

## **COVID-19: FAQs for Employers**

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As concerns about the outbreak of coronavirus disease 2019 (COVID-19) continue to mount in the United States (and world-wide), resulting in school and business closures and other disruptions across the country, employers are facing many difficult questions. Below are our answers to some frequently asked questions that employers have been raising in their efforts to respond to this ongoing public health crisis.

### **Excluding Employees from the Workplace**

#### **1. Can we mandate that employees who travel abroad, either for personal or business reasons, stay home from work?**

Yes. In fact, if an employee has traveled to an area with “widespread sustained transmission,” as defined by the CDC, the CDC recommends that the employer send that employee home, regardless of whether the purpose of travel was for personal or business reasons.

#### **2. If we learn that one of our employees has come into close contact with someone who has been infected with COVID-19, can we send that employee home?**

Yes. CDC guidelines recommends that an employer exclude an employee from the workplace if that employee has come into “close contact” with someone who has been infected with COVID-19. “Close contact” includes (but is not limited to) living in the same household as an infected person, sitting within 6 feet of an infected person, or being in a relationship with an infected person. States have provided similar guidance. For example, the Massachusetts Attorney General has indicated that employers may ask employees not to come into work if one of their family members has contracted COVID-19, even if the employee is not subject to a quarantine or isolation recommendation.

#### **3. If one of our employees is demonstrating symptoms of COVID-19 in the workplace, can we send that employee home?**

Yes. In fact, the CDC has recommended that employers take such action. In the event that the employee has not tested positive for COVID-19, the CDC has recommended that employers permit that employee to return to work if their symptoms subside for a 24-hour period. However, employers cannot make decisions about sending employees home on a discriminatory basis. For example, employers cannot send their older employees home, based on a belief that COVID-19 disproportionately affects older individuals, but allow younger employees to remain in the workplace.

### **Notice Requirements**

#### **4. Can we require our employees to inform us if they have tested positive for COVID-19?**

Yes. In most circumstances, COVID-19 is not considered to be a disability, and is therefore not subject to the laws preventing certain disability-related employee inquiries. In fact, under the Occupational Safety and Health Act (“OSHA”), employers may be required to prohibit employees who have tested positive for COVID-19 from returning to the workplace to maintain a safe working environment, so a policy requiring employees to inform employers that they have tested positive is prudent.

### **Concerns about Employee Attendance**

#### **5. Can we discipline non-affected employees who refuse to come into the office for fear of being exposed to COVID-19?**

Maybe. Under OSHA, an employee may refuse a work assignment that involves a “risk of death or serious physical harm.” However,

whether a reasonable employee would determine a particular situation to be an “unsafe work environment” will depend upon the circumstances of the workplace. Given that COVID-19 is a new virus and public health officials are still learning about how the virus is transmitted, it may be difficult for an employer to prove that an employee’s concern about exposure is unreasonable. Accordingly, employers should consult with counsel before taking an adverse action against an employee who refuses to come into work.

However, employers need to be aware of the laws of the states in which they and their employees are located. Some states that require employers providing mandatory paid sick leave may allow employees to use such time without having to provide documentary support establishing the leave was necessary. For example, in Massachusetts, under the state’s Earned Sick Time law, employers can only require employees to justify their sick leave under certain circumstances, including when the employee remains out of work for three consecutive work days.

#### Confidentiality Concerns & Reporting Requirements

##### **6. Can we inform our employees of confirmed or suspected COVID-19 cases in the workplace?**

In most circumstances, yes. The CDC has issued guidance suggesting that employers inform employees who may have come into close contact with employees who have confirmed or suspected COVID-19 infections. However, employers should strive to inform these employees that they may have come into contact with COVID-19, while not disclosing the identity of the infected employee and otherwise maintaining the confidentiality of that employee, to avoid violating federal and state confidentiality requirements. We strongly recommend obtaining a written authorization from the infected employee before disclosing identifiable information about the employee’s health to other employees.

##### **7. Do we have an obligation to report a suspected or confirmed case of COVID-19 to the CDC?**

No. Employers do not have an obligation to report a suspected or confirmed case of COVID-19 to the CDC. The employee’s health care provider has an obligation to report all confirmed cases of COVID-19 to the CDC.

#### Vacation/Sick Time/Leaves of Absence

##### **8. Can we require employees who stay home because of suspected or confirmed COVID-19 cases to use their vacation or sick time?**

Possibly. Under the new Families First Coronavirus Response Act, covered employers (i.e., employers with less than 500 employees) cannot require employees to use existing paid time off benefits before they use the emergency sick leave or family and medical leave provided under the Act. However, this Act does not address use of PTO after any emergency leave benefits are exhausted, so it is possible employers may be able to require employees to use paid vacation or sick time for any additional time off they would need.

