials prior to a plant closing, mass layoff, or other triggering event.

Many of the states that have enacted mini-WARN Acts often have different notice requirements than the federal statute. Thus, employers should look at whether notice is required in each jurisdiction where layoffs may occur, as well as the federal requirements.

**What is a triggering event?**

Plant closings and mass layoffs are both triggering events under the WARN Act. Under the federal WARN Act, a temporary or permanent plant closing is the shutdown of a single site of employment or of one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss for 50 or more employees during any 30-day period. A mass layoff is a reduction in force which results in an employment loss at a single worksite during any 30-day period for at least 33% of full-time employees and at least 50 or more full-time employees.

The state mini-WARN Acts have different definitions of both plant closings and mass layoffs, so it is important to check both state and federal law when looking at the WARN Act requirements.

**Are there any exceptions to the WARN Act requirements that may apply during the pandemic?**

Yes, unforeseeable business circumstances and natural disasters are established exceptions to the WARN Act notice period. An unforeseeable business circumstance is a circumstance that is caused by some sudden, dramatic, and unexpected action or condition outside the employer’s control. The U.S. Department of Labor (DOL) has interpreted such business circumstances to include a “government ordered closing of an employment site that occurs without prior notice.” This would likely encompass many of the employers that are currently facing the difficult decision of what to do with their workforce during the COVID-19 crisis, but there has not yet been official guidance confirming that interpretation.

Even with this exception, the employer is still required to give as much notice as practical given the unforeseen circumstances. Furthermore, to the extent that any employer is providing shortened WARN Act notice to employees and government agencies, it should provide the reason for the shortened notice, such as being required to shut down under government order without notice.

**FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

**General**

**What is the Families First Coronavirus Response Act (FFCRA)?**

The FFCRA is a federal act that was enacted on March 18, 2020 to provide relief to workers affected by COVID-19. The FFCRA mandates that employers with fewer than 500 employees provide emergency paid sick leave (EPSL) and emergency paid family and medical leave to employees that are unable to work or telework due to one of the statute’s listed qualifying reasons through December 31, 2020. The DOL issued a temporary rule clarifying several of the FFCRA’s provisions on April 1, 2020.

**How does an employer know if its business is under the 500-employee threshold?**

An employer has fewer than 500 employees if it employs fewer than 500 full-time and part-time employees within the United States, including employees on leave, temporary employees who are jointly employed by two employers, and
day laborers. The employer should not count independent contractors, employees that have been furloughed, or any employees outside of the United States.

The determination of whether an employer has 500 employees is dependent on the number of employees the employer has on the day the employee would take leave. DOL has clarified that this does mean some employees will be eligible for paid leave, while other employees at the same business may not be if the business grows in size between when the first employee takes leave and the second takes leave.

For employers who are part of a family of companies, the Family and Medical Leave Act’s (FMLA) integrated employer test will determine whether those companies’ employees should be counted together for both the emergency paid leave and emergency family leave provisions of the Act. This test balances four factors to determine if more than one entity is a single employer: whether there is common management; interrelation between operations; centralized control of labor relations; and the degree of common ownership or financial control.

Companies that share employees will also have to determine whether or not to count the shared employees when determining size under the FFCRA. The Federal Labor Standards Act (FLSA) joint-employer test applies to this determination, which is whether the employer can, and actually does, exercise direct or indirect control over a particular employee. If an employer is considered a joint employer of a particular employee, then that employee should be included in its headcount for purposes of whether it has 500 employees.

Does the FFCRA apply to businesses with fewer than 50 employees?

Yes, although there is a limited exception provided in the FFCRA and explained by the DOL’s temporary rule. Employers with 50 or fewer employees may be excepted from the requirements of the FFCRA if providing paid leave under the act will “jeopardize the viability of the business as a going concern.” This exception is limited in the following ways.

First, the exemption only applies the employees who are requesting emergency paid leave (either sick leave or medical and family leave) to care for a dependent. There is no such exemption for employees who are requesting emergency sick leave pursuant to one of the other qualifying reasons.

Second, employers with 50 or fewer employees may only take advantage of this exemption if providing such paid leave would jeopardize the viability of the business as a going concern. DOL has clarified this to mean that a small employer is exempt from the requirement to provide such leave when: (1) such leave would cause the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

Employers may deny paid emergency leave only to employees whose absence would cause one of these three scenarios, which means that leave may sometimes be denied non-uniformly. In this situation, employers are strongly urged to consult with counsel before making leave decisions so as not to unintentionally implicate non-discrimination laws.

