



# **PANDEMIC PREPAREDNESS IN THE WORKPLACE**

Starting in January 2020, an outbreak of coronavirus (COVID-19) started in China and began to spread worldwide, creating business disruptions that hit at every part of American workplaces. As a result, several agencies of the U.S. government have advised employers on how to respond to the threat. This document summarizes advice on three key fronts:

- **Employee Health and Safety, pages 1–5** *(from the CDC)*
- **Medical and ADA Issues, pages 6-7** *(from the EEOC)*
- **Wages, Hours and Leave Issues, pages 8-16** *(from the DOL)*
  - Your Leave Requirements under the New Families First Coronavirus Response Act (pages 8-9)
  - Wage-and-Hour Law: Coronavirus and the Fair Labor Standards Act (pages 10-12)
  - Coronavirus and the Family and Medical Leave Act (pages 13-15)

## **Employee Health and Safety** *(advice from the CDC)*

The U.S. Centers for Disease Control (CDC) offers this advice to employers for keeping employees healthy and preventing the spread of the virus (updated as of March 30, 2020):

Businesses and employers can prevent and [slow the spread of COVID-19](#). Employers should plan to respond in a flexible way to varying levels of disease transmission in the community and be prepared to refine their business response plans as needed. for more information about job risk classifications). Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.

## **Reduce Transmission Among Employees**

**Actively encourage sick employees to stay home:**

- Employees who have [symptoms](#) (i.e., fever, cough, or shortness of breath) should notify their supervisor and stay home.
- Sick employees should follow [CDC-recommended steps](#). Employees should not return to work until the criteria to [discontinue home isolation](#) are met, in consultation with healthcare providers and state and local health departments.
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow [CDC recommended precautions](#).

### **Identify where and how workers might be exposed to COVID-19 at work:**

- See [OSHA COVID-19](#) webpage for more information on how to protect workers from potential exposures and [guidance for employers](#), including steps to take for jobs according to exposure risk.
- Be aware that some employees may be at [higher risk for serious illness](#), such as [older adults](#) and those with chronic medical conditions. Consider minimizing face-to-face contact between these employees or assign work tasks that allow them to maintain a distance of six feet from other workers, customers and visitors, or to telework if possible.

### **Separate sick employees:**

- Employees who appear to have [symptoms](#) (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home.
- If an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). The fellow employees should then self-monitor for [symptoms](#) (i.e., fever, cough, or shortness of breath).

### **Educate employees about how they can reduce the spread of COVID-19:**

- Employees can [take steps to protect themselves](#) at work and at home. Older people and people with serious chronic medical conditions are at [higher risk for complications](#).
- Follow the policies and procedures of your employer related to illness, cleaning and disinfecting, and work meetings and travel.
- Stay home if you are sick, except to get medical care. Learn [what to do if you are sick](#).
- Inform your supervisor if you have a sick family member at home with COVID-19. Learn what to do [if someone in your house is sick](#).
- Wash your hands often with soap and water for at least 20 seconds. Use hand sanitizer with at least 60% alcohol if soap and water are not available.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Cover your mouth and nose with a tissue when you cough or sneeze or use the inside of your elbow. Throw used tissues in the trash and immediately wash hands with soap and water for at least 20 seconds. If soap and water are not available, use hand sanitizer containing at least 60% alcohol. Learn more about [coughing and sneezing](#) etiquette on the CDC website.
- Clean AND disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use [products that meet EPA's criteria for use against SARS-CoV-2](#), the cause of COVID-19, and are appropriate for the surface.
- Avoid using other employees' phones, desks, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.
- Practice social distancing by avoiding [large gatherings](#) and maintaining distance (approximately 6 feet or 2 meters) from others when possible.

# Maintain Healthy Business Operations

**Identify a workplace coordinator** who will be responsible for COVID-19 issues and their impact at the workplace.

**Implement flexible sick leave and supportive policies and practices.**

- Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of and understand these policies.
- Maintain flexible policies that permit employees to stay home to care for a sick family member or take care of children due to school and childcare closures. Additional flexibilities might include giving advances on future sick leave and allowing employees to donate sick leave to each other.
- Employers that do not currently offer sick leave to some or all of their employees may want to draft non-punitive “emergency sick leave” policies.
- Employers should not require a positive COVID-19 test result or a healthcare provider’s note for employees who are sick to validate their illness, qualify for sick leave, or to return to work. Healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner.
- Review HR policies to make sure that policies and practices are consistent with public health recommendations and are consistent with existing state and federal workplace laws (for more information on employer responsibilities, visit the [Department of Labor’s external icon](#) and the [Equal Employment Opportunity Commission](#) websites).
- Connect employees to employee assistance program (EAP) resources (if available) and community resources as needed. Employees may need additional social, behavioral, and other services, for example, to cope with the death of a loved one.

