

Frequently Asked Questions¹

Please note that this is a rapidly changing situation. The information in this FAQ sets out a summary as of 10 a.m. EST, March 17, 2020.

1. May employers send employees home if they display coronavirus-like symptoms during a pandemic?

Yes. The US Centers for Disease Control (CDC) recommends that employees who manifest symptoms consistent with influenza or coronavirus be temporarily removed from the workplace. The Equal Employment Opportunity Commission (EEOC) supports such measures during pandemic conditions, and taking measures to temporarily separate symptomatic employees from the workplace does not violate the Americans with Disabilities Act (ADA). Even outside of pandemic conditions, the ADA allows employers to take measures to protect other workers when an employee showing symptoms of a contagious illness poses a direct threat to others.

2. Now that there is a pandemic, how much information may employers request from employees who report feeling ill at work or who call in sick?

Although employers are ordinarily not permitted to conduct medical inquiries or examinations of employees unless job-related and consistent with business necessity, under pandemic conditions, the EEOC recognizes the prudence of asking employees whether they are experiencing symptoms consistent with the pandemic condition. During the current worldwide coronavirus outbreak, employers may ask employees whether they are experiencing symptoms typically associated with the virus, such as a fever, cough or sore throat. Remember to maintain any personally identifying medical information required of or volunteered by employees as a confidential medical record (i.e., separate from the main personnel file).

3. May an employer take employees' temperatures at work to determine whether they have a fever?

Although temporal thermometers allow for noninvasive temperature checks, the EEOC considers measuring employees' body temperature a "medical examination" and, thus, under ordinary conditions (subject to ADA authorized exceptions), is prohibited. However, because the current coronavirus has been deemed a worldwide pandemic, the EEOC recognizes that temperature checks may be warranted and do not violate the ADA. Despite the greater flexibility around temperature gauging during pandemic conditions, remember that checking for fevers may yield false positives, as fever is associated with a number of viruses, including the influenza virus, and false negatives, as coronavirus can present without fever.

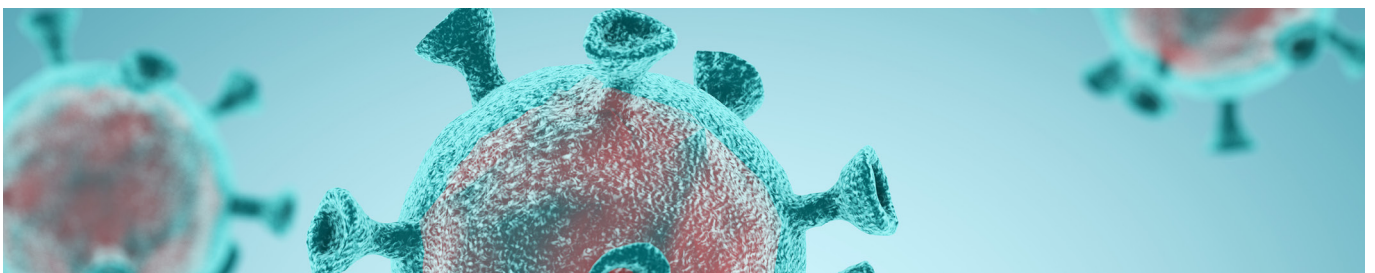
4. When an employee returns from travel (during the pandemic), must an employer wait until the employee develops symptoms to ask about possible exposure during the trip?

No. Inquiring about employees' recent travel does not constitute a disability-related inquiry. Employers may ask employees where they have recently traveled to determine whether they visited areas associated with widespread infection, whether or not the travel was business-related or personal. Employers, of course, should be careful not to single out employees for these inquiries based on race or national origin, and should follow developing CDC guidance regarding concentrations of infections and exposure.

5. May an employer ask an employee why they have been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. However, many state paid sick leave laws limit employers' ability to require doctors' authorizations before employees are permitted to return to work. Before obligating employees to obtain a doctor's note clearing them to return to work after a brief absence covered by state or local paid sick leave laws, be sure to review and comply with all such laws' timing and notice requirements.