To avail itself of this exemption, employers should carefully document the facts and circumstances of the denial and how it meets the criteria set forth above. These materials should not be sent to DOL, but rather retained in the employer’s files.

What documentation does an employer need to receive from its employee in order to obtain the tax credits?

With regard to documentation to support a request for emergency sick leave, the IRS is specifically advising that the employer receive the following information contained in a written request in order to substantiate eligibility:

1. The employee’s name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person’s name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is requesting leave.

If the employee wishes to take the emergency family and medical leave, the employer should stick with normal procedure for FMLA requests and ask for the documentation that would normally support such leave.

**Can an employee take intermittent leave under the FFCRA?**

The DOL temporary rule provides that employers do not have to permit intermittent use of paid sick or emergency FMLA leave but may agree to allow increments of intermittent leave in any amount. Intermittent leave cannot be used, however, when the employee is working at the employee’s usual worksite (as opposed to teleworking) and is taking the emergency sick leave because of a quarantine or isolation order, because the employee is experiencing symptoms and is seeking a diagnosis, or if the employee is caring for another individual. In those circumstances, the employee must continue to take paid sick leave until the allotment of leave is exhausted or the reason for the leave is no longer in effect.

**Emergency Paid Sick Leave (EPSL)**

**What are the qualifying reasons that would entitle an employee to EPSL?**

- Employee is subject to a Federal, state, or local quarantine or isolation order related to COVID-19;
  - This may include employees that are subject to a shelter in place order.
- Employee has been advised by a health care provider to self-quarantine;
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Employee is caring for an individual who is subject to quarantine pursuant to first two qualifying reasons, above;
- Employee is caring for a child or children whose school or care provider is unavailable due to COVID-19;
- Employee is experiencing a “similar condition” as specified by the U.S. Department of Health and Human Services, Labor, or the Treasury.

**When is an employee entitled to EPSL because of an isolation order?**

The FFCRA provides that an employee is entitled to the emergency paid sick leave if the employee is unable to work because of any one of six qualifying reasons. One of those qualifying reasons is if the employee is subject to a “Federal, State, or local COVID-19 quarantine or isolation order.” The DOL temporary rule clarifies that the phrase “quarantine or isolation orders” can include a broad range of governmental orders, including shelter-in-place, stay at home, or quarantine orders. An employee may take paid sick leave if they are subject to one of these orders, but DOL provides that the test is whether the employee would be able to work or telework “but for” being required to comply with one of the aforementioned orders. Further, the employee can only take sick leave when the employer has work for the
employee to do. While there will still be scenarios where the facts are not wholly clear on whether or not an isolation is a but-for cause, the test still provides a guidepost for employers navigating this new legislation.

The temporary rule also clarifies that an employee who has tested positive for COVID-19 but is still able to telework due to mild symptoms or other ability, is not eligible for emergency sick leave under the FFCRA, if the employee is able to continue performing their work while self-quarantining. The guidance cites as an example an attorney who has tested positive for COVID-19, but whose symptoms are such that the attorney is still able to perform services by teleworking. This attorney would not be eligible for emergency sick leave under the FFCRA.

When is an employee entitled to EPSL because the employee is caring for another individual?

An employee is only eligible for paid sick leave if they have a genuine need to care for an individual and is actually prevented from working due to caring for that individual, who has been subject to a quarantine or has become ill due to COVID-19. Further, the individual must be someone with whom the employee has a personal relationship, i.e. a family member, roommate, or similar person. This excludes employees that do not want to come to work because they live with an immunocompromised or high-risk individual from eligibility, and those who are not acting in a caregiver capacity.

How much must employees be paid while taking EPSL?

- The normal rate of pay in these circumstances up to $511/day:
  - Employee is subject to a Federal, state, or local quarantine or isolation order related to COVID-19;
  - Employee has been advised by a health care provider to self-quarantine; or
  - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

- Two-thirds of the normal rate of pay in these circumstances up to $200/day:
  - Employee is caring for an individual who is subject to quarantine;
  - Employee is caring for a child or children whose school or care provider is unavailable due to COVID-19;
  - Employee is experiencing a “similar condition” as specified by the U.S. Department of Health and Human Services, Labor, or the Treasury.

