

Novel Coronavirus (COVID-19): Employer FAQs

March 9, 2020

Key Points

- The continued spread of COVID-19 presents employers with an array of unprecedented workforce management and public health challenges.
- Decisions that employers may be called upon to make implicate a variety of laws and regulations, including occupational safety and health regulations, wage and hour rules, and leave laws.
- In these questions and answers, we discuss some important considerations to assist employers in navigating the pressing questions they may face in the coming days.

COVID-19 infections have now been detected in locations throughout the United States. Continued spread of the virus is causing significant business disruptions and the shutdown of schools and other facilities where mass gatherings occur. Employers may find it necessary to modify operations as the virus spreads, both to address employee and client safety concerns and possibly as a consequence of a general business slowdown.

Employer strategies to address the crisis may implicate a variety of employment laws and regulations. These questions and answers address some of the issues and concerns that employers might be called upon to consider as they develop plans and responses to evolving events. Because resolution of these questions may depend upon the particular facts in many cases, the responses below are provided for informational purposes only. Employers should consult with their counsel to further understand their rights, obligations, and options.

1. What obligation does my company have to protect employees from COVID-19?

Under the Occupational Safety and Health Act (OSHA) and similar state occupational safety and health laws, employers have a general duty to provide employees with a workplace that is free from recognized hazards likely to cause harm. Employers in the health care industry have more extensive obligations due to likely occupational exposure to known infected persons.¹ In addition, California employers that operate health care facilities, laboratories, correctional and detention facilities, among other

Contact Information

If you have any questions concerning this alert, please contact:

Robert G. Lian Jr.

Partner
blian@akingump.com
Washington, D.C.
+1 202.887.4358

Esther G. Lander

Partner
elande@akingump.com
Washington, D.C.
+1 202.887.4535

Nathan J. Oleson

Partner
noleson@akingump.com
Washington, D.C.
+1 202.887.4425

Richard J. Rabin

Partner
rrabin@akingump.com
New York
+1 212.872.1086

Allison S. Papadopoulos

Counsel
apapadopoulos@akingump.com
Washington, D.C.
+1 202.887.4588

Joshua Keith Sekoski

Counsel
jsekoski@akingump.com
Washington, D.C.
+1 202.887.4544

Grace Margaret O'Donnell

Associate
godonnell@akingump.com
New York
+1 212.872.1015

settings, are obligated to comply with Cal-OSHA's Aerosol Transmissible Diseases Safety Order, which mandates a number of steps beyond those required by federal law.²

While much remains unclear about COVID-19 as to the contagiousness of the disease and its effects, employers should take steps to avoid putting employees at elevated risk of exposure. Among other measures, such steps might include: (i) prohibiting employee business travel to areas with significant outbreaks and barring all nonessential travel to other locations; (ii) requiring employees who may have recently traveled to affected areas to work remotely until the incubation period for the illness has passed; (iii) canceling employee participation in large-scale gatherings where there is an elevated risk of exposure; (iv) allowing greater flexibility for employees to work remotely; and (v) instituting temporary office closures or large-scale remote working arrangements if the outbreak continues to expand. In addition, employers should consider whether to provide employees with greater leave flexibility to deal with school closures, disruptions in public transportation, or other developments that affect the ability of employees to work as scheduled.

In the workplace, employers should vigilantly encourage good hygiene practices, including by regularly cleaning work areas and ensuring sanitizers and other cleaning agents are available to employees. The Environmental Protection Agency (EPA) has issued the following list of approved disinfectant products: www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2.

Companies should encourage good health and sanitation practices by employees, such as washing hands frequently, covering their mouth and nose when they need to cough or sneeze, and avoiding close contact where possible.

Employers also should continually monitor sources of public health information and other official sources, and consult with medical providers, to help them evaluate exposure risk and implement additional control measures as they are proposed. Useful sources of information include:

- S. Centers for Disease Control and Prevention (CDC): <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- World Health Organization (WHO): <https://www.who.int/health-topics/coronavirus>
- European Centre for Disease Prevention and Control (ECDC): <https://www.ecdc.europa.eu/en/novel-coronavirus-china>

2. I am concerned that employees may become infected if they travel, whether for work or on personal vacation. Can I institute a travel ban for employees?

