

MANAGING YOUR WORKFORCE DURING PANDEMIC

April 23, 2020, 10:30 a.m. to 11:30 a.m.

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OVERVIEW

- ▶ **Safety and health, wage and hour, disability discrimination**
- ▶ **Families First Coronavirus Response Act**
- ▶ **Best Practices as Business Re-starts**

SAFETY AND HEALTH

- ▶ OSHA 32-page booklet on COVID-19 published March 9, 2020
 - ▶ Describes “lower exposure,” “medium exposure,” and “high or very high exposure” risk occupations
 - ▶ ... and precautions employers can take to protect employees at each level

Guidance on Preparing Workplaces for COVID-19

U.S. Department of Labor
Occupational Safety and Health Administration

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About COVID-19	4
How a COVID-19 Outbreak Could Affect Workplaces	6
Steps All Employers Can Take to Reduce Workers' Risk of Exposure to SARS-CoV-2	7
Classifying Worker Exposure to SARS-CoV-2	18

SAFETY AND HEALTH

- ▶ **More abatement measures**
 - ▶ Requiring employees to stay home for 14 days if had close contact with anyone who tests positive
 - ▶ Requiring employees to stay home if sneezing and coughing or showing other symptoms until can provide return-to-work release
 - ▶ Contacting CDC and state health department if employee develops COVID-19
 - ▶ Thoroughly cleaning and disinfecting the workplace
 - ▶ Training on how to avoid transmission of infectious diseases
 - ▶ Restricting workplace visitors
 - ▶ Providing telework options

SAFETY AND HEALTH

- ▶ OSH Act Section 11(c) prohibits retaliation against employee for raising workplace safety concerns
- ▶ Section 13(a) states employee may refuse to work if he/she has good faith belief there is imminent danger of death or serious injury
 - ▶ Includes if there is “reasonable expectation ... health hazards are present, and exposure to them will shorten life”

WAGE AND HOUR

- ▶ W&H Div. webpage on “Pandemic Flu and the FLSA”
 - ▶ Issued in 2009 during “swine flu”/H1N1 pandemic



Wage and Hour Division

[DOL Home](#) > [WHD](#) > [FLSA](#) > Pandemic Flu and FLSA

Pandemic Flu and the Fair Labor Standards Act

Questions and Answers

How many hours is an employer obligated to pay an hourly-paid employee who works a partial week because the employer’s business closed?

The Fair Labor Standards Act (FLSA) generally applies to hours actually worked. It does not require employers who are unable to provide work to [non-exempt employees](#) to pay them for hours the employees would have otherwise worked.

WAGE AND HOUR

- ▶ **Exceptions: don't have to pay for ...**
 - ▶ **Full-day absences for sickness or disability if employer has paid sick leave policy**
 - ▶ **Full-day absences for personal reasons other than sickness or disability**
 - ▶ **Full-day or partial-day absences taken as unpaid leave under FMLA**

***Under FLSA; check state and local laws for employees outside SC and applicable contracts**

WAGE AND HOUR

- ▶ **Reductions in pay require seven days' advance written notice under SC Payment of Wages Act**
 - ▶ **Check state and local wage payment laws in other states**
- ▶ **If having to ask employees to work extra hours, no limit in number of hours per day or week employees can be asked to work**
 - ▶ **As long as employees are 16 years old or older**
 - ▶ **But consider morale and PR implications**
 - ▶ **And check wage and hour laws in other states**

WORK FROM HOME/TELECOMMUTING

- ▶ **Tips for complying with FLSA requirement to track hours of non-exempt employees**
 - ▶ **Set specific work schedule and hours**
 - ▶ **Require non-exempt employees to record all hours worked**
 - ▶ **Require advance written authorization for overtime**
 - ▶ **Prohibit working off-the-clock (including checking e-mail), under-reporting hours, or over-reporting hours**
 - ▶ **Protect electronic data**

