

FAQ: Employment-Related Issues Stemming from COVID-19

MARCH 19, 2020

What steps should my Company take as the spread of COVID-19 continues to evolve?

- Designate and charge an employee or a group of employees to lead your company in all aspects of coronavirus preparedness and response. This includes: remaining informed about any changes to the CDC or other governmental agencies' response and recommendations regarding the spread and containment of the coronavirus and communicating to staff the company's policies, efforts, and instructions regarding the coronavirus.
- Remind employees to practice proper hygiene including washing their hands effectively and regularly and to maintain a six-foot distance from other individuals at all times. Consider placing posters about hygiene etiquette in areas of the workplace that employees regularly access.
- Ensure that employees have access to adequate supplies to contain the spread of the coronavirus, including tissues, hand sanitizer, and disinfecting wipes. Spread out these supplies throughout the workplace and let employees know that they are encouraged to use these supplies.
- Instruct cleaning personnel to consistently wipe down surfaces that are regularly used and continue routine workplace cleaning procedures.
- Cancel or reschedule all large work events. Consider whether individuals may participate in such meetings via video conference.
- Limit all non-essential work travel. Avoid any and all travel to areas that the CDC has designated as "Alert Level 2" or "Warning Level 3."
- Encourage employees to limit all personal travel. While employers cannot prevent employees from traveling to areas impacted by the coronavirus, they may ask employees who do travel to impacted areas to work from home upon their return and demonstrate that they are free from symptoms of the coronavirus before returning to work. Should you choose to enforce such a policy, you must notify employees in writing and obtain acknowledgement that they have received the notice.

- Be prepared for increased requests to work from home, even from employees who do not display symptoms of the coronavirus.
- If employees work remotely, ensure non-exempt employees record their hours and take all required meal and rest periods.
- Avoid discrimination and harassment against employees based on any protected characteristic including national origin or ethnicity. The CDC has instructed the public not to assume that Asian individuals are more likely to be infected with the coronavirus.

Can I pay my employees to stay home? Yes. Employers may send their workers home and continue to provide them full salary and benefits. For some employers, this may significantly reduce operational expenses, depending on the variable expenses associated with operating their facilities.

Can I send sick employees home and/or instruct them to stay at home? Yes. Employees who report to work and have a fever and demonstrate symptoms of respiratory illness such as sneezing, coughing, or shortness of breath should immediately be isolated from others and sent home. Such employees should be instructed to stay home until they are free of fever and other symptoms without the use of medication for at least 24 hours.

Am I required to pay employees who stay at home? It depends. Employers may send workers home and continue paying them and providing benefits if they choose. However, employers are not required to pay non-exempt employees for hours they do not work. Employers must pay their exempt employees their full salary for any workweek in which they perform any work.

Am I required to provide benefits to employees on an unpaid leave of absence? It depends. Employers should consult their individual plans. If their plans allow employees on unpaid leaves of absence to remain eligible for employer-provided benefits, employers should consider whether their allocation of employee benefits will differ from current practice.

Can I discipline employees for not practicing proper hygiene etiquette in the workplace? Yes. If you have implemented a proper workplace policy that requires employees to practice certain hygiene etiquette such as washing their hands regularly or using sanitizer, you may discipline an employee who violates such policy.

If I suspect that an employee is sick, can I check the employee's body temperature? Probably. While checking an employee's body temperature is ordinarily considered a prohibited medical examination under the ADA, the EEOC has recently issued guidance stating that in light of current circumstances, employers may measure employees' body temperatures. Note, however, that some states, including California, prohibit employers from checking an employee's body temperature. This may change if the state and/or local municipalities provide additional guidance on how businesses should handle the current state of emergency.

Can I prevent employees from attending large non-work events? Probably not. Employers should caution employees about attending large non-work events but may not punish them for engaging in lawful activity.

Can I discipline an employee who refuses to work in positions that require interaction with the public? Probably not. Employers should not discipline employees for refusing to work due to a fear of being infected with the coronavirus as such conduct may be protected activity. If the employer can demonstrate that the employee is not at risk for exposure to the virus, the employer is not required to pay the employee for the time that the employee refuses to work.

What should I do if an employee refuses necessary work travel because of fear of the coronavirus? You should take such concerns very seriously and should consider alternatives such as postponing travel or having the employee participate in any meetings or events that require travel via telephone or video conference.

Can I limit visitors to my worksite? Yes. Employers can limit worksite visitors (including employees, customers, and clientele) to their worksite as long as individuals are not singled out based on any protected characteristics. Employers can also voluntarily choose to suspend operations altogether.

Can I ask visitors to my worksite whether they have been potentially exposed to the coronavirus? Yes. Businesses may ask worksite visitors whether they have been potentially exposed to the coronavirus.

Can I require my employees to be vaccinated for the coronavirus if and when a vaccine is made available? No. Employers may not require their employees to be vaccinated.

May I require employees to disclose whether or not they have tested positive for the coronavirus? Yes, but only in areas where a state of emergency has been declared.