¹ See generally, EEOC's Pandemic Preparedness in the Workplace and the Americans With Disabilities Act.





6. An employee has tested positive for coronavirus after traveling to a high-risk area for business reasons. What are the employer's obligations, if any, to report this?

The Occupational Safety and Health Administration (OSHA) urges employers to report incidents of coronavirus known or suspected to have been contracted by employees while working. State occupational safety and health agencies may impose similar obligations. Employers should treat suspected occupational coronavirus infection cases as reportable incidents. This is a departure from OSHA guidelines that exempt recording of common colds and influenza infections, even when a worker is infected on the job. 29 C.F.R. § 1904.5(b)(2)(viii).

7. May an employer ask employees who do not have coronavirus symptoms to disclose whether they have a medical condition that could make them vulnerable to coronavirus complications?

Generally, no. The EEOC states that in the absence of severe pandemic conditions (unclear as to how "severe" is defined), asking employees without symptoms whether they have underlying medical conditions or disabilities that may render them more vulnerable to coronavirus complications is considered a prohibited disability-related inquiry.

However, in the context of accommodating employees with high-risk conditions, employers are permitted to let employees know of accommodations available to those with high-risk conditions (or other disabilities) that are more affected by the pandemic. If an individual employee volunteers that they have a disability or underlying medical condition that puts the employee at high risk, whether in connection with a request for time off, telework arrangement, personal protective equipment or other reasonable accommodation, the employer must keep this voluntarily disclosed information confidential. Employers may still engage in an interactive dialogue with employees who request a specific reasonable accommodation to determine the reasonableness of the request, whether the accommodation (or an alternative) will enable the employee to perform the essential functions of his job, and whether the accommodation poses an undue burden.

8. May an employer encourage or require employees to telework (i.e., work from an alternative location, such as home) as an infection-control strategy during a pandemic?

Yes. Telework can be an effective infection-control strategy. The CDC and World Health Organization (WHO) encourage "social distancing" to reduce and slow the spread of the virus, and telecommuting can play a valuable role in this effort. Employers who implement telecommuting arrangements, whether as an infection-control strategy or in response to a request for reasonable accommodation, should take appropriate steps to ensure accurate timekeeping for wage (particularly overtime) payment purposes and data and information security. Employers should plan in advance for sudden office/facility closings by ensuring that employees have sufficient supplies and equipment at home to continue working seamlessly, paying careful attention to state law requirements for reimbursement of business-related expenses. Telecommuting employees should be reminded to report any occupational injuries or illnesses, even those incurred while working remotely, for workers' compensation insurance purposes.

Follow-Up Scenario: Prior to the pandemic's inception, an employee with chronic migraines repeatedly asked to telecommute because his long drive to work triggers his headaches and limits his ability to take medication. The company repeatedly denied this request because attendance in the workplace is essential. The company has now required that the entire workforce telecommute for the duration of the coronavirus outbreak. May the company continue to deny the employee's telecommute request when the pandemic subsides?

It depends. Employers that permit or require extended telecommuting arrangements during the pandemic may learn during the process that remote work can be accomplished seamlessly and with little added cost or burden, a factor that may cut against future denials of requests for reasonable accommodation. However, the ADA "reasonableness and undue burden" analysis takes into account the duration of the accommodation and the relative burdens presented under the circumstances. Telecommuting may be reasonable under pandemic conditions because the risk of infection to an entire workforce significantly outweighs the administrative burden imposed by the arrangement, but the burden of accommodating an extended telecommuting arrangement may not be justified under ordinary business conditions.

9. 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. Consistent with employers' general duty under OSHA to provide employees with a working environment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm, employers are encouraged to provide soap, alcohol-based hand sanitizer, sanitizing/disinfectant wipes and facial tissue to employees, and to regularly and thoroughly clean and disinfect surfaces. This is particularly true in higher risk environments like schools, daycares, nursing homes, hospitals and other healthcare facilities.