How many hours must employers provide employees in EPSL?

A full-time employee is entitled to 80 hours of EPSL. Part-time employees are entitled to leave for their average of work hours in a two-week period. If this is not reliable, the employer may use a six-month average to calculate the average daily hours.

Can an employee use the sick leave to make up for working reduced hours?

No, underemployment is not a qualifying reason to use sick pay.

If an employee uses the emergency sick leave, will the employee lose the ability to use existing PTO or other leave guaranteed by existing, non-emergency state law?

No. This leave is in addition to that leave and is only available until December 31, 2020.

Does the emergency sick leave roll over?

No.
Can employees use state-mandated paid sick leave in addition to the federal emergency sick leave?

Generally, no. This is state specific, but most state emergency sick leave laws provide additional sick leave only to the extent that the state leave provides for leave beyond the federal emergency paid sick leave mandate.

Emergency Family and Medical Leave (EFML)

Who is eligible for the EFML?

Employees are eligible for the EFML if they are unable to work or telework because they must care for a dependent whose school or place of care is closed due to COVID-19. An employee must have worked with the company for at least a month at the time of the leave request in order to be eligible.

How does an employee request the EFML?

Employers should maintain its normal processes for processing and approving family and medical leave requests, with the caveat that it should be considered and approved with some urgency. Employers should also request that employees seeking emergency family and medical leave provide the name of the school or care center that has been closed and documentation to support their request.

How many weeks of leave is an employee entitled to? How many of those weeks will be paid?

The employee can take twelve (12) weeks of leave, ten (10) of which must be paid by the employer pursuant to the legislation. If the employee wishes to use existing paid leave that is either guaranteed by company policy or by State law during the first ten days of their emergency leave, the employee may do so. The employee may also use the emergency sick leave to cover those ten days. It should be noted that the emergency medical and family leave is not provided in addition to regular family and medical leave, so any amounts of regular leave that the employee has already taken should be deducted from the amount provided for under the FFCRA.

How much pay does an employee receive under the emergency FMLA?

The employee is entitled to be paid two-thirds of their normal rate of pay with a limit of $200 per day.

CARES ACT

Paycheck Protection Program (PPP)

What is the Paycheck Protection Program?

The PPP is a lending program designed to provide low-interest loans to small businesses through banks that are authorized to provide 7(a) Program small business loans. The program is regulated and guaranteed by the Small Business Administration (SBA).

How does a PPP loan affect an employer’s obligations toward its employees?

While these loans do not affect an employer’s obligations to its employees, the loans can only be used to pay for payroll, mortgages or rent, and utilities, and the loans are only forgivable if the employer maintains its payroll for the eight weeks following the origination of the loan. Thus, the actions the employer takes with respect to its employees will determine how much of the PPP loan is forgiven.

Employers should be aware that FFCRA leave payments cannot be paid with PPP loan monies.

How much of a PPP loan is eligible to be forgiven?

Loan proceeds that are used for the permitted expenses enumerated in the CARES Act and by the SBA (payroll costs, mortgage interest, rent, and utilities) over the 8-week period after the loan origination date are eligible to be forgiven.
The maximum forgiveness amount is the loan principal (interest is not forgiven), but 75% of the funds must be spent on payroll. Non-payroll costs in excess of 25% of the amount of the loan will not be forgiven.

**How will decreasing payroll or employee wages affect loan forgiveness?**

The forgiveness amount will be reduced on a proportionate basis if the number of the borrower’s employees, or any employee’s compensation, is reduced. This is based on either:

1. Average number of full-time equivalent (FTE) employees during the 8-week “covered period” vs the average number of FTE employees during either (i) February 15, 2019 – June 30, 2019 or (ii) January 1, 2020 – February 29, 2020.
2. Any employee whose salary is reduced by more than 25% (excluding employees with an annual salary of more than $100,000).

**Tax Relief**

**What should employers know about the refundable payroll tax provisions of the CARES Act?**

The CARES Act provides a refundable payroll tax credit for 50% of wages paid by employers to employees during the COVID-19 crisis, up to $10,000 per employee. The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related shut-down order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020. Employers who receive a PPP loan cannot take advantage of this tax credit.