May I require employees who have recently traveled to disclose where they have traveled? Yes. Employers may require employees to disclose where they have traveled as long as the employer asks all employees and does not restrict employee travel or take any employment actions based on any protected characteristic.

May I require an employee to use PTO if the employee requests time off? State and local law generally determines the answer to this question. For California, the answer is yes. Note, however, that under the version of the federal Emergency Paid Sick Leave Act currently expected to pass into law and applicable to employers with fewer than 500 employees, employees eligible for paid sick leave under that Act cannot be required to use other paid leave provided by the employer before the employee uses paid sick leave under the Act. For further information regarding this new legislation, please see our recent briefing accessible [here](#).

Can I require an employee to use PTO if I require the employee to take time off? State and local law determines the answer to this question. For California, the answer is likely yes. However, if the government mandates workers with no symptoms to quarantine, we recommend that employers should make PTO use optional.

Can I require employees out on sick leave to provide medical certification confirming that they do not have the coronavirus? No. Employers should not require employees who are on sick leave to confirm that they do not have the coronavirus before returning to work. Employers may, however, follow their normal requirements regarding medical certification before allowing employees to return to work.

Can I allow my employees to voluntarily take unpaid personal leaves of absence?

Non-Exempt Employees: Yes. Employers are not required to pay non-exempt employees for hours they do not work. Employers should ensure that non-exempt employees are not expected to be “on-call” either on or near the employer’s premises during the unpaid leave of absence because non-exempt employees must be paid for “on-call time.” On-call time is not triggered, however, when the employer merely asks a non-exempt employee on an unpaid leave of absence to provide his or her contact information in the event the employer needs to reach the employee.

Exempt Employees: Yes. Note, however, that exempt employees must be paid their full salary for any workweek in which they perform *any* work. Therefore, any unpaid leave of absence imposed on an exempt employee must be for a full workweek or longer, and the employer must ensure that no work is performed during the leave.

WARN Notice May Be Required: Involuntary leaves of absence may trigger federal and/or state Worker Adjustment and Retraining Notification (“WARN”) notice requirements. Under federal law, unless limited exceptions apply, employers must 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% reduction in hours of work of individual employees during the month of the shutdown. Federal law grants an exception to employers required to temporarily shut down a site of employment due to a “natural disaster” and/or “unforeseeable business circumstances,” such as the COVID-19 pandemic. State WARN acts, however, may differ.

Using Paid Time Off During Involuntary Leaves of Absence: Subject to state and local laws, employers may require employees to exhaust PTO during an unpaid leave of absence. As noted above, however, federal law may soon require employers with fewer than 500 employees to provide paid sick time to eligible employees for certain COVID-19-related reasons. Notably, employers subject to the federal legislation cannot require their employees to exhaust their PTO before they use the government-mandated paid sick time.

Employee Benefits During Unpaid Leaves of Absence: Employers should consult their plan documents to determine rules relating to unpaid leaves of absence. After assessing whether their employees on unpaid leave will remain eligible for continued employee benefits pursuant to the applicable plan documents, employers should understand how the allocation of employee benefits will differ from their current practice. For example, if the employer provides any employee benefits that require employee contributions, eligible employees on unpaid leave will bear the burden of paying their premiums “out of pocket” in order to keep their coverage. Employees who become ineligible to participate in health coverage may become eligible for COBRA. Employers should also understand that 401(k) contributions can present a particular challenge if there is insufficient pay to allow for a deduction and/or if there has been a loan taken against the 401(k).

California Considerations: California employees who are parents of children in day care or grades K-12 are entitled to take up to 40 hours of leave per year to address a child care or school emergency, including unexpected school closures. Employers may require employees to use vacation or PTO benefits before they can take unpaid leave, but employers cannot require employees to use paid sick leave.

Can I require my employees to work reduced hours?

Nonexempt Employees: Absent an employment contract to the contrary, employers may reduce the number of hours nonexempt employees typically work. Employers should check local wage payment laws and predictive scheduling laws when modifying employee schedules on short notice.

Exempt Employees: Reducing hours for exempt employees is generally not an effective payroll cost-cutting strategy because exempt employees must be paid their full salary for any workweek in which they perform any work.

WARN Act Considerations: Reducing hours may trigger state WARN Act obligations in certain states. For example, the New York WARN Act’s notice requirement may be triggered by a reduction by more than 50% in hours of work during each month in any consecutive six-month period for a certain number of employees.

Unemployment Agency Work Share Programs: Some states such as California and Illinois have programs designed to prevent layoffs by paying partial wage replacement to employees whose hours and wages have been reduced.

Can I do a prospective reduction in pay or salary? Yes. Absent an employment agreement to the contrary, it is generally lawful for employers to temporarily reduce wages on a prospective basis for both exempt and non-exempt employees. Employers should, however, give affected employees at least a pay period’s notice of the reduction in pay in order to comply with state wage payment and collection laws. Certain states such as California and New York have wage theft prevention acts that require employers to notify employees in writing when making changes to certain employment conditions such as pay rates and methods of pay.

