

FAQ'S FOR EMPLOYERS REGARDING COVID-19

Last Update: March 23, 2020

FAQ: What do I do if one of my employees appears to be sick?

Answer: Based upon the guidance provided by the Centers For Disease Control (CDC), we recommend that you ask any sick employee to leave work until they “are free from fever (defined as 100.4 degrees or greater using an oral thermometer), signs of fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g., cough suppressants).” However, if the individual was diagnosed with COVID-19, we recommend an additional step of quarantining the employee for 14 days. If you are unsure, you may want to err on the side of caution and quarantine the employee for 14 days.

FAQ: Can I perform any health checks of my employees during the COVID-19 Pandemic?

Answer: Yes. The Equal Employment Opportunity Commission (EEOC) recently said that “employers may measure employees’ body temperature.” This is true even though such tests are typically prohibited medical examinations under the ADA and the Rehabilitation Act. The EEOC further said that nothing should interfere with “or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.” In the CDC’s recently-released mitigation strategies, the CDC encourages employers to consider “health checks,” such as “temperature and respiratory symptom screening” of all staff and visitors entering the workplace. In addition, in response to this same question during the 2009 pandemic, the EEOC stated:

Generally, measuring an employee’s body temperature is a medical examination. If 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.

Therefore, employers are allowed to conduct both temperature and respiratory checks for employees coming into work since it is a reasonable measure to protect a workforce from exposure to an illness.

FAQ: What do I do with any employee who reports that they may have been exposed to COVID-19, or tests positive for COVID-19?

Answer: First, if the employee is at the workplace, we recommend that you provide them with a facemask in order to prevent any exposure to other employees. You should then send the employee home right away and encourage them to contact their health care provider to see if they should be tested for COVID-19. You should also require that the employee stay quarantined for at least 14 days. During this time, this employee may utilize their PTO, vacation, sick pay, or may work from home (if possible). In addition, the employee may qualify for either Emergency FMLA or Paid Sick Leave under the new Families First Coronavirus Response Act (“FFCRA”) depending on the size of your workforce. *You can review our expanded summary of your obligations under the FFCRA entitled [COVID-19 Paid Leave Law is Final and Effective April 2.](#)*

Lastly, to the extent these employees had any contact with your other workers, we encourage you to investigate all contacts to determine if anyone else was potentially exposed. You can also sanitize any work stations or facilities and notify your workforce that an employee tested positive and that they should watch for symptoms of COVID-19. Any employee who may have been exposed, you may want to send them home with instructions to quarantine and watch for symptoms. In addition, consider monitoring the exposed employees to determine whether they develop symptoms and if you need to record the injury on your OSHA log. In drastic situations, you may want to ask your workforce to work from home (if possible) in order to clean and sanitize the workplace.

FAQ: If an employee is exposed to COVID-19 in the workplace, do I need to report it to OSHA?

Answer: Yes. If the employee was exposed by another employee in the workplace, it is a best practice to record the injury. If, however, the employee was exposed outside of work, then it is not generally a recordable injury. This becomes increasingly difficult to determine as the virus becomes more widespread, but we nevertheless recommend erring on the side of caution and reporting all exposure on your OSHA logs. In addition, if any hospitalization or death results from the exposure, you would have to inform OSHA right away

FAQ: Several employees of mine expressed that they are “high risk”—what should I do?

Answer: If an employee is a high-risk individual (defined as older adults or people with serious underlying health conditions like heart disease, diabetes, and lung disease), and expressed concern about working during this time, you may want to first determine whether teleworking is an option. The EEOC stated in previous guidance that “employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.” If teleworking is not an option, you may encourage them to utilize their paid time off, vacation, or unpaid time without repercussions.

Not only are these options good for your employee(s), but they are also good for your business since an employee contracting COVID-19 in the workplace may be a recordable event under OSHA. Lastly, we caution against terminating any employees who express reservations about coming into work due to a disability since it may be unlawful age or disability discrimination.

FAQ: I employ workers who transport cargo—what happens in the event of a state or federal quarantine?

Answer: Depending on what you are transporting, employers who are classified as “critical infrastructure,” such as food supply, may be exempt from such quarantines, curfews, or shelter-in-place orders. For example, President Trump recently spoke with numerous grocers to discuss supply chain logistics during the COVID-19 pandemic. During this conversation, President Trump reassured grocers that the government would coordinate with them to ensure that the nation’s roadways would remain open to cargo transport. Thereafter, the White House authored the “[President’s Coronavirus Guidelines for America – 15 Days to Slow the Spread](#),” in which the White House further stated that those in critical infrastructure have a “special responsibility to maintain [their] normal work schedule.” Minnesota has provided similar [guidance](#).