Additionally, some state laws prohibit an employer from requiring an employee who is kept out of work involuntarily to use their paid time off while out of work. No such law exists in Massachusetts.

Employers must also be consistent with their written paid time off (PTO) policies and applicable collective bargaining agreements, if any. Moreover, even if requiring use of sick time is permitted by its written policies, employers should be aware that imposing this obligation upon employees may incentivize employees who have tested positive for or are experiencing symptoms of COVID-19 to report to work, potentially increasing spread of the virus in the workforce.

##### **9. Can we require employees to cancel scheduled vacations and to come into work?**

Generally, yes. There are no laws preventing employers from cancelling or rescheduling vacations previously granted to employees. Most employer vacation policies expressly grant the employer to exercise such discretion if business needs dictate the cancellation or rescheduling of vacations. However, employers will want to check their vacation policies and, if applicable, collective bargaining agreements with labor unions to confirm that nothing contained therein impedes the employer’s ability to require employees to cancel or reschedule vacations. Employers should consult with counsel if they are subject to a policy or agreement.

##### **10. Do we have to pay employees who stay home from work for reasons related to COVID-19?**

In some circumstances, yes. Under the newly passed Families First Coronavirus Response Act (which comes into effect April 2, 2020 and applies to employees with less than 500 employees), if an employee cannot work (or telework) due to their own COVID-19 related illness, to seek treatment of symptoms of COVID-19, or due to either a government quarantine order or a healthcare provider’s isolation recommendation, you must provide them up to two weeks of paid leave at 100% of their regular pay, up to \$511 per day. If an employee cannot work because they are caring for a family member with COVID-19, you must also provide them two weeks of leave paid at 2/3 of their regular pay, up to \$200 per day. Additionally, if an employee is unable to work or telework because their child’s school or daycare

closure due to COVID-19, you must provide them up to twelve weeks of leave paid at 2/3 of their regular pay, up to \$200 per day (but the first two weeks can be unpaid if the employee already used two weeks of emergency paid sick leave for other COVID-19 related purposes).

As to circumstances that are not covered by the Families First Coronavirus Response Act, the following rules apply:

- In general, for non-exempt employees, employers do not have to pay their employees when they remain at home (and are not working) because of COVID-19. This is true regardless of whether the employee decided to stay home or the employer instructed the employee to leave work and/or stay home from work.
- For exempt employees, employers must pay employees their full day's salary if they report to work, even if they are ultimately sent home by the employer or voluntarily leave because of COVID-19. If an employee decides not to report to work because of COVID-19 related concerns, that employee is not entitled to pay for that day's work (but they can use available PTO for that day). If an employer instructs an employee to remain at home because of COVID-19 related concerns, that employee is entitled to pay for their time away from work, unless that employee remains out of work for a full seven-day period, corresponding to the employer's workweek. However, exempt employees can use any PTO they have available to receive pay during their time out of work.

While these are the general rules, employers should consult with counsel concerning their pay obligations. These general rules can be affected by individual employment agreements, collective bargaining agreements, and workplace policies. Employers should also be aware that failing to pay employees for their time away from work may incentivize employees who have tested positive for COVID-19 or are experiencing symptoms of COVID-19 to report to work, potentially increasing the spread of the virus in the workforce.

#### **11. Is a COVID-19-related absence covered by the Family and Medical Leave Act ("FMLA")?**

Possibly. Under the FMLA, a covered "serious health condition" is one in which an employee does not report for work for three consecutive work days and either (1) visits their medical care provider twice within a specified period of time, or (2) visits their medical care provider once and is subject to "continuing treatment," which includes use of prescription medications. If an employee experiencing a COVID-19 related absence (including tending to family members) satisfies the FMLA's definition of "serious health condition," that absence may be protected by the FMLA, which requires up to 12 weeks of unpaid, job-protected leave.

#### **12. With local schools closed, employees are asking for leave to stay home and care for their children. Is such leave required?**

Yes. As described above, under the Families First Coronavirus Response Act, employees will be eligible to take up to 12 weeks off due to a COVID-19-related closure of their child's school or care facility. This time off must be paid at 2/3 of the employee's regular salary (up to \$200 per day). Employers must reinstate employees following their leave (subject to limited exceptions if the employee's position disappears due to layoffs or other reasons unrelated to leave) and must not retaliate against employees who request or take leave. Certain states and cities also have laws and ordinances that require employers grant employees time off to care for their children in the event of unexpected school closures. Employers should consult with counsel to assess their obligations in the face of such a request.