**When is a business partially suspended for the purposes of the Employee Retention Credit?**

While there has been some guidance as to how this provision of the CARES Act will be interpreted, that issue will largely be a question of fact depending on the specifics of the business. That said, the IRS has stated that a business may be partially suspended if an appropriate governmental authority imposes restrictions upon the business’ operations due to COVID-19 such that the operation can still continue to operate but not at “its normal capacity.” It is expected that this will not be a difficult bar to hurdle, but guidance is evolving.

**Can employers utilize both the tax credits provided for under the FFCRA and the CARES Act?**

Employers can utilize both tax credits but cannot take credits for the same wages. Generally, the credits are related to different types of wages; the FFCRA provides for tax credits on employer-side Social Security payroll taxes the offset to costs of providing paid family and sick leave under the FFCRA, while the CARES Act tax credit is not dependent on employees taking qualified sick or family leave but can be taken against regular wages.

**Against what employment taxes does the CARES Act tax credit apply?**

The credit is allowed against the employer portion of social security taxes under section 3111(a) of the Internal Revenue Code, and the portion of taxes imposed on railroad employers under section 3221(a) of the Railroad Retirement Tax Act that corresponds to the social security taxes under section 3111(a) of the Code.

**What should employers know about the tax deferral provisions of the CARES Act?**

The CARES Act allows employers that have not taken a PPP loan to defer payment of the employer share of the Social Security tax that they would otherwise pay to the federal government. Instead, the employer could elect to defer that payment, but it must be paid over the following two years. This deferral is taken against the employer’s portion of Social Security taxes and certain Railroad taxes.
DISCRIMINATION CONCERNS

May an employer ask only one employee questions to determine if they have COVID-19, or require that this employee alone have their temperature taken?

If an employer wishes to ask only a particular employee to answer such questions, or to have their temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. A reasonable belief should be based on objective evidence of known symptoms, such as a hacking cough, which is currently considered a symptom of COVID-19.

May an employer single out employees based on national origin and exclude them from the workplace due to concerns about possible transmission of COVID-19?

No. Title VII of the Civil Rights Act prohibits all employment discrimination based on national origin. It does not matter if it is linked to the current COVID-19 pandemic. Further, employers have a responsibility to keep their workplaces free from discriminatory conduct and harassment. It may be prudent to remind all employees that negative comments or adverse action taken based on national origin is not permitted and will not be tolerated in the workplace, even if the harassment or actions are due to fear related to the virus.

EMPLOYEE PRIVACY AND HEALTH

Can employers require that its employees disclose all suspected or confirmed cases of COVID-19?

Yes.

Can an employer ask employees if they have tested positive for or been exposed to coronavirus?

Yes, an employer may ask employees whether they have tested positive for COVID-19 or whether they have been exposed to the virus. Employers are advised to ask these questions broadly, rather than ask if the employee has been exposed to a family member who has tested positive both because specific questions about family members may run afoul of certain privacy laws and are generally underinclusive for determining whether an employee has been exposed to COVID-19.

Can employers ask employees who have been exposed to or tested positive for coronavirus to stay home?

Yes. The Equal Employment Opportunity Commission (EEOC) recently issued guidance confirming that requiring workers exhibiting symptoms to stay home or leave the workplace is permissible.

Can employers require employees with symptoms of COVID-19 (but no diagnosis) stay home?

Yes. Employers can and should continue to tell employees that if they have a cough, fever, runny nose or other cold or flu-like symptoms, or any of the other symptoms that the CDC has identified as indication of COVID-19, they should stay at home and not risk exposing others to illness. In some states, wage and hour laws may be implicated where employees who report to work are sent home.

Can employers require employees who are “high-risk” to stay home?

Generally, no. This is not permissible under the ADA absent a directive from CDC authorities that employers should take such measures. The EEOC has represented that the ADA does not prohibit employers from following CDC guidance. To the extent possible, it is important for employers to treat employees equally and apply policies non-discriminatory, both during the pandemic and when the crisis is over, and the workplace returns to normal. If employers obtain any confidential medical information, they will need to keep it confidential.
Can employers require that employees are tested for COVID-19 before returning to the workplace?
Yes.

Can employers measure an employee's body temperature to determine if the employee has a fever?
Yes, both current and prospective employees who have received a conditional offer may be required to pass a temperature check before reporting to a workplace. It should be noted that this may not be an effective measure of determining whether an employee has COVID-19 as many people are asymptomatic.