Thus, it appears that if the state or federal government orders a quarantine or curfew, employers who transport critical cargo will likely be exempt.

FAQ: Do I need to do anything if I change my employee’s start date, pay, or hours?

Answer: The Minnesota Wage Theft laws require that employers provide each employee with a [written notice](#) at the start of their employment that discuss, among other things: rate of pay, hours, allowances, benefits, deductions, employment status with respect to minimum wage and overtime, etc. If the COVID-19 pandemic requires you to change any of the terms of the employment relationship with a given employee – such as pay or hours – you must provide those employees with a wage notice, which must be signed. This notice must be provided [before](#) the changes take effect. If this happens, please contact your Felhaber Larson attorney and we can draft the notices for you.

FAQ: Can we make any prospective reductions to employees' salaries due to an economic downturn brought about by the COVID-19 pandemic?

Answer: Pursuant to Department of Labor, an employer may be able to reduce the predetermined salary of an employee who is exempt under 29 C.F.R. § 541 as a result of any downturn in business as long as the change is bona fide and not used as a device to evade the salary basis requirement. However, the employee must still receive at least \$684 per week (in some cases \$455 per week). In addition, this is to be used for long-term business needs and is not lawful to use for short-term needs, such as week-to-week or day-to-day arrangements. If the reduction is not done due to a business downturn, then the employee's exemption will be lost and the employee must be paid hourly and compensated for any overtime hours worked.

With respect to hourly employees, the Fair Labor Standards Act ("FLSA") does not prohibit an employer from lowering an employee's hourly rate, provided that the rate is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.

FAQ: Do I have any rights if I, or the other party to a contract, is unable to perform as a result of the COVID-19 outbreak?

Answer: Yes. Depending on the language in your contract, there may be a *force majeure*, act of God, impossibility, or impracticability provision. Such provisions will generally allow a party to delay or excuse any nonperformance due to unforeseen circumstances. Whether the COVID-19 pandemic will be considered a *force majeure* will depend upon the contractual language previously agreed to by both parties. Nevertheless, some courts have held that similar outbreaks in other contexts may be *force majeure* events. That said, these provisions vary greatly in scope and allocation of risk, so we encourage you to speak with your Felhaber Larson attorney about whether you may be able to exercise your rights under any *force majeure* provisions.

FAQ: Will I be subject to a workers' compensation claim if an employee contracts COVID-19?

Answer: It depends, but probably not. Whether being exposed to the COVID-19 depends on two factors: (1) whether the disease is occupational (meaning that it arose out of and was in the course and scope of employment); and (2) the disease was caused by conditions peculiar to the work (meaning that the illness is found almost exclusively in workers in certain fields, or there is an increased exposure to the illness or disease because of the employee's working condition—*e.g.*, asbestos-related illnesses).

If the worker is able to successfully connect their exposure to the workplace, and that it was caused by the conditions of the work, they may have a compensable injury. However, with the spread of the virus, and the World Health Organization recently declaring COVID-19 a pandemic, it would be difficult for an employee to show a causal connection between the exposure and the employee's workplace. In addition, it would be even more difficult to show that the illness is found almost exclusively in workers in a certain field (*e.g.*, black lung disease for coal miners). Thus, it is unlikely that COVID-19 is an occupational disease. But, there may be circumstances where COVID-19 *could* be compensable under workers' compensation, such as first responders or other medical personnel who contract the disease in the course of employment outside of a hospital.

In summary, COVID-19 is likely not an occupational disease and the fact that an employee may contract the virus at work or from a co-worker would not constitute a compensable occupational illness. However, if there is something peculiar about the work that increases the likelihood of contracting COVID-19, an employee may be able to prove a compensable work injury. That said, this is a fluid situation and the ultimate determinations of compensability would depend on the interpretations of the workers' compensation laws in the respective jurisdiction. For more information on this, please review our expanded blog on workers' compensation [COVID-19 and Workers Compensation](#).

FAQ: Will the DOL enforce the WARN Act against my business if I must layoff my workers or close a plant?

