

FREQUENTLY ASKED QUESTIONS FROM EMPLOYERS AMID THE COVID-19 PANDEMIC

With many schools and businesses closed across the country, employers and employees are not sure how to handle this new reality. It is important that employers continue to follow existing laws and keep track of new laws in motion. Here are the common questions we've been asked, and what to do.

Question: We will be closing our offices, hopefully on a temporary basis, and will need to layoff or furlough our employees. Can they get unemployment compensation?

Response: To our knowledge employees who are laid off due to COVID-19-related closures can seek to file claims for unemployment compensation benefits. Whether they will qualify for an award of benefits depends upon each state's program, but we can advise that recently the U.S. Department of Labor announced "new guidance outlining flexibilities that states have in administering their unemployment insurance (UI) programs to assist Americans affected by the COVID-19 outbreak. ... Under the guidance, federal law permits significant flexibility for states to amend their laws to provide UI benefits in multiple scenarios related to COVID-19. For example, federal law allows states to pay benefits where: (1) An employer temporarily ceases operations due to COVID-19, preventing employees from coming to work; (2) An individual is quarantined with the expectation of returning to work after the quarantine is over; and (3) An individual leaves employment due to a risk of exposure or infection or to care for a family member. In addition, federal law does not require an employee to quit in order to receive benefits due to the impact of COVID-19." See https://www.dol.gov/newsroom/releases/eta/eta20200312-0 and for guidance specifically as to unemployment insurance in your state, please contact your state unemployment compensation agency for specific guidance. There is also helpful information for employers relative to temporary furloughs and temporary closures at https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs.

Question: We have a few employees over 60 and 70 years of age. Will we be discriminating based on age if we send these employees home?

Response: The CDC's risk assessment, which you can review at https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html, does not specifically identify age as a risk factor for coronavirus contraction or spread, per se. While we appreciate that the existing information around COVID-19 suggests that older individuals may face greater challenges if infected with the virus, it does not appear that such individuals are necessarily at a higher risk for spreading or contracting it, as indeed available information suggests that other individuals (i.e., those who are immuno-compromised) may be equally at risk to face complications if positive for the virus, and individuals seem likely to transmit it without regard for age. As such, we caution the employer against making age-based distinctions in connection with work-related policies, including policies related to who can and cannot report to the workplace.

As government authorities are now strongly encouraging (and in some instances, requiring) "social distancing," we recommend that employers seek to evaluate work-from-home options for all non-essential personnel, not just those of a particular age or whom the employer assumes may have higher susceptibility to contraction or complications. Such actions can expose the employer to potential age (or disability, if that is a factor) discrimination claims that may be difficult to defend.

Question: If employees are worried about the virus and decide to stay home, must they use their PTO if they have? Is the company required to give separate paid leave for the virus?

Response: We appreciate that many employees may be too nervous to come to work for fear of contracting COVID-19. In response, employers should attempt to strike a balance between addressing a nervous employee's fears while also reminding them that they are generally required to come to work. Under most circumstances, employees may not refuse to go to work because they fear that they may contract COVID-19. The Occupational Safety and Health Act (OSHA) requires employers to provide a safe and hazard-free workplace for their employees. Unless employees reasonably believe they are in imminent danger, they may not refuse to work. However, in some circumstances, if an employee is required to travel to a COVID-19 "hot spot" or engage in activity that is considered "high risk," the employee may be able to demonstrate an imminent danger. If such circumstances arise, employers should attempt to find a resolution in order to avoid triggering an OSHA claim, as indeed the Act prohibits retaliation against an employee who has expressed concerns about workplace safety.

Even if an employee cannot demonstrate an imminent danger, the employer nevertheless may want to consider allowing him or her to work from home, particularly if the employee can complete his/her tasks out of the office. As noted above, absent imminent danger the employer is not required to allow the employee to work remotely, and arguably can require the employee to report to work. That said, if an employee fails or refuses to do so, and the employment relationship is terminated, the employer may face potential backlash from an employee relations (if not public relations) standpoint.

If the subject employee is non-exempt, keep in mind that such employee's compensation is typically tied to hours of work. Unless a company policy, practice or contract provides otherwise, there is no statutory obligation to pay wages to non-exempt employees when they are not performing work or providing a service to the employer. That said, if work is performed, whether such work is done in the office or remotely, it must be properly paid.