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

Yes. An employer may require employees to wear personal protective equipment (PPE) during a pandemic. Employers may also have an obligation to provide PPE to employees as a reasonable accommodation of a disability caused or exacerbated by, or threatened to be worsened by, the virus outbreak if doing so enables the employee to perform the essential functions of his or her job. Similarly, OSHA imposes obligations on employers to provide PPE to certain employees whose health and safety is at heightened risk, such as hospital workers and first responders frequently in contact with infected individuals.

The Senate is currently considering HR 2601, which, if passed, will be known as the Families First Coronavirus Response Act. The bill in its current form requires that respiratory PPE for coronavirus prevention and treatment reasons be treated as insurance-covered countermeasures.

11. Must an employer continue to compensate employees who are not working?

Under Existing Law

Under laws predating the current pandemic, hourly, non-exempt employees must be paid for all hours suffered or permitted to be worked, but they need only be paid for hours actually worked. Accordingly, absent state or local laws or passage of federal legislation to the contrary, employers can dock non-exempt employees' pay for absences and withhold wages for hours not worked. However, remember that many jurisdictions have paid sick leave laws that must be consulted, and several states have "show up" pay and advance scheduling laws that may be implicated in this scenario, depending on the reason for not working.

On the contrary, salaried exempt employees ordinarily must be paid their weekly salary for any workweek in which they perform any work. If an exempt employee is ready and willing to work, but the employer does not permit the employee to work (such as due to a partial workweek closure out of fear of contagion or because of supply delays), the exempt employees must, nonetheless, be paid for the full workweek. If the employer remains open and an exempt employee fails to work for one or more full days and does not utilize time available to them under a *bona fide* sick or paid time off plan, the employer may in that limited circumstance take deductions from the exempt employee's salary for a full day without losing the overtime exemption.

Families First Coronavirus Response Act (Pending)

On March 16, 2020, the House of Representatives approved a bill that if passed by the Senate and signed by the President would require private employers with fewer than 500 employees to provide up to 80 hours of paid sick leave to certain employees who are subject to quarantine or isolation orders or recommendations; who are awaiting testing and diagnosis for suspected coronavirus infection; who are caring for quarantined or isolated family members; or who are facing school and daycare closures in response to the virus. Depending on the reason for the sick leave, the 80 hours would be paid in full or, for child caregiver leave, at two-thirds the employee's regular rate of pay. The act would exempt certain healthcare providers and emergency responders, and relieve some small businesses from the paid childcare leave requirement.

Paid sick time would not carry over from one year to the next and would be in addition to, and not in place of, paid sick leave already made available by an employer prior to the enactment of the act. If passed, employees may not be required to exhaust existing paid sick leave or paid time off prior to using public health emergency paid sick leave. Employers would be prohibited from discriminating or retaliating against employees who exercise their public health emergency paid sick time benefits, and the penalty provisions of the Fair Labor Standards Act (FLSA) would apply.





12. Must an employer provide job-protected time off to employees who have been exposed to, but do not show symptoms of, coronavirus?

Existing FMLA Requirements

The Family and Medical Leave Act (FMLA) currently provides eligible employees (i.e., those with at least one year of experience who have worked at least 1,250 hours in the preceding 12 months) of covered employers (those with 50 or more employees in a 75-mile radius of the employee's worksite) with up to 12 weeks of job-protected unpaid leave under certain conditions, including, without limitation, when the employee's own serious health condition renders them unable to perform the essential functions of the employee's job. Absent other complicating factors, mere exposure to a person infected with the coronavirus without subsequently developing symptoms does not constitute a serious health condition under the FMLA. However, if an eligible employee has a preexisting serious health condition and their healthcare provider recommends isolation and monitoring after virus exposure to prevent exacerbation of the underlying serious health condition, FMLA protection may apply. And, of course, if the individual is infected with the coronavirus, as a result of the virus or complications resulting from the virus, becomes unable to perform the essential functions of the employee's job; and requires inpatient treatment or a course of continuing treatment by a healthcare provider, the employee would fall within the scope of the FMLA.

Families First Coronavirus Response Act (Pending)

If passed into law, the Families First Coronavirus Response Act would amend the FMLA by extending, through December 31, 2020, leave benefits in certain coronavirus-related circumstances to employees who have been employed at least 30 days by employers with fewer than 500 employees (including those with fewer than 50 employees who are not otherwise covered employers for FMLA purposes, unless the pay obligation would jeopardize the business as a going concern).

