



Coronavirus in the Workplace: Practical Guidance for Employers

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An Employer's Obligations

- Provide a safe workplace (federal/state OSHA)
- Comply with laws on medical examinations, inquiries, and information (federal/state ADA, HIPAA)
- Comply with leave and benefits laws (federal/state FMLA, state/local/federal contractor sick and safe leave, state paid family leave benefits, state unemployment insurance, state workers' compensation)

An Employer's Obligations

- Comply with wage payment laws (FLSA, state wage payment, state wage/hour, state predictive scheduling)
- Nondiscrimination (Title VII, ADA, ADEA, GINA, and state laws)
- Respect employees' concerted activity and union bargaining obligations (NLRA)
- Comply with loss of employment laws (federal/state WARN, COBRA)

The Families First Coronavirus Response Act

- New paid sick leave mandate for COVID-19 related reasons
- Expansion of Family and Medical Leave Act
 - Includes COVID-19 related reasons
 - New paid leave mandate
- Unemployment benefits for COVID-19 related reasons
- Payroll tax credit to fund paid leave mandates

Emergency Paid Sick Leave Act

- Applies to employers < 500 employees
- Secretary of Labor may issue regulations:
 - To exclude certain health care providers and emergency responders from the definition of employee and allowing employers of such HCPs and emergency responders to opt out
 - To exempt small businesses with fewer than 50 employees if the PSL “would jeopardize the viability of the business as a going concern”

Emergency PSL

Provides ten days of paid leave

- 80 hours or part-time equivalent
- Special rules for varying hours schedule
- Paid at greater of regular rate or minimum wage
- May be paid at 2/3 for family reasons
- Subject to caps:
 - \$511 per day and \$5,110 total for personal use
 - \$200 per day and \$2,000 total for care for others, “other reasons”

Emergency PSL

- No carryover
- No payout upon termination
- No longer “in addition to” existing leave policies
 - Impact on existing policies?
- Sunset 12/31/2020

COVID-19-Specific PSL Reasons

Leave may be used where employee is unable to work or telework:

- Employee is subject to federal, state, or local quarantine or isolation order
- HCP has advised employee to self-quarantine
- Employee has symptoms and is seeking diagnosis
- Employee is caring for an individual under quarantine (but not for seeking diagnosis)
- The child's school or place of care is closed or child care provider is unavailable
- Other substantially similar condition?

Notice and Use of PSL

- Available for immediate use
- Cannot require employee to find replacement
- Employee may choose order of paid leave
- After first day, employee may be required to follow notice procedures

Employer Notice and Recordkeeping

- Post DOL's notice
- Retain records for 3 years

Prohibited Actions and Enforcement

- No discharge, discipline or other discrimination
 - For taking leave
 - For filing complaint, instituting proceeding, or testifying
- FLSA Remedies
 - \$10,000 fine and 6 months imprisonment
 - Civil suit
 - Unpaid leave
 - Liquidated damages
 - Equitable relief
 - Attorneys' fees and costs
 - Injunctive relief

Emergency Family and Medical Leave Expansion Act

- Applies to employers with < 500 employees
 - Exemption for certain healthcare employees and emergency responders
 - Exemption for employers < 50 employees if requirements “would jeopardize the viability of the business as a going concern”
- Employee is eligible if employed for at least 30 days
- Ends 12/31/2020

Special Rule for Health Care Providers and Emergency Responders

- Employers of these employees may elect to exclude them from these FMLA amendments!
- “Emergency responders” is not defined
- FMLA already has definition of HCP
 - Doctors, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, Christian Science Practitioners, those an insurance company would accept to establish SHC
 - NOT lower level personnel – RNs, CNAs, GNAs, medical techs, etc.