Can I defer compensation for Executives? Deferring compensation for non-exempt and most exempt employees is rarely an option, but employers may consider deferring executive compensation until cash flow recovers. Many executives are compensated well above minimum salary thresholds to meet the white collar exemptions. Therefore, subject to agreement, employers may defer executive compensation while still meeting the minimum salary threshold.

Employers must obtain the written agreement of the affected executive before deferring compensation. The agreement should expressly provide that the executive is voluntarily deferring future earnings to a specific date. Employers can structure these types of agreements in a variety of ways in order to meet the employer’s needs. This option may trigger 409A issues. Therefore, before instituting any deferred compensation agreements, we encourage you to seek legal counsel.

May I offer voluntary separations in exchange for severance benefits? Yes. Employers may invite employees to voluntarily separate their employment in exchange for severance benefits. Severance benefits should be conditioned on the employee’s execution of an agreement containing a release of claims against the employer.

Can I implement an involuntary reduction in force of at-will employees? Yes. Employers may implement an involuntary reduction in force of at-will employees. Reductions in force may implicate federal and state WARN laws, which, as discussed above, often require employers to provide advance notice to affected employees, as well as certain federal, state and/or local entities. When terminating the employment of employees with employment agreements, employers should be careful to comply with the termination provisions set forth in the agreements.

****NOTE: Employers must comply with OWBPA requirements.** Employers must comply with the Older Workers Benefit Protection Act (“OWBPA”) when terminating employees aged 40 and above. The OWBPA requires any waiver of potential age discrimination claims to be executed knowingly and voluntarily by the employee after certain consideration and revocation periods. If an employer is offering severance benefits to a group of employees, it must provide an additional disclosure to employees aged 40 and older and allow these employees to consider the release for at least forty-five (45) days.

FAQ re San Francisco/Bay Area Public Health Order

On March 16, 2020, San Francisco, with Health Officers from the Bay Area, announced a Public Health Order that requires residents to stay home except for essential needs. What does this mean? Everyone should stay home except to get food, care for a relative or friend, get necessary health care, or go to an essential job.

How long is the Public Health Order in place for? At present, the Public Health Order is in place until April 7, 2020. It may be extended.

What cities does the Public Health Order apply to? Marin, San Francisco, San Mateo, Santa Clara, Contra Costa, Alameda Counties and the City of Berkeley.

What is an “Essential Business” that may stay open? Examples of Essential Businesses include:

- Healthcare organizations, such as hospitals, medical and mental health clinics, doctor offices, pharmacies, health care supply stores, and other health care facilities
- Grocery stores, certified farmers’ markets, farm and produce stands, supermarkets, food banks, convenience stores, and other store groceries
- Food cultivation
- Gas stations and auto-supply, auto-repair, and related facilities
- Banks and related financial institutions
- Garbage and sanitation services and collection
- Hardware stores, and plumbers, electricians, exterminators, and others who provide services that are necessary to maintaining safety and sanitation
- Schools, for distance learning and providing meals
- Laundromats and laundry service providers
- Restaurants and other prepared food facilities, but only for delivery or carry out
- Businesses that supply products needed for people to work from home
- Businesses that supply other essential businesses with the support or supplies necessary to operate
- Businesses that ship or deliver groceries, food, goods or services directly to residences
- Airlines, taxis, and other private transportation providers providing transportation services necessary for Essential Activities and other purposes expressly authorized in the Order
- Home-based care for seniors, adults, or children
- Residential facilities and shelters for seniors, adults, and children

- Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities
- Childcare facilities providing services that enable employees exempted in the Order to work as permitted, subject to certain conditions discussed below

What if my business is not considered an “Essential Business”? Companies that are not an “Essential Business” are only allowed to perform “Minimum Basic Operations,” provided that employees are able to maintain a distance of six feet from one another to the greatest extent feasible to carry out the minimum necessary activities to maintain the value of the business’s inventory, ensure security, or for related functions or to facilitate employees of the business being able to continue to work remotely from their residences.

My Company provides products and services that the public needs to access critical services. Can we keep operating? Yes, but likely in a different capacity than before the Health Order was issued. Anyone who must work onsite to maintain “Essential Infrastructure” for the community or to maintain “Minimum Necessary Operations” as described in the Order may continue to work in the workplace so long as they are able to maintain a distance of six feet from one another to the greatest extent feasible.

What if I have employees that are not sick and want to come to work? Only employees who must work onsite to maintain “Essential Infrastructure” for the community or maintain “Minimum Necessary Operations” may continue to work in the workplace. And even then, they may only do so as long as they are able to maintain a distance of six feet from one another to the greatest extent feasible.

What are the penalties if my Company does not follow the Public Health Order? Individuals and companies that fail to comply are subject to a misdemeanor punishable by fine, imprisonment, or both.

Additional Resources

The following government agencies offer guidance on issues related to the coronavirus. Below are links to the resources they offer:

- The Centers for Disease Control and Prevention (for businesses and employers)
- [OSHA](#) (preventing exposures to and infection with coronavirus)
- [EEOC](#) (pandemic preparedness in workplace and the Americans with Disabilities Act)
- [HTTPS://SF.GOV](https://sf.gov)

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

10+ Min Read

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