### Employer Liability

#### **13. Can we be held liable if one of our employees becomes infected with COVID-19 within the scope of their employment?**

Such liability is possible, but unlikely. While the law varies state by state, an employee who becomes infected with COVID-19 while acting within the scope of his or her employment would generally be entitled to worker's compensation (covered by insurance), which would preclude other recovery from the employer. For instance, in Massachusetts, worker's compensation is the exclusive remedy for employees injured within the scope of their employment, and other causes of action against the employer seeking damages for the injury are barred. However, some jurisdictions have adopted a gross negligence exception to the worker's compensation bar, meaning employers could face liability related to a workplace infection. Because the inquiry is state-specific, we strongly encourage employers to consult with counsel to assess potential risks.

### Union Issues

#### **14. The union representing our employees is pressuring us to adopt new practices and benefits to address the COVID-19 outbreak. What are our obligations?**

It depends on the status of the employer's relationship with the union. If the union and the employer are still in the process of negotiating a collective bargaining agreement, the employer has an obligation to negotiate with union in good faith over the union's proposals. If such negotiations have been completed and a final collective bargaining agreement is in place, the employer's obligations will be determined by the terms of the agreement. It is common for agreements to have health and safety provisions that obligate employers to take steps to

ensure the health and safety of bargaining unit employees, so some action may be required. Given these unusual circumstances, however, employers may want to engage in such discussions. Employers should contact their counsel upon receipt of any such demand from a union.

## Layoffs and Workplace Closures

### **15. What is a furlough? If we decide to furlough our employees, what are our obligations to employees?**

A furlough is an employer-implemented mandatory leave of absence from work, typically without pay. Furloughs are permitted by law. For non-exempt employees, so long as the employee is not working, there is no wage payment obligation. With respect to exempt employees, an employer will be required to pay an exempt employee his or her full salary for the week if the employee performs any work during the work week. Therefore, furloughs for exempt employees must commence with the start of a work week, and care should be taken to ensure that such employees perform no work during the furlough (e.g., no checking email, no returning calls, etc.).

### **16. If we put employees on furlough, will they be eligible to apply for unemployment?**

Most likely, yes. In Massachusetts, employees are eligible to apply for unemployment when their hours or earnings are reduced by more than one-third. Employees who are no longer receiving pay (or are receiving substantially less pay) due to a COVID-19 related furlough or closure thus will be eligible to apply for unemployment. Additionally, the Division of Unemployment Assistance has waived the one-week waiting period for benefits for employees totally or partially unemployed as a result of COVID-19. Individuals who are unemployed as a result of COVID-19 also will not be required to meet the job-search requirements.

### **17. If we temporarily furlough or lay off employees, do we need to pay them all wages and earnings owed, including vacation pay?**

Most likely, yes. If you are laying off employees, even temporarily, you must pay them all wages and earnings owed on the date of termination. This would include wages earned but not yet paid and, in most states, vacation time that was accrued but unused. Whether this requirement applies in the event of a furlough is a slightly different question and less clear. Furloughs are ordinarily treated as leaves of absence, and employers ordinarily do not need to pay final wages upon commencement of an unpaid leave of absence. However, it is possible that a furlough could be viewed as a temporary layoff instead, especially if it is for an indefinite period. Employers contemplating furloughs should contact their counsel.

### **18. What about a partial furlough or work reduction – can we reduce the hours an employee is asked to work, and also reduce their salary?**

Generally, yes. For overtime-eligible non-exempt employees, employers can reduce their hours or their pay prospectively at any time, provided that they continue to adhere to all minimum wage and overtime requirements. (As always, employers must pay hours already worked at the existing rate.)

As to exempt employees, a one-time salary reduction is permissible as long as the new salary does not vary based on the hours actually worked. Most exempt employees (and particularly those in executive, administrative, and professional positions) are paid a regular salary above a specified salary threshold (\$684 per week for executive, administrative, and professional employees) regardless of how many hours they work. Ordinarily, deducting from this salary when an employee works fewer hours than expected will destroy the exemption. However, an employer can make a prospective adjustment to the salary rate without eliminating the exemption as long as the new rate remains consistent even if the hours vary. Thus, for instance, if an exempt employee is expected to work approximately 50% as much as they normally do because of COVID-19, an employer could accordingly reduce the salary by 50% as long as the employer pays that same new salary regardless of whether the employee worked 40% or 60% of their pre-COVID-19 hours in any given week. This scenario would not cause the employee to lose exempt status.

## Work From Home

### **19. If we close our office, can we require our employees to work from home?**

Generally, yes. If employees can fulfill their work obligations from home, employers can require those employees to work from home. But employees must be paid for all time worked. This is simple for exempt employees, who are paid the same salary for the week regardless of how much time they work. For non-exempt employees, employers should require employees to record and report all time worked from home to ensure that the employers can ensure that employees are paid accurately.

**Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus**

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