New FMLA Reason

- Closure of school/place of care closure or unavailability of child care provider due to COVID-19 emergency
- Reduced from passed bill, which would have included quarantines

FMLA Reinstatement

Employer < 25 employees not required to reinstate:

- Position no longer exists
- Reasonable effort to restore to equivalent position
- Reasonable effort to contact employee about equivalent position within 1 year

FMLA Paid Leave Mandate

- First 10 days unpaid (and covered by new Paid Sick Leave)
 - Employee may choose whether to substitute any paid leave
- Remainder of up to 12-week leave is PAID!!!
 - 2/3 of regular rate for hours normally scheduled to work, to a max of \$200 a day or \$10,000 total
 - Special rules for varying hours (same as PSL)

Tax Credit for PSL and FMLA Paid Leave

- PSL: payroll tax credit equal to 100%
 - Up to \$511 per day for employee's own condition
 - Up to \$200 per day for family member or school closure
- FMLA Paid Leave: payroll tax credit equal to 100%
 - Up to \$200 per day
- Consult tax counsel or accountant

Unemployment Insurance

- States are to ease eligibility requirements and access to UI for reasons related to COVID-19:
 - Illness in the workplace
 - Quarantine
- Note that UI already covers layoffs and closures

Pending Emergency Legislation in Maryland

- HB 1663 was passed in the House, crossfiled in the Senate
- Gives the Governor authority to take certain COVID-19-related actions, including prohibiting termination based solely on quarantine
- Revises unemployment insurance eligibility to cover:
 - Employer's temporary shutdown
 - Quarantine, with expectation of returning to work
 - Leave because of employee's risk of exposure or infection of COVID-19, or to care for a family member due to COVID-19

Facts About Coronavirus

- From no/mild to severe impact
- Person to person transmission through respiratory droplets – 6 feet
- Possible transmission through hard surface contamination
 - Unclear how long virus survives
 - Not concern with packages or mail
 - Not animals

Symptoms

- These may appear 2-14 days after exposure:
 - Fever
 - Cough
 - Shortness of breath
- Complications
 - Pneumonia
 - Kidney failure
 - Death

Start with the CDC...

- CDC is the definitive authority in US
 - CDC will determine if situation rises to a level of a direct threat that would allow greater latitude in medical testing and inquiries under ADA
- OSHA and other federal agencies rely on CDC
- CDC relies on state/local departments of health for testing
- Health departments will provide guidance when there is infection or possible exposure
- Testing is being referred to private labs

Workplace Hygiene and Disinfection

OSHA's General Duty Clause – employer must furnish a place of employment free from recognized hazards that may cause death or serious physical harm

- Conduct workplace hazard assessment
- Take control measures

Workplace Hygiene and Disinfection

Communicate with/train employees:

- Stay home if sick
 - Fever-free for 24 hours? 3 days?
 - Return to work clearance may not be necessary
- Report illness/exposure
- Frequent and thorough hand washing
- Use of hand sanitizer
- Cover coughs and sneezes with tissue or sleeve
- Don't use other employees' equipment (e.g. phones, computers, tools, desks, etc.)
- Review leave policies

Workplace Hygiene and Disinfection

- Provide soap and/or alcohol-based sanitizer
- Provide cleaning spray and wipes
- Provide tissues
- Perform regular housekeeping – clean and disinfect surfaces
- Consider postponing/canceling group events and public events
 - May be required under state emergency orders

PPE – Gloves and Masks

- With certain exceptions (e.g. healthcare), CDC does not currently recommend use of masks and gloves.
- But what if employee asks to use masks or gloves?
 - Not required to allow, unless employee has disability and doctor has identified use of mask/gloves as possible accommodation.
 - Can get medical information to support request.