Public emergency FMLA leave would be available to eligible employees to care for a son or daughter under age 18 whose school or daycare provider has closed or become unavailable due to the coronavirus public health emergency.

The first 10 days of public health emergency FMLA leave may be provided without pay, but employees may substitute accrued paid time off, and, if the paid sick leave provisions of the bill survive, employees needing emergency FMLA leave would qualify for partial salary payment for the first 80 hours. After the first 10 days, the employer must pay each subsequent day of leave at an amount that is no less than two-thirds the employee's regular rate of pay for the hours the employee would otherwise be normally scheduled to work, up to US\$200/day or US\$10,000 in the aggregate. The job restoration obligations of the FMLA would apply, except if (i) the employer employs fewer than 25 employees, and (ii) the employee's position does not exist at the conclusion of the leave of absence due to economic conditions or other changes in operating conditions resulting from the public health crisis, so long as the employer makes "reasonable efforts" to restore the employee to work and notifies the employee if equivalent work becomes available within the following year. If the bill is passed into law, employer obligations will go into effect within 15 days.

13. May employees take FMLA leave in order to avoid exposure to the coronavirus, or to address heightened anxiety regarding contagion?

FMLA leave is not intended simply to avoid public places, even if to reduce the risk of infection. Employees may use paid time off for such purposes, subject to their employers' attendance and call-in requirements. However, if an eligible employee has an existing serious mental health condition, such as generalized anxiety disorder or panic disorder with or without agoraphobia, the symptoms of which are exacerbated by the widespread fears related to the pandemic, FMLA leave may be required.

The proposed Families First Coronavirus Response Act does not alter this analysis; the public health emergency leave provisions apply to those dealing with sudden school and daycare closures, but does not provide coverage for those merely fearful of the COVID-19 virus.

14. May an employer terminate an employee for refusing to travel for work? Does it matter if the travel is domestic rather than international?

Although an employer ordinarily may discipline or terminate an at-will employee for willfully refusing to perform reasonable work-related duties, current air travel, particularly international travel to high-risk locations, may expose employees to an unreasonable risk of infection. With travel bans expanding rapidly, employees may genuinely (even if erroneously) believe that travel to and from certain destinations is unlawful. Employers should exercise caution before terminating employees for refusing to engage in conduct they believe poses an undue risk to themselves or that they believe may violate federal or state law.

15. Due to international travel and import restrictions, an employer lacks supplies and materials required to operate, and seeks to halve all employees' hours for the pendency of the pandemic. Is this cost-saving measure permissible?

Barring individual employment agreements or collective bargaining agreements to the contrary, an employer may reduce hourly non-exempt employees' schedules for cost-savings measures. (Salaried exempt employees are entitled to their full weekly salary if they work any portion of the workweek, or the employer will lose the overtime exemption.) However, many states permit employees to file applications for partial unemployment compensation when their hours are involuntarily reduced for cost-savings purposes, such as to prevent or postpone layoffs. In addition, employers should be careful to avoid reducing employees' hours so substantially that their benefits, such as employer-provided group health insurance, are jeopardized. Further, if federal legislation passes requiring payment of paid sick leave for covered reasons, the proposed bill does not exempt businesses struggling financially due to the pandemic.

16. Furloughs and hours reductions have been insufficient due to the duration of the pandemic, so the employer anticipates layoffs, or even potentially permanent reductions. May the employer immediately layoff/terminate the impacted workers?