DISABILITY DISCRIMINATION

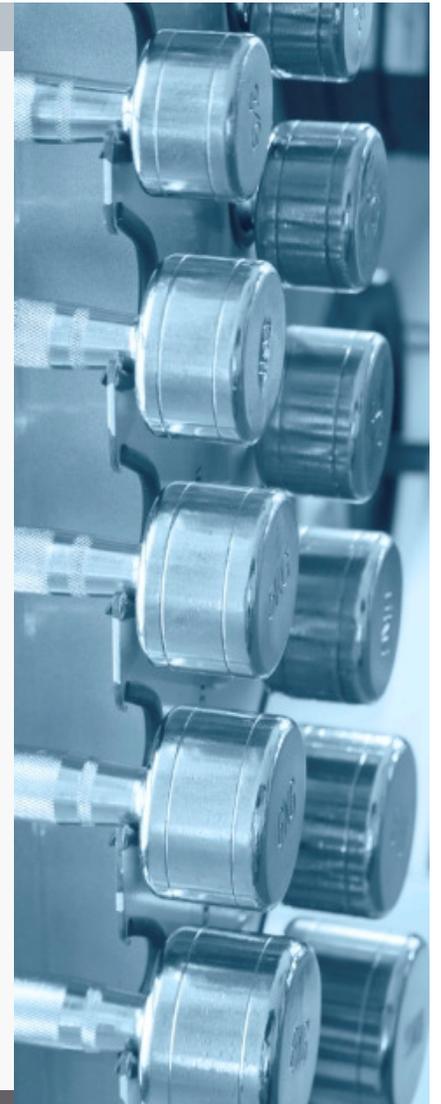
- ▶ EEOC addresses whether employer can take temperature of employees at work to determine if they are infected
 - ▶ Q: “During a pandemic, may an ADA-covered employer take its employees’ temperatures to determine whether they have a fever?”
 - ▶ A: “Generally, measuring an employee’s body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus [], or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.”

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- ▶ **Applicable to Small/Mid-Size Employers**
- ▶ **Paid Sick Leave & Paid Child Care Leave**
- ▶ **Employers 100% reimbursed for Paid Leave**
- ▶ **Some Small Business Protections**
- ▶ **Easing of Compliance**

CORNERSTONE OF ELIGIBILITY: UNABLE TO WORK

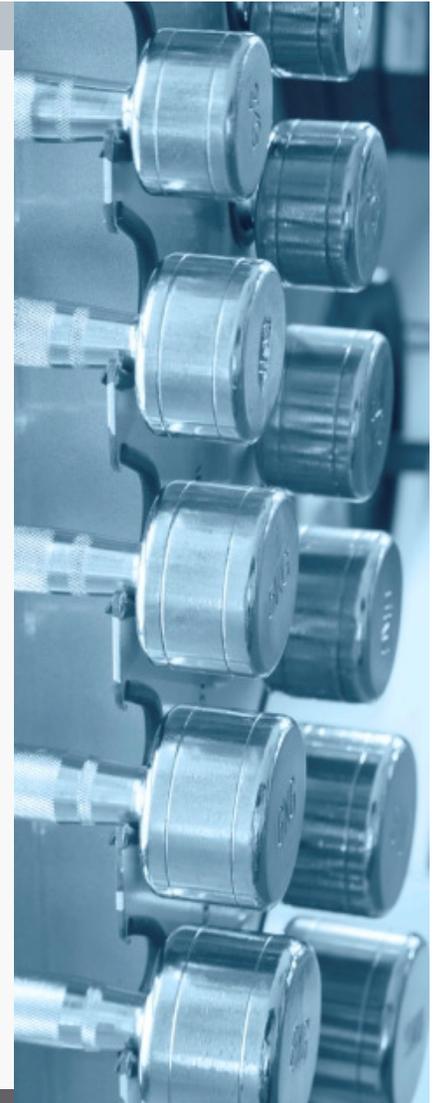
“Unable to work
because of”



CORNERSTONE OF ELIGIBILITY: UNABLE TO WORK

NOT because of ...