A ban on nonessential work-related travel may be appropriate if employee travel would take them to areas where there is elevated risk of exposure or would otherwise cause unnecessary and elevated risk of exposure (e.g., certain airline or train travel). Situations should be evaluated on a case-by-case basis, considering guidance from the CDC and other organizations, the nature of expected travel and whether ready alternatives to travel might be available, such as videoconferences, postponement, and the like.

As to personal travel by employees, state or local laws may impose restrictions on an employer's ability to control what employees do during their off-duty time. However, employers may require an employee to inform the employer if they are traveling to an area with a known outbreak. Employers should also let employees know that, upon their return, they may be prohibited from coming to work for a period of time until the incubation period for COVID-19 has passed. As COVID-19 spreads across the U.S. and other regions, employers should consult the CDC or medical resources to make determinations based on the most up-to-date information.

3. How should I handle a situation in which an employee does not want to travel at all because of fear of contracting COVID-19?

Although an employer may have the right to direct employees to travel in situations in which the risk of exposure to COVID-19 appears to be low, the current circumstances make fully informed judgments difficult. Information on the extent of the spread of COVID-19 is changing rapidly, and the limited availability of testing means that employers will be making determinations of risk based on incomplete and potentially faulty information. Given the unique nature of this contagion, there is little to be gained by requiring employees to take low-value business trips that could be rescheduled or handled via videoconference. This is particularly true if the virus begins to spread rapidly across the U.S., which may require the employer to completely curtail all nonessential travel as part of its employee safety obligations.

4. An employee is sick, and I want to have him tested for COVID-19 before he returns to work. Can I do that? Do I have to pay for the testing and doctor's visit? What information am I entitled to receive about the results of the test?

Employers may seek to have an employee tested for COVID-19, subject to the availability of tests, if there is good cause to believe that the employee may pose a direct threat to the health and safety of others, such as if the employee became sick after traveling to high-risk areas or shows symptoms of infection with COVID-19.³

Employers must balance their obligation under occupational safety and health laws to provide a workplace free of any recognized hazards with obligations under disability discrimination laws that prohibit employers from requiring an employee to undergo a medical examination unless the examination is job related and consistent with business necessity. A medical examination is permitted under disability discrimination laws if necessary to ensure that the workplace is free from direct threats to the health and safety of the employee or others, i.e., significant risk of substantial harm to the health or safety of one's self or others that cannot be eliminated or reduced by reasonable accommodations.

Whether an employee who is sick poses a direct threat to the health and safety of themselves or others should be determined on a case-by-case basis, considering factors such as (i) when the employee became sick, (ii) symptoms known to the employer, (iii) whether the employee has traveled recently to an area with a known outbreak, and (iv) whether the risk can be eliminated or reduced by requiring the employee to work from home for a period of time. Under the current circumstances, where an employer can demonstrate that an employee has symptoms of COVID-19 or may have been exposed to the virus, an employer may be justified in requiring a medical examination before the employee returns to work. However, the value of such

an examination may be limited in the absence of more wide-spread availability of COVID-19 tests. It therefore may be more pragmatic for an employer to require that the employee self-quarantine until he or she is well or, in the case of suspected exposure, until the two-week presumptive incubation period has passed.

To the extent that a medical examination is required, its goal should be limited to determining whether the employee may return to work without posing a direct threat to the health and safety of themselves or others. If the employer requires that the employee be examined by a health care professional of the employer's choosing, then the employer must bear the cost of the exam. An employee may be entitled to compensation for time spent being tested at the employer's direction, particularly if the employee is required to leave work to be tested or is tested during normal working hours.

5. One of our employees was on a business trip and became confined due to a quarantine. Are we required to continue paying the employee?

Under the Fair Labor Standards Act (FLSA), an employer generally is required to pay nonexempt employees only for the time they actually work. Thus, an employer need not pay hourly employees for time spent in quarantine under federal law. However, the Department of Labor's FLSA regulations may require employers to pay nonexempt employees for any return travel home from quarantine imposed during a business trip if such travel occurs during the employees' normal work hours—even if the travel occurs on a weekend or holiday.

Federal regulations require employers to pay exempt^A employees their weekly salary in any workweek in which they perform any work. Thus, if a salaried employee is quarantined during a workweek in which the employee already performed work, the employer must pay the employee their full salary for that week. However, the employer is not required to pay the salary in any workweek in which the employee fails to perform any work. As a consequence, exempt employees would not be entitled to their salary in any subsequent weeks in which they were quarantined and performed no work.