Employers are ordinarily free to terminate at-will employees without notice, but the size of the workforce and the layoff or reduction may trigger reporting obligations. Under the federal Worker Adjustment and Retraining Notification Act, or the WARN Act (29 U.S.C. § 2100 *et seq.*, 20 C.F.R. Part 639), employers with 100 or more employees (excluding those who have worked fewer than six of the last 12 months and those who work on average fewer than 20 hours a week) must provide at least 60 calendar days' advance written notice of a plant closing (closing an employment site or one or more facilities or operating units within an employment site, thereby causing an employment loss for 50 or more employees during any 30-day period), or mass layoff (an employment loss other than due to a plant closing that results in the employment loss of 500 or more employees in any 30-day period, or of 50-499 employees if they make up at least 33% of the employer's active workforce), so that workers and their families may adjust to the prospective loss of employment. Notice must be given to workers, their representatives, the local chief elected official and the state dislocated worker unit. For purposes of the WARN Act, an employment loss includes termination other than for cause, resignation or retirement; a layoff exceeding six months; or a reduction in an employee's hours of work of more than 50% in each month of any six-month period.

The 60-day notice requirement does not apply when a plant closing is due to a faltering company (i.e., one seeking new capital or business to stay open, where notice would jeopardize the funding), or when a plant closing or mass layoff is due to unforeseeable business circumstances or natural disaster. A sudden loss of supplies, material or labor due to pandemic conditions that was not foreseeable 60 days before the employment loss may constitute an unforeseeable business circumstance, but employers should carefully review business conditions with counsel before making such determination, and give workers and state agencies as much notice as possible under the circumstances.

In addition to the federal WARN Act, some US states have adopted mini-WARN Acts with lower thresholds for determining employer coverage and notice-triggering employment losses, and at least one state requires severance payments in the event of mini-WARN Act triggering employment losses. Before a sudden plant closing or mass layoff, consult with counsel about state-specific notice and payment requirements.

17. The same employer is considering layoffs due to the steep drop-off in business during the coronavirus pandemic, but a segment of the workforce belongs to a union. May the employer proceed immediately with the layoff?

In addition to the WARN Act and mini-WARN Act considerations, unionized employers also must review the terms of their collective bargaining agreements (CBAs) to ensure they follow all steps required prior to layoff/termination, including, if applicable, conferring or bargaining with the units' representative, following CBA requirements for selecting affected employees, and adhering to recall requirements following a temporary layoff.

18. A group of disgruntled employees is heard complaining about the company's failure to frequently and thoroughly clean and sanitize work areas, leading them to fear they will contract the coronavirus. May the employer instruct them to discontinue these group discussions?

The National Labor Relations Act (NLRA) applies to unionized and non-union employers and protects employees' right to engage in concerted activity for their mutual aid and protection, which includes, without limitation, discussing the terms and conditions of their employment and any workplace safety or hygiene risks. If two or more covered employees are engaged in discussions about perceived workplace safety hazards, their communications may constitute protected concerted activity, and disciplining them for these discussions or attempting to chill their protected concerted activity may result in an unfair labor practice charge.

19. A key employee discloses that she is a member of the National Guard and has been called to immediate duty due to pandemic conditions threatening the public's health. She does not yet know the duration of her call to duty. May you deny her request to take leave due to lack of notice and her substantial responsibilities to the company?

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects employees who are called to render "service in the uniformed services," whether in the active component of the Armed Services, the National Guard or reserve military personnel, and covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Covered employers may not deny employment, reemployment, retention, promotion or any benefit of employment to an individual on the basis of their membership, performance of service or obligation for service in the uniformed services. Federal National Guard duty is covered by USERRA; National Guard duty under authority of state law, such as a call by the state governor, is not covered by USERRA. If the employee's orders to serve are issued under federal authority, the employee must give as much notice as is practicable – which she has done under the circumstances – and the employer must honor the request and comply with the antidiscrimination and antiretaliation provisions of the statute when the employee completes her service, provided the total leave to serve is five years or fewer. There are no exceptions for key, executive, managerial, professional or administrative employees. At least one state governor has called for national guard assistance, so employers should take care to review the nature of the orders and review supplemental state law military leave protections before denying requests for protected time off to serve.

Contacts



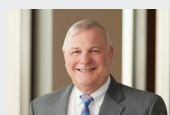
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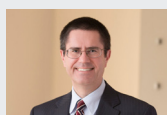
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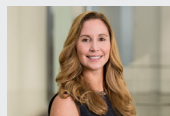
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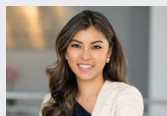
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