Can employers ask employees who are displaying symptoms of COVID-19 to seek medical attention?
Yes, employers may ask employees to seek medical attention, to get tested for COVID-19, and to leave the workplace if they exhibit symptoms associated with COVID-19.

Can employers require that employees present proof of their fitness for duty before returning to work following COVID-19 exposure or a positive diagnosis?
Yes, the EEOC's recent guidance confirms that employers may require a doctor's note stating the employee is fit for duty before permitting the employee to return to work. Employers may also ask all employees to certify that they are symptom-free prior to returning to a workplace.

What should employers do if an employee tests positive for COVID-19 or reports that they have been exposed to COVID-19?
Employers should instruct employees who are exhibiting symptoms or who have been exposed to COVID-19 to leave the workplace and seek medical attention. Employers also have an obligation to inform other employees who may have been exposed to the virus through contact with the sick employee that they may have been exposed, but should not provide the name of the employee. Instead, employers should provide those employees who may have been exposed enough information for them to determine the extent of the potential exposure. If an employee has been working directly with the infected person, employers should consider seeking permission from the infected person to share their name with only the employee that has been working with the sick employee directly.

Are employers required to notify the CDC of an employee's exposure or positive test?
No.

Is COVID-19 a recordable event under the Occupational Safety and Health Act (OSH Act)?
Yes. COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if: (1) the case is a confirmed case of COVID-19, as defined by Centers for Disease Control and Prevention (CDC); (2) the case is work-related as defined by 29 CFR § 1904.5; and (3) the case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

In areas where there is ongoing community transmission, employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work. In light of those difficulties, OSHA exercised its enforcement discretion in order to provide certainty on April 10, 2020 with the following changes to the reporting requirements, which will be in force until the pandemic subsides:

Employers of workers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions must continue to make work-relatedness determinations pursuant to 29 CFR § 1904. Until further notice, however, OSHA will not enforce 29 CFR § 1904 to require other employers record the cases, except where:
1. There is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and

2. The evidence was reasonably available to the employer. For purposes of this memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees’ health and safety in the ordinary course of managing its business and employees.

Practically, this means that employers (outside of the industries listed above) do not need to record every case of COVID-19 unless there is known or suspected evidence that the case is work-related.

**What steps can employers who are hiring take to protect its existing workforce?**

The EEOC has confirmed that employers may screen applicants for symptoms of the COVID-19 after extending a conditional job offer, so long as the company applies the practice uniformly. Employers may also take an applicant’s temperature as part of a post-offer, pre-employment medical exam after extending a conditional offer of employment.

The EEOC has also advised that employers may delay the start date of an applicant who has COVID-19 or symptoms associated with it. According to current CDC guidance, an individual who has the COVID-19 coronavirus or symptoms associated with it should not be in the workplace. In fact, the EEOC has also said that employers may withdraw a job offer if the company needs an applicant to start immediately but the individual has COVID-19 or symptoms of it.

**What information can employers share with employees or customers who may have been exposed to coronavirus?**

The CDC’s guidance explains that employers should inform fellow employees of potential workplace exposure, but only to the extent necessary to adequately inform them of their potential exposure. That means employers should share information with its employees without revealing the infected individual’s name. Employers should communicate to employees generally that there has been a potential COVID-19 exposure, without sharing additional identifying information. Employers also may be able to communicate to affected non-employees (e.g., customers, vendors, and others with whom the employee may have come in contact while working) that there was a potential COVID-19 exposure.

It is important to remember that employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA which requires that the information be kept separately from other personnel files and in a secure manner.

Employers should also evaluate any applicable state privacy law or state “mini-ADA” laws to ensure they do not contain different or additional requirements or provisions. For example, if the company does business in the State of California (e.g., it has one or more locations, employees, customers, suppliers, etc. in the state), and the business is subject to the California Consumer Privacy Act (CCPA), then the employer must provide employees a CCPA-compliant notice prior to or at the same time as the information is collected.

**Can an employee report to a manager that they know a co-worker has tested positive for COVID-19 or is exhibiting symptoms?**

Yes. ADA confidentiality does not prevent an employee from reporting to the employee’s manager that another co-worker has COVID-19 or is exhibiting symptoms. Once the manager learns about the situation, the manager should report that information to the appropriate person within the organization. Employers are advised to create clear guidance regarding this kind of reporting and clearly communicating that guidance with employees.