Answer: It is unknown currently. The Department of Labor ("DOL") has not specifically addressed enforcement in light of the COVID-19 pandemic yet. But, the DOL previously stated, "In lieu of laying off employees in this situation, we would encourage you to consider other options such as telecommuting and to prepare a plan of action specific to your workplace." Accordingly, prior to making the difficult decision of whether to lay off your workers or close your facilities, we first recommend analyzing all options to determine if any alternative arrangements may work for your business. Of course, we realize with the current uncertainty surrounding the COVID-19 it may not be an option for some to implement such arrangements, but in light of the penalties associated with a WARN Act breach, we suggest thoroughly analyzing your options and keeping documentation of your decision.

In the event of a qualifying WARN Act event, we recommend providing the requisite 60 days' notice. If that is not possible, there may be an exception to the 60 days' notice requirement where you may be able to provide notice "as soon as is practicable" due to the unforeseen nature of the COVID-19 pandemic. *For more information on the WARN Act, please review our article entitled [The WARN Act and COVID-19](#).* In any event, we encourage you to speak with your Felhaber Larson attorney before making such a decision.

FAQ: Will I be able to change my workplace policies for my unionized workforce?

Answer: Under the National Labor Relations Act (“NLRA”), employers have a legal duty to bargain in good faith with unions regarding their employees’ wages, hours, and other conditions of employment. As employers update or craft new policies governing their response to COVID-19, whether on new safety protocols, furloughs, or sick leave, these policies likely trigger the duty to bargain. However, a collective bargaining agreement (“CBA”) may have provisions – including management rights, health and safety, leaves of absence, and PTO – that allow an employer to take action unilaterally on these issues.

Should the CBA not plainly grant the employer the right to implement needed policies, employers should promptly give the Union notice of the planned changes and an opportunity to bargain if requested, with the expectation that exigent circumstances may require fast action. Acts by a union that appear to be designed to delay an employer’s ability to move forward should be documented and you should consult labor counsel regarding lawful strategies and options in response.

FAQ: How do I change my unionized workforce’s hours, schedules, or job duties in response to the COVID-19 outbreak?

Answer: Employers may need employees to work outside of their job duties, or to work different shifts or fewer hours as businesses face issues relating to COVID-19. Because employers generally have a duty to bargain with unions over substantive changes to the terms and conditions of represented employees’ employment, management must be careful to avoid “direct dealing” with employees regarding reducing their hours or changing their schedules in response to COVID-19. Keep in mind, however, that management may find latitude in their CBA’s “Management Rights” clause to direct the workforces and in so doing, determine employees’ schedules and work assignments. In addition, health care employers may have “low-need” language that allows them to send segments of the workforce home for a prescribed period of time.

Most CBAs contain at least one article, sometimes several, which address work hours, including in some cases, work week definitions and guarantees. That language must be carefully scrutinized to determine if the contract places specific restriction on reduction of hours.

FAQ: What do I have to do if I need to lay off a portion of my unionized workforce?

Answer: Employers who are forced to lay off workers due to the economic impact of COVID-19 may have an obligation to bargain with the union both over the decision to lay off employees, and the effects of the layoffs on those employees. Effects bargaining may include issues such as the order of layoffs, health insurance continuation, severance, bumping rights and return-to-work scenarios. Neither decisional bargaining nor effects bargaining will necessarily prevent the

actions the employer has determined are necessary, but it may impact the timing. Failing to bargain when legally obligated to do so, however, could expose an employer to potentially significant financial liability down the road should a union challenge the action.

Additionally, employers should review their CBAs and be aware of any Union and employee notice requirements and seniority provisions that govern the timing of layoffs and their implementation.

FAQ: What if a unionized employee refuses to come to work out of fear of being exposed to COVID-19?

Answer: If an employee refuses to come to work out of fear of COVID-19, employers should consider first allowing an employee to work from home, to utilize his/her sick time or PTO as provided in the CBA, and review whether any other leave-of-absence provisions of the applicable CBA apply that an employee could draw from.

An employer may have the ability to terminate or otherwise discipline an employee for a refusal to work, but this depends on whether the employee *reasonably* believes that he or she is in imminent danger. If an employee reasonably believes that he or she is in imminent danger, an employer may not terminate or otherwise discipline that individual for refusing to come to work under the Occupational Safety and Health Administration's anti-retaliation guidelines. Thus, the common adage in labor law of "work now, and grieve later" may not apply. In enacting any discipline for a refusal to work, employers again should first review their specific contract language regarding discipline and discharge and consult labor counsel for advice in how to minimize risk.