**Assess your essential functions** and the reliance that others and the community have on your services or products.

- Be prepared to change your business practices if needed to maintain critical operations (e.g., identify alternative suppliers, prioritize existing customers, or temporarily suspend some of your operations if needed).
- Identify alternate supply chains for critical goods and services. Some goods and services may be in higher demand or unavailable.
- Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
- Talk with business partners about your response plans. Share best practices with other businesses in your communities (especially those in your supply chain), chambers of commerce, and associations to improve community response efforts.

**Determine how you will operate if absenteeism spikes** from increases in sick employees, those who stay home to care for sick family members, and those who must stay home to watch their children if dismissed from [childcare programs and K-12 schools](#).

- Plan to monitor and respond to absenteeism at the workplace.
- Implement plans to continue your essential business functions in case you experience higher than usual absenteeism.
- Prepare to institute flexible workplace and leave policies.
- Cross-train employees to perform essential functions so the workplace can operate even if key employees are absent.

**Establish policies and practices for social distancing.** Social distancing should be implemented if recommended by state and local health authorities. Social distancing means avoiding [large gatherings](#) and maintaining distance (approximately 6 feet or 2 meters) from others when possible (e.g., breakrooms and cafeterias). Strategies that business may use include:

- Implementing flexible worksites (e.g., telework)
- Implementing flexible work hours (e.g., staggered shifts)
- Increasing physical space between employees at the worksite
- Increasing physical space between employees and customers (e.g., drive through, partitions)
- Implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events)
- Downsizing operations
- Delivering services remotely (e.g. phone, video, or web)
- Delivering products through curbside pick-up or delivery

**Employers with more than one business location** are encouraged to provide local managers with the authority to take appropriate actions outlined in their COVID-19 response plan based on local conditions.

## Maintain a healthy work environment

**Support respiratory etiquette and hand hygiene for employees, customers, and worksite visitors:**

- Provide tissues and no-touch disposal receptacles.
- Provide soap and water in the workplace. If soap and water are not readily available, use alcohol-based hand sanitizer that is at least 60% alcohol. If hands are visibly dirty, soap and water should be chosen over hand sanitizer. Ensure that adequate supplies are maintained.
- Place hand sanitizers in multiple locations to encourage hand hygiene.
- Place posters that encourage [hand hygiene](#) to [help stop the spread](#) at the entrance to your workplace and in other workplace areas where they are likely to be seen.
- Discourage handshaking – encourage the use of other noncontact methods of greeting.
- Direct employees to visit the [coughing and sneezing etiquette](#) and [clean hands webpage](#) for more information.



### **Perform routine environmental cleaning and disinfection:**

- Routinely clean and disinfect all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs.
  - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
  - For disinfection, most common EPA-registered household disinfectants should be effective. A list of products that are EPA-approved for use against the virus that causes COVID-19 is available [herepdf iconexternal icon](#). Follow the manufacturer's instructions for all cleaning and disinfection products (e.g., concentration, application method and contact time, etc.).
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.
- Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks, other work tools and equipment) can be wiped down by employees before each use.

### **Perform enhanced cleaning and disinfection after persons suspected/confirmed to have COVID-19 have been in the facility:**

- If a sick employee is suspected or confirmed to have COVID-19, follow the [CDC cleaning and disinfection recommendations](#).

### **Advise employees before traveling to take additional preparations:**

- Check the [CDC's Traveler's Health Notices](#) for the latest guidance and recommendations for each country to which you will travel. Specific travel information for travelers going to and returning from countries with travel advisories, and information for aircrew, can be found on the [CDC website](#).
- Advise employees to [check themselves for symptoms](#) of COVID-19 (i.e., fever, cough, or shortness of breath) before starting travel and notify their supervisor and stay home if they are sick.
- Ensure employees who become sick while traveling or on temporary assignment understand that they should notify their supervisor and promptly call a healthcare provider for advice if needed.

### **Take care when attending [meetings and gatherings](#):**

- Carefully consider whether travel is necessary.
- Consider using videoconferencing or teleconferencing when possible for work-related meetings and gatherings.
- Consider canceling, adjusting, or postponing large work-related meetings or gatherings that can only occur in-person.
- When videoconferencing or teleconferencing is not possible, hold meetings in open, well-ventilated spaces.