Of course, to the extent that any employees—hourly or salaried—perform work remotely during a quarantine, then the employees must be compensated for this time (nonexempt employees should be paid for the actual time worked; exempt employees should be paid their full salary for the relevant week). Employers also should consult applicable company policies, employment contracts, and collective bargaining agreements for potential contractual obligations to pay an employee during periods where the employee does not report to work.

Even if an employer has no obligation to pay its employees during a quarantine imposed during business travel, it should strongly consider continuing the employee's compensation during the quarantine period or substituting sick time, paid time off, or other paid leave to the extent doing so would be consistent with the employer's policies. The employer also may consider instituting a one-time grant of limited paid leave to address COVID-19-related absences. Refusing to pay employees while quarantined during travel required by the employer may raise fairness and employee relations concerns that significantly exceed the monetary costs of paying these employees during this period.

Employers should be aware that in certain states, payment for the entire quarantine period may be required. For instance, under California law, “hours worked” is defined to include all the time during which an employee is subject to the control of an employer. Employees required to self-quarantine by their employer may be subject to this rule. Employees in California also are entitled to reporting time pay if they report for work at the request or permission of the employer and then are required to return home due to the virus.

6. We are going to temporarily shut down a work location to protect our employees from COVID-19. How much notice do we need to give our employees?

Temporary shutdowns of a facility may implicate federal and state worker notification statutes, typically referred to as “WARN” laws. Under the federal Worker Adjustment Retraining Notification Act (WARN Act), employers with 100 or more employees are required to provide 60 days’ advance notice of a temporary shutdown if the shutdown will (i) affect 50 or more employees at a single site of employment and (ii) result in at least a 50 percent reduction in hours of work of individual employees during the month of the shutdown. However, 60 days’ notice is not required if the shutdown is a result of a “natural disaster” or “unforeseeable business circumstances.” Although the WARN Act does not specifically address whether a pandemic or potential pandemic qualifies as a natural disaster or unforeseeable business circumstance, the key factor for both is that the event was sudden, dramatic, and not foreseeable within the required notice period. Employers should note that, even if these exceptions apply to the COVID-19 outbreak, the employer is still required to give as much advance notice as is practicable. Employers accordingly should be prepared to communicate a temporary shutdown once a final decision has been made, even if the shutdown will not occur for several days.

Many states have “mini-WARN” laws that cover smaller employers or require notice for less significant shutdowns. These laws also may require a longer notice period and expand the scope of the notice required. For example, under New York law, private sector employers who have (i) 50 employees located in New York State, not including part-time employees; or (ii) 50 employees who work a total of 2,000 hours per week in the state of New York, including overtime hours earned by employees on a regular basis, must provide 90 days’ advance notice. Similarly, under California law, if a facility employs 75 or more persons (or has done so within the preceding 12 months), 60 days’ notice is required, even for a temporary work stoppage, unless the stoppage is because of a “physical calamity or act of war.”

7. We are going to shut down a facility because of concerns about COVID-19. Do we need to pay hourly employees while the facility is closed? What about salaried employees?

Under federal law, employers are required to pay nonexempt, hourly employees only for hours they actually work. Absent employer policies or contractual agreements to the contrary, these employees are not entitled to be paid during a shutdown of a work location. Of course, nonexempt employees must be paid for all hours worked at a remote location during a shutdown. Also, if the shutdown occurs in the midst of an employee’s shift, employers may be required under certain state laws to pay nonexempt employees for a minimum number of hours for that workday. For example,

as described above, New York law requires that an employee be paid for at least four hours or their regularly scheduled shift (whichever is less) if they report to work by request or permission of the employer. California has similar requirements.

With limited exceptions inapplicable to this situation, federal law requires that exempt, salaried employees (and nonexempt, salaried employees who are paid based on the fluctuating workweek method) must be paid their full salaries for any week in which they perform work. These employees accordingly must be paid their full weekly salary if an employer shuts down its location in the middle of the workweek. However, federal law does not require that these employees be paid their salary in any workweek in which they perform no work. Employers accordingly would not be obligated to pay such an employee in weeks in which the facility is closed unless the employee continues to work remotely during this period.

Employees entitled to nondiscretionary or productivity bonuses who are prevented from making progress toward the bonus during a work shutdown may be eligible for a prorated bonus based on principles of state contract law.