In addition, employers should be alert to the fact that if multiple employees together refuse to come to work, this conduct likely would be considered to be "protected and concerted" activity under Section 7 of the NLRA.

Note: If an employee is actually ill or has a family member ill or a child home from school due to COVID-19, other federal or state leave laws may apply, such as FMLA or the newly enacted Public Health Emergency Leave and Emergency Paid Sick Leave (which applies only to employers with "fewer than 500 employees").

FAQ: What do I do if my unionized workforce is asking about our plans for responding to COVID-19?

Answer: Many employers, particularly in the healthcare industry, are being inundated with extensive requests for information regarding the employer's plans for responding to COVID-19, and employee absence, infectious disease, workplace exposure and safety policies. Many of

these requests involve topics that are considered mandatory subjects of bargaining and therefore are presumptively relevant to the union's role in representing employees.

When there is a duty to respond to these requests, employers should remember that (1) they are not required to create information that does not exist, (2) if a document or policy is responsive to a specific question, that document can be provided by way of answer; (3) a union's requested turn-around time may not be reasonable, given the current circumstances; (4) employers must preserve confidentiality around employees' medical conditions; and (5) there may be an ongoing duty to update unions as employers revise policies in response to changing circumstances of dealing with COVID-19.

FAQ: What if my organization is approaching negotiations for a new or successor CBA?

Answer: Employers who are either in the midst of, or who may be approaching, negotiations for a new or successor CBA still have a statutory duty to bargain despite the pandemic. That said, the majority of employers in this situation have neither the time nor the staff to dedicate to negotiations right now. Experience to date shows consistent cooperation between management and labor on postponing bargaining or, if necessary, turning to video conferencing to conduct negotiations. Parties may also wish to consider entering into extension agreements for expired/expiring CBAs to add a level of stability to the workplace until the pandemic subsides. We strongly recommend against open-ended extensions that do not contain the right of the employer to insist on resumption of bargaining, in case concessions become necessary. Similarly, we recommend against making any commitments as to financial retroactivity once bargaining resumes and an agreement is reached. Far too much is still in flux to feel that such retroactivity commitments would be prudent.

For more FAQs specifically related to unionized employers, please see our blog post entitled [COVID-19 Issues for the Unionized Employer](#)

FAQ: Will my business be able to recoup any costs associated with COVID-19-related leave?

Answer: Yes. The IRS, the Treasury Department, and the Department of Labor announced on March 20, 2020 that small and midsize employers would be able to take advantage of two new refundable payroll tax credits to fully reimburse them for any of the costs associated with providing COVID-19-related leave. This relief comes by way of the Families First Coronavirus Relief Act recently passed on March 18.

For reference, the new law provides for a refundable tax credit toward social security and Medicare taxes up to the maximum amount of each employee's compensation paid under both the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act. In

addition, the wages paid as a result of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act are not included for purposes of determining employer Social Security taxes owed. If the credit exceeds the employer's total liability of the tax imposed, the excess credit is refundable to the employer.

The law also provides a refundable tax credit equal to 100% of the family leave equivalent a self-employed individual would receive if the employee was not self-employed. The credit is allowed against income taxes and is refundable. A self-employed individual is eligible for the benefit if the individual would be entitled to receive paid leave pursuant to the Emergency Family and Medical Leave Expansion Act if the employee were not self-employed.

FAQ: Does a temporary layoff trigger any obligation under COBRA?

Answer: Potentially. The Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") requires that employers with 20 or more employees provide temporary continuation group health coverage if a qualifying event occurs. "Qualifying events" are "certain events that would cause an individual to lose health coverage under a group health plan." The Department of Labor ("DOL") provides that a qualifying event for a covered employee includes: termination of the covered employee's employment for any reason other than gross misconduct; or a reduction in the covered employee's hours of employment if such reduction of hours causes the employee to fall below the group plan eligibility. 29 U.S.C. § 1163. This reduction can include changing an employee from full-time to part-time, a temporary layoff or furlough, or an absence from work due to disability or any other reason (other than FMLA leave). Thus, you should consult your group health plan to determine the exact parameters of any loss of coverage.

If a qualifying event does occur, an employer is obligated to notify its group health plan administrator within 30 days after an employee's employment is termination, or employment hours are reduced. 29 U.S.C. § 1166(a)(2). The notification has a number of requirements and we suggest you reach out to your Felhaber Larson attorney for more information.