**How should managers and supervisors keep medical information of employees confidential while working remotely?**

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other
medical information, while teleworking, and is able to follow an employer’s existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can see them. Similarly, documentation must not be stored electronically where others would have access.

What obligations does an employer have to provide reasonable accommodation if an employee says that they live in the same household as someone who due to a disability is a greater risk of severe illness if they contract COVID-19?

The employee only has a right to reasonable accommodation for the employee’s own disability. In the situation being raised here, the employee does not have a disability, only a member of the employee’s household. Employers are advised to develop a policy to specifically address this situation, and then apply it uniformly to all employees.

May an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

May an employer require its employees to wear personal protective equipment (PPE) (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear PPE during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

Yes, employers may make inquiries that are not disability related. An inquiry is not disability-related if it is designed in such a way that both potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) and medical reasons that might make an individual high-risk are presented together in such a way that the employee can answer yes or no without having to state that they have a medical condition. For example, an employer could ask the following question: Do you expect that the coronavirus pandemic will impact your availability to work, either due to practical concerns such as inability to access public transport or medical concerns? Please answer yes or no.

UNEMPLOYMENT

General

Are employees eligible for unemployment to make up for reduced hours?

While state rules differ, and it depends on how large an income loss is, most states provide partial unemployment benefits. Generally, if the lost pay exceeds what the employee would receive in unemployment benefits, then the employee may be eligible for benefits.

Are employees eligible for unemployment if they have been furloughed?

Potentially, depending on the state. DOL has authorized the states to make unemployment benefits available to people who are quarantined, who are furloughed, or who had to leave work to care for a family member. That said, sick leave pay is included in the calculation of whether an individual is receiving an income, so the individual would not be able to take unemployment if they are receiving sick pay (emergency or otherwise).
CARES Act Expansion of Unemployment Insurance/Benefits

What does the expansion of unemployment insurance mean for employees?

The CARES Act creates a temporary Pandemic Unemployment Assistance program through December 31, 2020 to provide payment to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others) who are unable to work as a direct result of the coronavirus public health emergency.

The CARES Act will also increase unemployment insurance by $600 per week for four months. This money is in addition to what states pay as a base unemployment salary. This benefit would extend to gig economy workers, freelancers, and furloughed workers who are still getting health insurance from their employers but are not receiving a paycheck.

Finally, the Act provides for an additional thirteen (13) weeks of unemployment benefits through December 31, 2020, for those who remain unemployed. These benefits would be paid by the federal government after state unemployment benefits have been exhausted. It is not yet clear how this program will be administered.

How does this section of the CARES Act affect employers?

The Act also provides funding to support “short-time compensation” programs, where employers reduce employees’ hours instead of laying off workers and the employees with reduced hours receive a pro-rated unemployment benefit. This provision would pay 100 percent of the costs the employer incurs in providing short-time compensation through December 31, 2020. It is not yet clear how this program will be administered.

RETURN TO WORK

What is contact tracing and do employers need to do it?

Contact tracing is essentially working backwards to identify all of the people an individual infected with COVID-19 has recently been in contact with an effort to warn those individuals of their potential exposure.

Contact tracing in the public health sense is a specialized skill conducted by trained health professionals. However, employers can and should employ contact tracing as a workplace safety measure. Employers who learn that an employee has a positive or presumptive positive COVID-19 diagnosis should immediately conduct an investigation to determine the employee’s work locations and close workplace contacts within the last 14 days.

Once employers have identified potentially exposed work areas and employees, they should clean the affected areas, isolate the potentially exposed employees, and communicate to the identified employees that they have potentially been exposed to COVID-19, while maintaining the affected employee’s confidentiality. Employers should take particular care to avoid disclosing the names of employees who have disclosed a positive or presumptive positive COVID-19 diagnosis.

Employers should also direct potentially exposed employees to relevant CDC guidance. It may also be helpful to review the CDC’s guidance concerning cleaning and disinfecting workspaces.

Does an employer need to train its employees in health and safety protocols before they return to the worksite?

An essential part of curbing the spread of COVID-19 within the workplace is training employees concerning new employer health and safety protocols before they return to work. Employers should provide copies of new health and safety policies or protocols (including social distancing, cleaning, handwashing, or other relevant polices) before employees return to the workplace. Employers should also be sure to provide employees with contact information for the person or team responsible for responding to questions or complaints as well as the person or team responsible for tracking the application of the policies and protocols.