Employers may require employees affected by a shutdown to utilize paid leave if such action is consistent with applicable company policies, employment contracts, or collective bargaining agreements.

8. We permitted an employee to work from home because the employee is concerned about possible contraction of COVID-19. Another employee learned about the arrangement and wants to do the same thing. Can we deny the request because we are concerned that all employees will start working from home?

As a general rule, there is no requirement that an employer allow all employees to telecommute. However, employers should ensure that federal and state laws mandate that flexible workplace policies are administered in a way that does not discriminate against an employee because of the employee's race, color, sex, national origin, religion, age, disability, sexual orientation, gender identity, veteran status and other characteristics. An employer thus should be prepared to offer a legitimate, nondiscriminatory explanation for why it may choose to allow some employees to work from home and not others, and ensure that they consistently apply this reasoning uniformly to all employees.

An employer should also consider possible implications under disability laws when deciding whether, and in what circumstances, it will allow employees in certain jobs to work from home. Under disability laws, employers have an obligation to provide reasonable accommodations to employees with disabilities unless doing so will present an undue hardship. Intermittent or temporary telework arrangements may be a reasonable accommodation for employees with disabilities where an employee can successfully perform the essential functions of a job without coming to work. By allowing temporary telework arrangements in response to COVID-19, an employer may undermine its ability to decline temporary telework arrangements as a reasonable accommodation to persons with disabilities. Therefore, employers should carefully consider the precedent set by allowing employees to telework in response to COVID-19 when the essential functions of their position cannot be adequately performed at home. If the employer allows employees to telework where it would not otherwise do so because of the unique challenges posed by the COVID-19 outbreak, it should make

clear in its communications that the telework accommodation is being granted due to the extraordinary circumstances posed by the virus.

9. We have told employees in affected areas to work from home until further notice. Can we monitor their email and phone activity to ensure that they are actually working?

Most employers maintain specific policies that allow them to monitor emails and communications for any work-related reason. These employers can monitor email and call activity consistent with their policies. In the absence of such policies, employers generally can monitor work email provided that there is a valid business purpose for doing so and employees do not have a reasonable expectation of privacy in using the employer's system.

10. Can we fire an employee who refuses to come to work because of concerns about contracting COVID-19?

Occupational safety and health laws prohibit employers from terminating an employee who refuses, in good faith, to expose themselves to a dangerous job condition and who has no reasonable alternative but to avoid the workplace. However, the condition causing the employee's fear must be objectively reasonable—not simply the potential of unsafe working conditions. The employee may also be protected from discharge under Section 7 of the National Labor Relations Act if their refusal is part of a concerted protest against unsafe working conditions.

11. Can we fire an employee who has complained on social media that we do not do enough to protect our employees from COVID-19?

Employee complaints about their employer raise complicated issues under federal labor law, which protects concerted activity by employees regarding their working conditions. Such complaints also may raise issues under the anti-retaliation provisions of various employment laws. Employers must carefully consider these rules and the particular circumstances of each case before taking action against an employee.

12. Local schools have closed temporarily because of the spread of COVID-19 in our area. An employee has asked to take leave to stay home with their children during this time. Are we obligated to provide this leave? Should the leave be paid or unpaid?

Federal law does not require employers to provide leave for employees caring for healthy dependents who are unable to attend school. Thus, under federal law, employers have no obligation to provide employees with leave (whether paid or unpaid) to remain home with children during an extended school closure, except to the extent provided for in the employer's leave or paid time off policies. Of course, nonexempt employees who perform remote work during this period must be paid for their working hours, and exempt employees must be paid for workweeks in which they work.

State laws may impose different requirements. For example, California requires most employers to provide unpaid leave to parents, guardians, grandparents, stepparents, foster parents or persons standing in loco parentis to a child for child care during unexpected school closures. Similarly, New York City mandates that employers

provide employees with leave necessitated by the “employee’s need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.”

Even if there is no requirement that employees be paid while staying home to care for children during a school closure, employers should consider creative solutions to support employees during this period. For example, employers may require affected employees to telework, attempt to coordinate reduced work schedules or coordinated childcare among affected employees, or allow affected employees to run a deficit in paid time off programs that can be repaid over time.

13. An employee has asked to take leave to care for a family member infected with COVID-19. Are we obligated to provide this leave, and must it be paid?