Voluntary Use of Gloves or Mask

- Regular surgical masks are not considered OSHA-regulated respirators
 - No employer action required
- NIOSH 95 (N95) masks are considered respirators
 - Employer must provide [§1910.134 Appendix D](#) to the employee using such mask
- If you permit nitrile gloves, you must conduct training on their use, [§1910.132\(f\)](#)

“Social Distancing”

- Relocation of desks/work areas
- Staggered work schedules
- “Split team” assignments
- Telecommuting
 - Test run?
- Eliminate or modify shared meals

Telecommuting

- Equipment/access for employees who don't usually telecommute
 - Employer cover costs?
 - State law on reimbursement of business expenses
 - ADA, if reasonable accommodation
 - No reductions below minimum wage
- Security issues for company information
- Timekeeping for non-exempt employees
- OSHA
 - Does not regulate home offices
 - Illness/injury reporting still applies

Telecommuting

- Establish clear expectations regarding schedules, availability, communications, etc.
- Maintain productivity and quality standards!
- Precedent for future reasonable accommodations requests under ADA?

Employee Business Travel

- At this time, general practice is no non-essential travel
- Explore technological options
 - Teleconferencing
 - Video conferencing

Employee Business Travel

At this time, can require essential business travel

- What is essential?
- Should avoid CDC Level 2/3 countries
- Other travel restrictions...

Employee Business Travel

But if employees express concern re: fact of travel or means of travel, do risk assessment:

- Location of travel
- Means of travel (air v. driving?)
- Risk factors: age, pregnancy, underlying medical conditions, mental health disorder (possible ADA accommodations)
- Other options (technology, other employees)

Employee Personal Travel

- Can require compliance with CDC travel restrictions
- Whether other travel may be prohibited depends on state law
 - Some states have legal off-duty conduct laws
- Regardless, can require employees traveling to CDC Level 2/3 countries or areas of outbreak to self-quarantine for 14 days before RTW

Employee Personal Travel

- Regardless, can ask employees traveling elsewhere to self-monitor and report
- Deny approval based on impact to business operations because of quarantine?
- Do not have to reimburse employee for cancellation costs

Screening Employees

ADA restricts medical exams and inquiries to those job-related and consistent with business necessity

- Direct threat meets this standard
- State of emergency is not necessarily the same as a direct threat

Screening Employees

Can conduct non-medical screening by asking about:

- Travel or close contact with someone who has traveled to area of outbreak
- (Possible) exposure to COVID-19 by employee or household member
- Whether experiencing symptoms of illness

Screening Employees

- If outbreak becomes a direct threat, as determined by CDC and public health officials:
 - May ask whether employee has compromised immune system or chronic health condition that makes them more susceptible to COVID-19
- Can always require employees to report if diagnosed with COVID-19

Screening Employees

Taking temperature?

- EEOC considers this a medical examination
 - Not advised at this time for most employers?
 - This may differ based on type of workplace (e.g. hospital, nursing home)
 - This may change if situation becomes a direct threat
- Practical concerns:
 - Lack of accuracy
 - Fever not always present
 - Fever may be illness other than COVID-19

Screening Employees

- Observation by medical professional?
 - Again, likely considered medical examination by EEOC
- Be careful not to target employees for screening based on race or national origin

Screening Visitors

- Employment laws do not apply to visitors
- Can conduct screening:
 - Travel or close contact with someone who has traveled to area of outbreak
 - (Possible) exposure to COVID-19
 - Experiencing symptoms of illness
 - Taking temperature?
- Can ban all/some visitors from workplace
 - Some employers may be required to ban/restrict such visitors under emergency state directives

Sick Employees

- Send home! Return to work clearance?
 - Permitted under ADA, FMLA (if notice provided), and sick leave laws (with restrictions)
 - But CDC currently suggests to suspend requirement
- Keep medical information confidential!
- ADA disability?
 - Depends on whether illness rises to the level of a substantial limitation on major life activity

Sick Employees

- FMLA
 - Currently depends on whether illness rises to level of “serious health condition” – but err in favor of coverage
- Sick leave laws will apply
 - Coronavirus Response Act - 10 days of PSL (but not paid FMLA)
 - State/local laws