# Medical Issues, the ADA and Coronavirus

*(advice from the EEOC)*

The Americans with Disabilities Act (ADA), which protects applicants and employees from disability discrimination, is relevant to pandemic issues in at least three major ways.

- First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities.
- Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation).
- Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

Applying these principals to the COVID-19 pandemic, the EEOC offers these answers to common employer questions about what to do after a pandemic has been declared:

- **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?** During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?** Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
- **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?** Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
- **When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?** Yes. Such inquiries are permitted under the ADA 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. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary,

such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

- **If an employer is hiring, may it screen applicants for symptoms of COVID-19?** Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.
- **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?** Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.
- **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?** Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- **May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?** Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.



## Wages, Hours and Leave *(advice from DOL)*

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### Your leave requirements under the new Families First Coronavirus Response Act *(advice from the DOL)*

The **Families First Coronavirus Response Act (FFCRA)**, signed into law by President Trump on March 18, 2020, requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The U.S. Department of Labor's Wage and Hour Division (WHD) administers and enforces the new law. These provisions will apply through December 31, 2020.

Generally, the Act provides that covered employers must provide to **all employees**:

- **Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay** where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- **Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay** because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition

A covered employer must provide to **employees that it has employed for at least 30 days**:

- **Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay** where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

**Covered Employers:** The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

#### Qualifying Reasons for Leave:

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work **(or unable to telework)** due to a need for leave because the employee:

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);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

**Duration of Leave: For reasons (1)-(4) and (6):** A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

**For reason (5):** A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

**Calculation of Pay: For leave reasons (1), (2), or (3):** employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

**For leave reasons (4) or (6):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

**For leave reason (5):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

**Tax Credits:** Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

**Required posters:** Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements. Here are links to the poster:

- [Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act \(FFCRA\)](#) ([Spanish](#))

# **Wage & Hour Law: Coronavirus and the Fair Labor Standards Act** *(advice from the DOL)*

## **1. 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 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.

## **2. What are an employer's obligations to an employee who is under government-imposed quarantine?**

The DOL's Wage and Hour Division (WHD) encourages employers to be accommodating and flexible with workers impacted by government-imposed quarantines. Employers may offer alternative work arrangements, such as teleworking, and additional paid time off to such employees.

## **3. How many hours per day or per week can an employee work?**

The [FLSA](#) does not limit the number of hours per day or per week that employees aged 16 years and older can be required to work. Note that states may have specific limitations.

## **4. Can an employee be required to perform work outside of the employee's job description?**

Yes. The FLSA does not limit the types of work employees age 18 and older may be required to perform. However, there are [restrictions on what work employees under the age of 18](#) can do. This is true whether or not the work asked of the employee is listed in the employee's job description.

As part of your pandemic planning, you may want to consult your human resource specialists if you expect to assign employees work outside of their job description. You may also wish to consult bargaining unit representatives if you have a union contract.

## **5. If individuals volunteer to a private, not-for-profit organization, are they entitled to compensation?**

Individuals who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform.

Where employers are requested to furnish their services, including their employees, in emergency circumstances under Federal, state or local general police powers, the employer's employees will be considered employees of the government while rendering such services. No

hours spent on the disaster relief services are counted as hours worked for the employer under the FLSA.

**6. Can an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?**

Yes. An employer may encourage or require employees to telework as an infection-control or prevention strategy, including based on timely information from public health authorities. Telework also may be a reasonable accommodation. Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws. (See the U.S. Equal Employment Opportunity Commission's publication, [Work at Home/Telework as a Reasonable Accommodation](#), for additional information.)

**7. Do employers have to pay employees their same hourly rate or salary if they work at home?**

If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then you must pay the same hourly rate or salary.

If this is not the case and you do not have a union contract or other employment contracts, under the FLSA employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office. However, the FLSA requires employers to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

**8. If an organization bars employees from working from their current place of business and requires them to work at home, will employers have to pay those employees who are unable to work from home?**

Under the FLSA, employers generally only have to pay employees for the hours they actually work, whether at home or at the employer's office. However, employers must pay at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. When not all employees can work from home, we encourage you to consider additional options to promote social distancing, such as staggered work shifts.

**9. Are businesses and other employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?**

Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Employers

may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the [Americans with Disabilities Act](#).

**10. Do OSHA's regulations and standards apply to the home office? Are there any other Federal laws employers need to worry about if employees work from home?**

The DOL's Occupational Safety and Health Administration (OSHA) does not have any regulations regarding telework in home offices. The agency issued a directive in February 2000 stating that the agency will not conduct inspections of employees' home offices, will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees. If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.

Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records for injuries and illnesses occurring in a home office.

The FLSA and its implementing regulations do not prevent employers from implementing telework or other flexible work arrangements allowing employees to work from home. Employers would still be required to maintain an accurate record of hours worked for all employees, including those participating in telework or other flexible work arrangements; and to pay no less than the minimum wage for all hours worked and to pay at least one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek to non-exempt employees.

Employers are encouraged to work with their employees to establish hours of work for employees who telework and a mechanism for recording each teleworking employee's hours of work. Non-exempt employees must receive the required minimum wage and overtime pay free and clear. This means that when a covered employee is required to provide the tools and equipment (e.g., computer, internet connection, facsimile machine, etc.) needed for telework, the cost of providing the tools and equipment may not reduce the employee's pay below that required by the FLSA.

# Coronavirus & the Family and Medical Leave Act (FMLA)

Under the [Family and Medical Leave Act \(FMLA\)](#), [covered](#) employers must provide employees job-protected, unpaid leave for specified [family and medical reasons](#), which may include the [flu](#) when complications arise. Employees on FMLA leave are entitled to the [continuation of group health insurance](#) coverage under the same terms as existed before they took FMLA leave.

Note that the new Families First law creates brand new FMLA requirements for employers (see page 8). Here are answers to some common FAQ regarding more general FMLA and employee-leave questions:

## **1. Must an employer grant leave to an employee who is sick or who is caring for a family member that is sick?**

An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons. This may include the flu where complications arise that create a “serious health condition” as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.

Workers who are sick with pandemic influenza or have a family member with influenza are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.

## **2. Can an employee stay home under FMLA leave to avoid getting pandemic influenza?**

The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of *avoiding* exposure to the flu would **not** be protected under the FMLA.

## **3. May employers send employees home if they show symptoms of pandemic influenza? Can the employees be required to take sick leave? Do they have to be paid? May employers prevent employees from coming to work?**

It is important to prepare a plan of action specific to your workplace, given that a pandemic influenza outbreak could affect many employees. This plan or policy could permit you to send employees home, but the plan and the employment decisions must comply with the laws prohibiting discrimination in the workplace. It would also be prudent to notify employees (and if



applicable, their bargaining unit representatives) about decisions made under this plan or policy at the earliest feasible time.

Your company policies on sick leave, and any applicable employment contracts or collective bargaining agreements would determine whether you should provide paid leave to employees who are not at work. If the leave qualifies as FMLA-protected leave, the statute allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances.

However, you may exclude an employee with a disability from the workplace if you:

- obtain objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and
- determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.

#### **4. May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?**

**Yes.** However, employers should consider that during a pandemic, healthcare resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious.

During a pandemic health crisis, under the ADA, an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would:

- impair his ability to perform **essential job functions** (i.e., fundamental job duties) with or without reasonable accommodation, or,
- pose a **direct threat** (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly-applied policy or practice that requires all similarly-situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a [fitness-for-duty certification](#) to return to work. If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

#### **5. May employers change their paid sick leave policy if a number of employees are out and they cannot afford to pay them all?**

Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status. Be sure also to consult state and local laws.

In addition, consider that if your workforce is represented by a labor union and the collective bargaining agreement covers sick leave policies, you may be limited in either the manner in which you change the policy or the manner of the changes themselves because the bargaining agreement would be controlling. In a workplace without a collective bargaining agreement, employees may have a contractual right to any accrued sick leave, but not future leave. Your sick leave policy also has to follow the requirements of the FMLA (if your employees are covered by the Act), and it needs to be consistent with federal anti-discrimination laws, such as the ADA.

**6. If an employer temporarily closes a place of business because of a pandemic and chooses to lay off some but not all employees, are there federal laws that would govern this decision?**

The federal laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, or disability may apply. Additionally, the Worker Adjustment and Retraining Notification (WARN) Act helps ensure advance notice in cases of qualified plant closings and mass layoffs. You may also not discriminate against an employee because the employee has requested or used FMLA leave. In addition, you may not discriminate against an employee because he or she is a past or present member of the U.S. uniformed service.

**7. Some employees may not be able to come to work because they have to take care of sick family members. May an employer lay them off?**

It depends. If an employee is **covered and eligible** under the FMLA and is needed to care for a spouse, daughter, son, or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of **job-protected**, unpaid leave during any 12-month period. Some states may have similar [family leave laws](#). In those situations, covered employers must comply with the federal or state provision that provides the greater benefit to their employees.



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