As to exempt personnel, under applicable federal wage/hour law (and we are not aware that state law differs), there is no statutory obligation to compensate exempt personnel during a week in which no work at all is performed, but if a contract or company policy support continuation of salary wages, the employer should follow adhere to it. If an exempt employee is absent for one or more full days (but is not absent for an entire week) for personal reasons, then the employer can make a deduction from salary pay in whole day increments for any such day or days, assuming doing so is consistent with policy and practice and not inviolate of any contract. The employer must ensure that no work at all is performed (i.e., no calls, emails, texts, etc.). Whole day absences due to illness or disability can also be docked in full day increments (again if consistent with policy and practice, if there is no contrary contract, and if no work is performed), but only

if the employer ordinarily has a policy that provides a wage replacement benefits (i.e. paid sick leave or similar) but that the employee has exhausted or not yet become eligible to receive.

If, however, an exempt employee was ready, willing and able to work but was unable to do so because the employer closed and did not make work available, then generally the employee must be paid for the week if he or she performed any work in that workweek (as noted above, whole workweeks in which no work is performed need not be paid). Please see the paragraph titled "Circumstances In Which The Employer May Make Deductions from Pay" at https://www.dol.gov/whd/overtime/fs17g_salary.htm and note that we are not aware that the law in your state differs on this. To the extent the employer implements a furlough, there is useful information published by the Department of Labor at https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs and we are not aware that state law differs on this, either.

Prorating the salary compensation of exempt employees for absences of less than a full day for personal reasons or for sickness are not permitted. In other words, if an exempt employee works any portion of a day, there can be no deduction from salary for a partial day absence for personal or medical reasons.

Employers can allow or require employees to use paid time off benefits in accordance with employer policy and practice. Paid sick leave, however, which is required in your state, can only be used in connection with specific reasons, which do not include an employee's discomfort in connection with reporting to work. For more information, please see https://www.dol.gov/agencies/whd/flsa/pandemic.

Question: Can we take our employee's temperatures before they start work?

Response: The EEOC's "Pandemic Preparedness and the Americans with Disabilities Act" guidance provides at question 7 that "measuring an employee's body temperature is a medical examination," and although employers in most cases cannot require or issue medical examinations to employees, "[i]f pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, 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. However, employers should be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever." Although this guidance was issued in response to the H1N1 virus in 2009, to our knowledge it is largely still applicable, and can be reviewed here: https://www.eeoc.gov/facts/pandemic_flu.html.

Thus, there appears to be some support for employers to take the temperatures of its employees in limited cases as described, but as a best practice we would discourage this practice to the extent it requires personnel without medical training to come into close contact with co-workers who, potentially, could spread the virus. In other words, if an individual has a contagious condition (or has been exposed to one and thus can still transmit it to others), there is risk of spreading the virus or contagion by having one employee take the temperature of another, and particularly if neither employee is properly trained in nor using sufficient universal precautions to prevent contamination.

Given the recent outbreak of COVID-19 and the concern of contraction through close human to human contact, we do not recommend that the employer implement a policy or practice nor otherwise authorize

or even condone employees taking the temperature (or conducting any other medical examinations) upon co-workers or other personnel in the workplace, particularly if using an oral or ear-based thermometer.

If, however, the employer seeks to utilizes an infrared/laser or similar thermometer that does not require human-to-human contact, this may lessen the risk associated with contamination. As well, the employer may wish to consider having employees take their own temperatures or have a trained healthcare worker do so when and where feasible, as an alternative. We also recommend contacting your insurance carrier directly for further information before undertaking this type of process in your workplace.

COVID-19 Resources

The COVID-19 pandemic is a fluid situation for all employers. We recently published guidance around Emergency Preparedness in the Workplace, and also encourage you to review the additional resources for more information (and refer back to these websites as many are frequently updated).

Additional Resources:

- CDC Employer Guidance: https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html
- EEOC COVID Alert: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- DLSE Guidance: https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm
- Pandemic Flu guidance (much of which is applicable to the current virus): https://www.eeoc.gov/facts/pandemic_flu.html
- DOL Pandemic Guidance: https://www.dol.gov/agencies/whd/fmla/pandemic