Signage about protocols or policies posted at key locations and pre-shift or mid-shift check-ins are also valuable training tools that employers may utilize.
When is it appropriate to reopen the workplace?

Knowing when to reopen the physical workplace is a fact intensive analysis that should be guided by employers’ review of orders and recommendations issued by state or local governments and health departments. Employers should also review federal guidance on the matter, including, but not limited to, the CDC’s recent guidance addressed to assisting employers in making decisions regarding reopening.

Is an employer required to provide PPE to its employees?

The answer to this question hinges on the applicability of a patchwork of state and local laws and orders to a given employer. New Jersey, New York, Michigan, and Rhode Island have issued executive orders that require covered businesses to offer employees face coverings at the employer’s expense. In Connecticut, all employees (with limited exceptions) are now required to wear a face covering at all times, and employers are required to provide masks, face coverings, or materials and CDC instructions for creating masks or face coverings to employees. California’s pre-COVID-19 wage and hour laws prohibit employers from requiring employees to pay for business expenses, which likely means that California employers who require their employees to wear PPE are required to provide the equipment or reimburse employees for purchasing it at their expense.

In jurisdictions where employers are not required by law or executive order to provide employees with PPE, employers should consider the extent to which masks or other PPE are needed to limit transmission of COVID-19 exposure in the workplace.

Employers should also be mindful of their potential obligations under the OSH Act. Because certain industries or jobs put workers at increased risk of injury due to the nature of the work, the standards set by OSHA may require employers to provide and pay for PPE.

Regardless of any legal obligations, we recommend that employers who require employees to wear PPE while performing services on the employer’s behalf either provide the required PPE to their employees or reimburse employees for expenses related to the purchase of approved PPE.

Can an employer require that its employees wear PPE? What can an employer do if an employee refuses to do so?

Employers may require the use of masks or other PPE in the workplace in light of the COVID-19 pandemic. If an employee refuses to wear a PPE or has an underlying medical condition that restricts their ability to wear PPE, the employer should not assign the employee to work in areas that would require the employee to wear PPE. Employers should also be mindful of EEOC guidance explaining that, absent undue hardship, employers are obligated to explore and provide reasonable accommodations for employees who are restricted from wearing PPE due to a disability under the ADA.

Are phased returns appropriate? How should an employer stagger its employees?

The National Guidelines for Opening Up America Again confirm that phased returns are both appropriate and encouraged as local conditions improve. Employers considering a phased return to work should consider how best to maximize telework for eligible employees while ensuring that essential functions are completed; the identity of groups or departments necessary to perform in-person tasks that are essential to the business; the capacity of their workspaces; and their ability to put into place social distancing, cleaning, or other relevant protocols or policies. Employers should balance those considerations and local conditions and directives against the specific operational needs of their business. The timeframe between each department or group’s return to the workplace may be based on need and the continued health of employees. Employers should be certain to document the legitimate business reasons for their selection process.

Should employers make special concessions to employees who are considered vulnerable?

Employers are generally not required to make concessions or accommodations for employees in a vulnerable category based on the employee’s (or the employer’s) subjective fear that the employee may be susceptible to a severe reaction to COVID-19.

That said, vulnerable employees may be eligible for benefits under the FFCRA depending on the specifics of their situation or if they have been advised by a medical professional to self-quarantine due to concerns about COVID-19.
Additionally, mental or emotional disorders such as anxiety could create an obligation to provide a reasonable accommodation.

If there are no FFCRA or other disability concerns, employers may find themselves in a position where they must choose between instructing vulnerable employees to work despite their concerns or terminating them. We believe that employers should be sensitive to requests by vulnerable employees and should give careful consideration to how such employees may be reintegrated into the workplace. That approach is supported by the National Guidelines for Opening Up America Again, which advises (but does not require) employers to “strongly consider” special accommodations for personnel who are members of vulnerable populations.

Ultimately, there is no one-size-fits-all answer to this question, and we advise employers work closely with their counsel to devise solutions that are suitable for each specific factual circumstance.

**What can an employer do if an employee refuses to come to work?**

An employer’s options in this situation depends on the reason for the employee’s refusal. Employees are entitled to refuse to work if they believe they are in imminent danger based on a “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.” Employers should consult counsel and guidance issued by the CDC and OSHA to determine whether an employee’s refusal to work is permissible under the OSH Act.

