

## Frequently Asked Questions

### **An employee reports to work with a bad cough and/or fever. What questions can HR or a manager ask of this employee?**

Managers can accidentally violate the Americans with Disabilities Act if the query delves into the worker's medical history. The EEOC has posted a notice detailing what employers should know. The federal agency advised that ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should be taking. The EEOC references its guidance for pandemic flu situations for how to handle the current situation with Coronavirus. ADA-covered employers may ask the employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. However, all information gathered about an employee illness must be maintained as a confidential medical record in compliance with the ADA. "There is that line there with the ADA as to the types of questions you can ask," Nathan Schacht of Baker Hostetler said. "You can certainly ask someone how they're feeling and see what their response is to that. But employers need to be very careful to not cross the line and ask those questions that could get into the disability zone."

### **Can HR send an employee home who comes to work sick?**

Yes. The CDC states that employees who become ill with symptoms of illness at work during a pandemic should leave the workplace. According to the EEOC, advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus, etc. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat to both the employee or other employees.

### **Can HR require a fitness for work before allowing the formerly sick employee to return to work?**

The EEOC discusses whether under the ADA, when employees return to work, employers may require doctors' notes certifying their fitness for duty. Yes, according to the EEOC. The ADA permits these inquiries "either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees," the EEOC said.

### **A public emergency is declared, and work is canceled as a result. Do workers have to be paid?**

It depends. One consideration for employers if exempt or non-exempt employees can't physically make it to their usual workplace is whether they can telecommute, and therefore must be paid the same as if they were physically in the office. But the issue becomes more complicated if workers are stuck at home with no work being performed.

If employees are non-exempt, they generally are only paid for time worked. Therefore, if they are not working, they do not have to be paid. Employers could require, similar to a shutdown, that employees use PTO during this time. Yet, employers need to understand that the Michigan Paid Sick Leave may be applicable as well because the time off is due to a health scare.

For exempt employees, they do not have to be paid if the business is closed for five business days or longer. Michigan Paid Sick Leave may also come into play since this is a health emergency. However, if they work one day in a week and there is no telecommuting options possible, they will have to be paid for the full week. In addition, if they telecommute or work using their phones (emails or taking calls) they will have to be paid.

### **Does OSHA require non-healthcare employees to wear respirators?**

At this time, there is no general requirement for non-healthcare employees to wear respirators or other types of personal protective equipment (PPE). The CDC has issued [guidance](#) regarding the use of PPE only for healthcare personnel caring for patients with confirmed or possible COVID-19. The CDC stresses: "This guidance is not intended for non-healthcare settings (e.g., schools) OR to persons outside of healthcare settings." At this time, the CDC is not recommending use of facemasks or any other protective equipment by the general public.

#### **What if an employee requests to wear some type of mask as an accommodation?**

The CDC does not recommend that people who are well wear some type of mask to protect themselves from respiratory disease, including COVID-19. The CDC does recommend that surgical masks should be used by people who show symptoms of COVID-19. If an employee shows symptoms or has been diagnosed with COVID-19, however, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask as an accommodation.

#### **Can an employer restrict travel to all locations under a CDC travel advisory?**

An employer may restrict business travel. Employers should continue to consult the CDC's website: "[Coronavirus Disease 2019 Information for Travel](#)" for up-to-date travel notices concerning risk. The CDC advises that employers restrict all nonessential travel to areas with a Warning Level 3, and to exercise caution regarding travel to Warning Level 2 areas.

#### **If one of our employees is quarantined, what information can we share with our employees? Who can we share it with?**

If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace. Employers should not, however, disclose to coworkers the identity of the quarantined employee because confidentiality requirements under law such as ADA and HIPAA as well as local laws.

There are a number of variations of the issues raised above. HR needs to consult with their legal counsel to ensure they are not violating any of the various laws. With the expectation that the Coronavirus spread hasn't peaked yet in the U.S., HR needs to be vigilant in advising managers not to do anything that would lead to liability during this time period.

#### **Does FMLA cover pandemic situations like school closings?**

Depends. According to the Department of Labor's guidance, [Pandemic Flu and the Family and Medical Leave Act: Questions and Answers](#), in dealing with pandemic influenza and providing FMLA leave for employees, employers should keep in mind that not all leaves related to a pandemic are protected by the FMLA. Leaves taken by an employee to avoid exposure to the pandemic influenza or to care for healthy children whose schools are closed because of the pandemic are not protected by the FMLA. However, employers should explore flexible leave policies for their employees in these circumstances.

#### **Does Michigan Paid Medical Leave cover pandemic situations like school closings?**

Yes. In a pandemic, eligible employees who work for covered employers may take paid leave for their own or their family members' sickness caused by pandemic influenza. Unlike the FMLA, there is no requirement that the leave be taken for a "serious health condition" under the FMLA. Eligible employees can also take paid leave for reasons not FMLA-qualified, such as to care for healthy children whose schools are closed because of the pandemic. However, leave provided under the PMLA is limited. In contrast to the 12-week (or 26-week for military family leave) leave allowed under the FMLA, the amount of paid family leave provided and used under the PMLA can be capped at 40 hours per year. When

requesting paid medical leave, eligible employees may be required to comply with the covered employer's usual and customary notice, procedural, and documentation, but the employer must provide the employees with at least three days to provide requested documentation (unlike the 15 days allowed under the FMLA). The employer may discipline or discharge an employee who fails to comply with the employer's usual and customary notice, procedural, and documentation requirements.

### **Unemployment Benefits Expanded for Michigan Workers**

The Governor's office signed Executive Order 2020-10 yesterday, *temporarily* expanding eligibility for unemployment benefits. The executive order is effective immediately until Tuesday, April 14 at 11:59pm. Under the governor's order, unemployment benefits would be extended to:

- Workers who have an unanticipated family care responsibility, including those who have childcare responsibilities due to school closures, or those who are forced to care for loved ones who become ill.
- Workers who are sick, quarantined, or immunocompromised and who do not have access to paid family and medical leave or are laid off.
- First responders in the public health community who become ill or are quarantined due to exposure to COVID-19.

### **Earlier in the week, the U.S. House of Representatives passed legislation that will help protect Americans from the Coronavirus. What does this legislation include:**

- Funding to cover the costs of free Coronavirus testing.
- Funding for nutrition assistance to senior citizens, children and low-income families.
- Protections for workers, including 14-day paid sick leave to employees affected by Coronavirus.
- Reimbursement for employers for paid sick leave through tax credits.

### **The legislation in the previous question stated "first responders", is this only for them?**

The FMLA language actually gives the right to exclude "certain emergency personnel" in the final regulations. **Keep in mind that this will likely change in the Senate.** *Just how much, is the question?*

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The Trump administration wants to send direct cash payments to Americans in the next two weeks to help them cope with economic ravages of the coronavirus, said Treasury Secretary Steven Mnuchin today. This is part of a massive economic stimulus package taking shape between Congress and the White House. Overall, this could be around \$1 trillion dollars making it one of the largest federal emergency fiscal packages ever assembled.