Sick Employees

- Paid family leave benefits laws may apply
- Employer STD or paid leave policies may apply
 - Caveat as to exempt employees – full day absences may be deducted if the employee has exhausted all sick leave or is not eligible under employer program
- Make unpaid leave available
- Consider paying leave, if possible?
 - Continue regular pay
 - Advance leave
 - Partial pay

Employees With COVID-19

- If employee contracted virus at work, will be covered by workers' compensation
 - Need to report to carrier
- Is recordable and reportable event under OSHA
 - If work-related
 - If employee receives medical treatment, has restricted work activity, or has days away from work
- Must be reported to Department of Health (if they don't already know)
 - Department will offer guidance on next steps

Employees With COVID-19

- Communicate with employees and visitors who had contact with sick employee
 - Do not disclose employee's name – confidential medical information
 - Recommend that they self-monitor
 - Rely on health department recommendations as to quarantine for those other individuals
- Deep cleaning of employee's work area and surrounding areas
- Publicity?

Employees Caring for Sick Family Member

- FMLA - it depends...
- Sick leave laws will apply – including CRA
- Paid family leave benefits laws will apply
- If none of these apply, no protections
- Consider providing unpaid leave
 - Consider allowing employees to use paid leave
 - Consider paying leave, if possible (per above)?

Employees Exposed to COVID-19

- Consult with Department of Health
- Work and self-monitor for low risk?
- 14-day quarantine
- Communication with other employees?
 - Depends on how widespread knowledge is
 - Do not disclose employee's name
 - Provide information about consultation with authorities
 - Reiterate hygiene protocols and self-monitoring

Employer-Required Quarantines

- FMLA likely does not apply under current law— does not meet definition of “serious health condition”
 - State FMLA law may provide more protection
- UI benefits may apply – depends on state law interpretation

Government-Required Quarantines

- State law may provide employment protections for employees under healthcare- or government-mandated quarantines (e.g. Maryland)
- FMLA may apply
 - Daily checks = treatment by medical provider?

Government-Required Quarantines

- UI benefits
 - WA and RI have passed emergency legislation
 - Not currently in MD, but likely interpreted in favor of coverage
 - If CRA enacted, will most likely be covered
- State/local sick leave laws may allow use for quarantines
- If enacted, CRA will provide PSL
- Paid family leave benefits laws may apply

Quarantines Generally - Telecommuting

- Exempt employees are paid for full week if they do any work during week
 - This includes checking email on their phones!
- Non-exempt employees are paid for work performed – must track hours worked

Quarantines Generally – Unable to Work from Home

Exempt employees

- Can be told not to perform ANY work during a full week, and not paid for the week
- Can be required to use paid vacation or PTO to cover partial weeks so that they still receive full week of pay
 - Must be paid for full week if they don't have paid leave to cover
- If sick leave applies and no sick leave left, can deduct whole day absences.
 - If CRA enacted, will receive PSL

Quarantines Generally – Unable to Work from Home

Non-exempt employees

- Legally required to pay only for hours worked
- Union contracts?
- May be required to use PTO or vacation
- May be allowed to use PTO or vacation
- Consider allowing use of sick leave, if not mandated by state law
 - If CRA enacted, will receive PSL
- Consider paying leave, if possible? (See above re: sick employees)

School Closures

- Some state/local sick leave laws apply
 - If CRA enacted, will receive PSL and paid FMLA
- Allow employees to use paid leave, including sick leave, to cover resulting absences
- Unemployment benefits?
 - If CRA enacted, likely will apply

School Closures

- No paid family leave benefits
- Consider paying leave, if possible? (See above re: sick employees)
- Bringing children to work? Not recommended.
- Stipends for child care?

Requests to Stay Home – Generalized Fear

- Insist that employees report to work?
- Allow employees to telecommute, where possible
- Allow employees to take leave – paid or unpaid (per above)
 - CRA would not apply here
- No FMLA
 - CRA would not apply here
- No UI
- Can require employees to actually stay at home

Requests to Stay Home

CDC and some states' officials have encouraged older individuals and those with underlying health conditions "to stay home as much as possible."