Additionally, employees who engage in concerted activity related to their working conditions, such as protesting a lack of employer policies addressed to worker safety, may be protected from adverse employment action such as termination under Section 7 of the National Labor Relations Act (NLRA). Importantly, the NLRA applies in such instances whether or not an employer’s workforce is unionized.

Absent any state or local law to the contrary, employers are otherwise authorized to enforce their policies as they would in any other instance where an employee either fails to appear for a scheduled shift or refuses to do so. That said, we strongly advise collaboration with counsel to determine the best approach in a given factual circumstance.

**An employee asked for an accommodation, but the employer cannot afford it due to the pandemic. Does that constitute an undue hardship?**

Employers should address accommodation requests on a case-by-case basis to determine the existence of viable accommodations by engaging in the interactive process mandated by the ADA. Employers are not required to grant accommodation requests that constitute an undue hardship in the form of a significant difficulty or expense.

Before the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer’s overall budget and resources (always considering the budget/resources of the entire entity and not just its components). The EEOC has issued guidance explaining that the factors that demonstrate the existence of an undue hardship are necessarily flexible in light of the COVID-19 pandemic. Specifically, the EEOC’s guidance counsel’s that employers’ sudden loss of revenue streams have created an environment where analysis of available discretionary funds, business expenses, and the effects that state or local restrictions have on both could give rise to an employer’s decision to reject an accommodation based on cost.

Notwithstanding the EEOC’s guidance, employers should carefully consider the viability of an accommodation request as well as potential alternative accommodations rather than rejecting accommodation requests out-of-hand.

**Should an employer make changes to the physical layout of its workspace? Install push-pedals? Remove break room desks? Stop the practice of hot-desking?**

It depends, but probably yes. Every employer should analyze its space and its plans with respect to returning the workforce (including the number of employees who will return and occupy a given space) to determine whether particular workplace modifications are necessary or helpful to maintaining social distancing, compliance with employer created workplace safety protocols, or compliance with government-issued orders or guidelines.

If certain employees work in areas that are within 6 feet of each other, employers should develop plans to reassign those employees to other areas or to align the space to ensure minimum distancing. That could mean reconfiguring or removing furniture, especially in shared spaces like break rooms.
What steps should an employer take if an employee tests positive for COVID-19?

Employers who learn of a confirmed or presumptive positive COVID-19 diagnosis should: (i) isolate the infected employee(s); (ii) identify and isolate employees who worked closely with the affected employee within the past 14 days; (iii) identify and clean potentially affected workspaces; and (iv) confidentially communicate with employees concerning the identification of a presumptive positive COVID-19 diagnosis and the steps the employer has taken to address any concerns related to exposure in the workplace.

Employers may require employees who reported a confirmed or presumptive positive COVID-19 diagnosis to provide a medical certification or otherwise certify that they are fit to return based on the CDC’s guidelines.

How does an employer decide who to re-hire now that its business is open?

Employers should make decisions about who to hire or re-hire and when to do so based on consideration of relevant federal, state, and local guidance concerning current conditions as well as their careful analysis of the legitimate business bases for hiring or re-hiring a given individual at a given time.

This issue, perhaps more than the many other difficult issues the COVID-19 pandemic has created, is ripe for potential claims related to the violation of federal, state, or local employment discrimination laws. Even decisions concerning which employees will work onsite and when to bring those employees back are subject to scrutiny under federal, state, or local anti-discrimination laws because those decisions could be considered adverse employment actions (i.e. employer decisions that negatively affect the terms and conditions of an individual’s employment such as pay, hours, or employment status).

Accordingly, employers should be mindful of their obligation to make decisions without regard for employees’ protected traits and should carefully analyze and document the business reasons for employment decisions.

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Given the rapid developments in this area of law, it is important to consult with legal counsel to obtain the most up-to-date legal information and advice that is appropriate for your particular factual situation. These Frequently Asked Questions are for general informational purposes only and should not be construed as legal advice.
Employment & Labor Practice Contacts

Contact information for members of Wiley’s Employment & Labor Practice is outlined below. Please contact us with any questions or concerns. To learn about Wiley’s Employment Capabilities Related to the COVID-19 Pandemic, please visit our [website](#).

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