Employers covered by the federal Family Medical Leave Act (FMLA) are obligated to provide job-protected unpaid leave and other benefits to eligible employees who miss work due to a serious health condition of the employee or the employee’s close family member. Although COVID-19 may produce mild symptoms in some people, it clearly will qualify as a serious health condition if complications arise from the illness leading to, for example, hospitalization or incapacitation.

In addition, laws in many localities—including New York, New York City, California, Washington state and the District of Columbia—may require paid leave in these circumstances. For example, under California law, employers must allow employees to use up to one-half of their annual paid sick leave (as provided for by the employer’s policies) to care for a family member. Employers should consult with counsel regarding applicable state and local leave laws.

If COVID-19 does not meet federal or state law requirements as a qualifying health condition, then an employer’s leave policies or contractual obligations will determine whether the employee may take leave to care for a family member infected with COVID-19, and if so, whether it is paid. Employers should therefore review their company policies regarding sick leave, as well as any obligations under employment contracts or collective bargaining agreements, to determine whether they have an independent obligation to provide leave.

14. Because absenteeism is increasing due to fear about COVID-19, we are paying employees a show-up bonus for every day worked. Do we need to pay overtime on this bonus to nonexempt employees?

The U.S. Department of Labor requires that pre-arranged bonuses designed to encourage work be included in the regular rate of pay for purposes of calculating overtime. However, if both the determination of whether to award a bonus and the amount of the bonus are determined at the discretion of the employer, the bonus may be excluded from the regular rate. These may include bonuses paid to employees after-the-fact to thank them for overcoming stressful or difficult situations. Call-out payments for work outside of normally scheduled hours may also be excluded from the regular rate in certain circumstances, although the approach on this issue may be affected by state law, collective bargaining obligations for employers with union relationships, or individual employer compensation policies.

15. We have devised a liberal leave program for employees who are most at risk of developing complications from COVID-19, such as older workers and workers with health conditions. Is this permissible? Can we require medical documentation to prove their eligibility for this program?

Employers should not base eligibility for a liberal leave program on protected characteristics such as age or disability status, as doing so may violate federal and state employment discrimination laws. If an employer wants to limit a liberal leave program to individuals at higher risk of complications from COVID-19, then it can restrict the program to employees who request a liberal leave accommodation to address a disability or other specific medical condition. If an employee voluntarily discloses a medical condition when seeking liberal leave as a reasonable accommodation, then the employer may request certain medical documentation to determine whether the requested accommodation is reasonable and whether alternative reasonable accommodations are available. Under federal and state disability laws, such documentation should be limited to information necessary to evaluate the employee's accommodation request.

16. An employee refuses to work with Jewish and Asian employees out of fear that they may be more likely to carry the virus. May we reassign our Jewish and Asian employees to address this concern?

No. Employers have an obligation to protect an employee from discrimination or harassment based on their race, national origin, religion, or any other characteristic protected by law. The reported prevalence of COVID-19 in particular countries or among certain religious groups does not justify disparate treatment of an employee based solely on their race, national origin, or religion, even if a coworker associates the risk of exposure with these legally protected characteristics. Rather, the employer should focus on objective factors that may heighten exposure risk, such as travel to affected areas or known exposure to persons infected with COVID-19. An employer also must take steps to stop any hostile or harassing behavior toward an employee assumed to have a higher COVID-19 risk profile because of a protected characteristic.

17. What steps should we take to keep employees informed?

To help evaluate exposure risk and control measures, an employer should monitor official sources of public health information and consult with medical providers. One or more senior individuals—such as the head of human resources, general counsel, chief compliance officer, or chief operating officer—should be made the point-person(s) for the employer's response, including communication with employees regarding protocols and expectations. Point-persons should keep abreast of developments, remain in regular contact with other decision makers and legal counsel, and help ensure that the employer speaks with "one voice" regarding its response.

¹ Federal OSHA guidance on COVID-19 can be found at the attached link: <https://www.osha.gov/SLTC/covid-19/>.

² See 8 CCR § 5199 (Aerosol Transmissible Diseases Safety Order), <https://www.dir.ca.gov/title8/5199.html>.

³ According to the CDC, symptoms of COVID-19, which typically appear 2-14 days after exposure, are fever, cough and shortness of breath. <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>.