- work is closed
- unemployment
- doesn't like teleworking
- vacation
- personal preference



QUALIFYING TRIGGERS - PAID SICK LEAVE

Employee is unable to work or telework because employee

1. is under a government quarantine or isolation order due to COVID-19
2. has been advised by doctor to self-quarantine because of COVID-19
3. is experiencing COVID-19 symptoms and seeking medical diagnosis
4. is caring for an individual subject to quarantine or isolation order or advised to self-quarantine because of COVID-19
5. **needs to care for a child because daycare or school is closed and childcare is unavailable due to COVID-19 precautions**
6. Is experiencing other similar conditions (as determined by HHS)

PAYMENT FOR PAID SICK LEAVE

Leave based on employee's regular rate of pay, depending on the reason:

- **100% employee's regular rate or \$511 per day/\$5100 total if:**
 - ▶ quarantine order (federal, state, local government, or advice of health care provider) /experiencing symptoms/seeking diagnosis
- **66% employee's regular rate or \$200 per day/\$2000 total if:**
 - ▶ need to care for individual subject to quarantine/care for child whose school is closed

PAID SICK LEAVE DETAILS

- ▶ **Paid sick leave is in addition to other PTO. Employers cannot require employees to:**
 - utilize existing PTO first
 - find coverage or replacement before using leave
 - wait a period of time before providing
- ▶ **Paid Sick Leave does not “carry over”**
- ▶ **Not paid out if employee quits employment**

PAID CHILDCARE LEAVE

“EMERGENCY FAMILY AND MEDICAL LEAVE ACT”

TEMPORARY DRAMATIC FMLA EXPANSION

- ▶ Eligible employees: employed at least 30 days
[NOT 12 months/1250 hours]
- ▶ Eligible employers: fewer than 500 employees
[NOT 50 employees/75 mile radius]

PAID CHILDCARE LEAVE: ELIGIBILITY

12 weeks of job protected leave (paid leave after the first 10 days):

“The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

PAID CHILDCARE LEAVE - AMOUNT

- ▶ **First 10 days UNPAID (employee may elect to substitute other leave, but employer may not require)**
- ▶ **After first 10 days unpaid:**
 - ▶ 66% employee's regular rate, maximum of \$200 per day/\$10,000 total
 - ▶ Part time: based on average number hours worked previous 6 months

NOTICE

Employer	Employee
Post FFCRA poster	Pre-leave notice nice, but not required
Notify employee to supply documentation or information about need for leave	Follow employer's "reasonable" notice procedures
	DOL encourages, but doesn't require notice "as soon as practicable"



EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▶ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

▶ ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
[dol.gov/agencies/whd](https://www.dol.gov/agencies/whd)



WH1422 REV 03/20

DOCUMENTATION

QUALIFYING REASON:

<p>1. ___ Subject to a Federal, State, or local quarantine or isolation order related to COVID-19¹ Name of government entity that issued quarantine or isolation order: _____</p>	<p>4. ___ Care for an individual subject to #1 or described in #2⁴ Name of government entity or healthcare provider: _____ Name of individual affected and relation to employee: _____</p>
<p>2. ___ Advised by healthcare provider to self-quarantine due to COVID-19 concern² Name of healthcare provider: _____</p>	
<p>3. ___ Experiencing symptoms of COVID-19 and actively seeking medical diagnosis from a health care provider³ Name of healthcare provider: _____</p>	<p>6. ___ Other substantially similar condition specified by U.S. Department of Health and Human Services⁵</p>



TAX CREDITS FFCRA

- ▶ <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>
- ▶ Credit against payroll taxes for each calendar quarter in an amount equal to 100% paid in emergency leave benefits
- ▶ Limitation on amount capped to \$511/\$200 per day
- ▶ If cost of providing paid leave exceeds the payroll taxes then credit is “refundable”
- ▶ Allows the employer to obtain reimbursement for the cost of assisting employees retain group medical plan coverage during the emergency leave period