- If underlying health condition, may be ADA-covered reasonable accommodation?

Furloughs, Layoffs, and Closures

- Allow employees to use PTO or vacation
- Sick leave laws may apply to workplace closures
- UI benefits are likely available
- Predictive scheduling laws may apply
 - Exceptions for exigencies?
- Final paycheck requirements under state law
- WARN Act – state and federal requirements?
 - Exigent circumstances?
- COBRA applies with reduction in hours

Bargaining Obligations

- Start with collective bargaining agreement
 - Look at management rights clause
 - Look at any provisions regarding leave, telework, layoffs, etc.
- May be required to provide notice and opportunity to bargain with union as to any changes in leave administration
- Duty to bargain may be suspended for compelling economic exigency requiring immediate action

Potential Bargaining Issues

- Paid time off for testing
- Periodic mandatory testing
- Payment for testing
- Longer or additional shifts for coverage
- Relaxing the prohibition against cross-classification work or management performance of work

More Potential Bargaining Issues

- Relaxation/modification of attendance and leave rules
- Salary continuation for quarantine/school closures/family illness
- Support programs for quarantined/ill employees
- Workplace safety concerns

Comply with Existing CBA Provisions

- Layoff and recall
- Shutdowns
- Filling vacancies
- Attendance and leave rules
- STD
- Disability, accommodations and return to work
- Illness reporting

Employee Refusal to Work

- Concern about coming to work at all
 - Age, pregnancy, underlying medical condition?
 - Mental health condition – anxiety disorder
- Concern about employees/others visiting from areas of outbreak
- Concern about other employees with illnesses
- Concern about sharing equipment
- Desire to use PPE

Employee Refusal to Work

OSHA guidance: Your right to refuse to do a task is protected if **all** of the following conditions are met:

- Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so; and
- You refused to work in "good faith." This means that you must genuinely believe that an imminent danger exists; and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Employee Refusal to Work

- Protected Concerted Activity?
 - Multiple employees share common concern
 - One employee speaking on behalf of group
- Whistleblower protections
 - OSHA
 - State law

COVID-19 Response Plan

- Identify leadership and point of contact
- Identify and address possible exposure and health risks
- Explore social distancing strategies
- Identify essential business functions and roles and how to cover these
- Inform staffing agencies of need to have sick employees stay home and non-punitive leave policies

COVID-19 Response Plan

- Identify critical supply chain elements
- Plan communications
- Institute flexible workplace and leave policies
- Communicate with public health officials about community resources and plans
- Physical changes to the workplace?

Written Policies

Illness policy:

- Whether there are restrictions on travel and other activities
- What illnesses/exposures must be reported and to whom
- When employees are required to stay home
 - Illness or quarantine
- Whether they will be paid for absences
- What benefits are available
- Whether return to work clearances are required
- Policy may be subject to revision, based on rapidly changing circumstances

Written Policies

- Sick leave policies – implement/review/modify
 - If CRA enacted, will need to address
- COVID-specific leave policies?
- If permitted by plan documents, modification to health plan eligibility because of reduced hours?

Resources

- CDC Webpage: <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>
- CDC Workplace Guidance: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- OSHA Webpage: <https://www.osha.gov/SLTC/covid-19/>
- OSHA Workplace Guidance: <https://www.osha.gov/Publications/OSHA3990.pdf>
- EEOC Guidance: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm

Resources

- DOL FMLA Guidance:
<https://www.dol.gov/agencies/whd/fmla/pandemic>
- DOL FLSA Guidance:
<https://www.dol.gov/agencies/whd/flsa/pandemic>
- DOL UI Guidance:
https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8893
- WHO Webpage: <https://www.who.int/health-topics/coronavirus>
- MD Department of Health:
<https://phpa.health.maryland.gov/Pages/Novel-coronavirus.aspx>

Questions

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