CARES ACT

SMALL BUSINESS LOANS AND FORGIVENESS PROGRAM

- ▶ Coronavirus Aid, Relief, and Economic Security Act.
- ▶ Passed by the Senate on March 25, 2020
- ▶ Paycheck Protection Program: Allows small businesses to apply for SBA 7(a) loans to cover costs associated with payroll, insurance premiums, mortgage, rent and utility payments
- ▶ Allows 8 weeks of cash flow assistance to small businesses with 500 employees or less

BEST PRACTICES

RETURN TO WORK CONSIDERATIONS

- ▶ After Stay at Home orders are lifted, how should you decide when to reopen?
 - ▶ CDC Guidance:
 - ▶ 1. Are you in a community no longer requiring significant mitigation?
 - ▶ 2. Will you be able to limit non-essential employees to those from the local geographic area?
 - ▶ 3. Do you have protective measures for employees at higher risk (teleworking, tasks that minimize contact?)
 - ▶ Follow recommendations & Orders of local and state government

BEST PRACTICES

IF YOU ANSWERED YES TO ALL THREE:

- ▶ CDC Recommended safety actions:
 - ▶ Promote healthy hygiene practices
 - ▶ Intensifying cleaning, disinfection (small groups, no large events)
 - ▶ Cancelling non-essential travel, encourage telework
 - ▶ Spacing out seating and staggering gathering times
 - ▶ Restricting use of shared items and spaces, and
 - ▶ Training staff in above safety actions

BEST PRACTICES

- ▶ CDC also recommends only reopen after implementing safeguards for ongoing monitoring of employees, including:
- ▶ Encouraging sick employees to stay home
- ▶ Establishing routine, daily employee health checks
- ▶ Monitoring absenteeism and having flexible time off policies
- ▶ Having an action plan if an employee gets COVID-19
- ▶ Creating and testing emergency communication channels for employees
- ▶ Establishing communication with state and local health authorities.

BEST PRACTICES

WHEN EMPLOYEES RETURN

- ▶ Expect additional concerns related to coronavirus to continue for some time
- ▶ Some employees and their families will be anxious
- ▶ The more employees understand about what safety measures are being taken, and why, the more likely there will be employee buy-in (and the less likely employees may make complaints to OSHA and DOL about perceived risk in the workplace)
- ▶ Employee complaints about perceived safety issues should be taken seriously and investigated – and you should not take any retaliatory action against employees who make claims in good faith

BEST PRACTICES

GENERAL HR ISSUES – PREPARE!

- ▶ Establish clear communications to employees about new processes and expectations for return to work, including:
- ▶ Signage posted at entry points and key locations to share and remind employees of new requirements;
- ▶ Communications drafted and ready to go in the event of a positive COVID-19 case at the workplace;
- ▶ Social distancing rules for work areas and common areas;
- ▶ PPE and other mitigation measures when social distancing is not possible
- ▶ Protocols for frequently cleaning work stations and common areas and disposal of PPE in accordance with WHO/CDC/OSHA guidelines.

BEST PRACTICES

TRANSPARENCY AND HONESTY IS KEY

- ▶ When employees trust that you are being honest and transparent in your communications, and see that you are taking every reasonable step possible to ensure their safety, the more likely your employees will return to work and perform their jobs.

BEST PRACTICES

MASKS IN THE WORKPLACE

- ▶ Refusing an employee's requests to wear:
 - ▶ Under most circumstances, an employer may refuse an employee's request to wear a mask at work, under OSHA respiratory protection standards a *respirator* must be provided to employees only “when such equipment is necessary to protect the health of such employees.”
 - ▶ BUT: CDC's April 3 guidance recommends wearing *cloth face coverings* in public settings where social distancing is difficult to maintain.
 - ▶ AND: Local jurisdictions may require/recommend the wearing of face masks.
 - ▶ RECOMMENDATION: Don't refuse an employee's request to wear a mask, but recommend that the employee use a cloth face covering as suggested by the CDC.

BEST PRACTICES

MASKS IN THE WORKPLACE

- ▶ Can an employee refuse to work without a mask?
 - ▶ Unless you are required to provide a mask or respirator as PPE to your employees, in most cases an employee does not have the right to refuse to work without a mask.
 - ▶ An employee's right to refuse to do a task is protected by OSHA only if all the conditions are met:
 - ▶ Employee has asked the employer to eliminate the danger and the employer failed to do so;
 - ▶ Refusal is in "good faith" (employee must genuinely believe imminent danger exists)
 - ▶ Reasonable person must believe that there is a real danger of death or serious injury
 - ▶ There isn't time due to urgency of the hazard for OSHA to inspect.

BEST PRACTICES

MASKS IN THE WORKPLACE

- ▶ If you require employees to wear face coverings, then OSHA's PPE standards likely apply.
- ▶ Applies to “all protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers”
- ▶ According to OSHA rules, before you require an employee to put on PPE, you must, among other things:

BEST PRACTICES

MASKS IN THE WORKPLACE

- ▶ Perform a Hazard Assessment
- ▶ Consider other alternatives to protect employees
- ▶ Identify and provide appropriate PPE
- ▶ Train employees on the use and care of PPE
- ▶ Train employees how to clean and maintain PPE, including replacing worn or damaged PPE; and,
- ▶ Prepare a written plan that is periodically reviewed.
- ▶ If you require employees to wear face coverings, you should pay for them as PPE

BEST PRACTICES

OSHA

- ▶ Is COVID-19 a recordable illness for OSHA logs?
 - ▶ You must record instances of employees contracting COVID-19 on the OSHA 300 log if the worker contracts the virus while on the job.
 - ▶ OSHA has said that they will not enforce recordkeeping requirements in areas where there is ongoing community transmission, except where:
 - ▶ There is objective evidence that a COVID-19 case may be work-related, and
 - ▶ That evidence was reasonably available to the employer.

BEST PRACTICES

CONFLICTS OF LAWS OR ORDERS

- ▶ Common question that will likely result in litigation
- ▶ State and local governments issue or enact their own laws/orders/”recommendations” related to stay at home orders, the wearing of face coverings, paid sick leave requirements and other provisions – at conflict with federal requirements
- ▶ Usually depends on specific language of the state or local law – and your state’s constitution.
- ▶ Generally, a more restrictive state or local law will control.

BEST PRACTICES

AVOID WRONGFUL DEATH & NEGLIGENCE CLAIMS

- ▶ Can your company be sued directly for an injury related to COVID-19 exposure, outside of workers comp?
 - ▶ Expect plaintiffs' lawyers to file in court claiming willfulness or intentional torts (including negligence and negligent supervision)
- ▶ Follow the CDC's Interim Guidance for Businesses, including best practices for social distancing, Guidelines for Cleaning and Disinfecting the workplace, and quarantining employees who have an exposure to a confirmed COVID-19 case.

BEST PRACTICES

AVOIDING TROUBLE

- ▶ Ensure that employees are provided and properly using required PPE
- ▶ Educate your employees and engage with them – constantly remind them of the symptoms of COVID-19 and urge them to seek medical attention if symptoms appear.
- ▶ Check in with sick employees at least daily to ask them about their health – an employee that you engage with is less likely to seek litigation against their employer.

BEST PRACTICES

AVOIDING TROUBLE

- ▶ If a COVID-19 death occurs due to exposure at the workplace, reach out to the family promptly, and consider ensuring that the funeral is paid for.
- ▶ Inform employees of a confirmed COVID-19 case in the workplace. CDC recommends that employers notify potentially exposed coworkers of confirmed cases. DO NOT IDENTIFY the worker.
- ▶ OSHA may also determine that a failure to notify employees of a confirmed case is a violation of OSHA's General Duty Clause (generic requirement to maintain safe work environment)

BEST PRACTICES

AVOIDING TROUBLE

- ▶ Listen to your employees.
- ▶ They might have really good ideas you didn't consider
- ▶ Gives them "buy in" to their working conditions
- ▶ Remember some businesses are seeing their employees walk out or having social media complaints – Consider your company's reputation.
- ▶ Also, remember that if 2 or more employees are acting in concert that this may be a protected concerted activity under the NLRA

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