

COVID-19 (Coronavirus) 100:100

COVID-19 (Coronavirus) | This article was reviewed by author(s), and the law is current as of March 17, 2020.
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Employers' Guide to the Fair Labor Standards Act and the Family and Medical Leave Act During the Coronavirus Outbreak

The situation concerning the spread of Coronavirus (COVID-19) changes daily, and, on March 11, 2020, the World Health Organization declared Coronavirus a pandemic. Many employers have started to implement practices to prevent the spread of Coronavirus in the workplace, such as limitations on travel and work-from-home policies. As the extent of the impact of Coronavirus continues to develop, employers are likely considering implementing additional policies or practices in response and may have questions regarding their obligations under certain federal employment laws. On March 9, the DOL's Wage and Hour Division issued guidance on common issues that employers may face in responding to various Coronavirus scenarios or other public health emergencies under both the Fair Labor Standards Act ("FLSA") and the Family and Medical Leave Act ("FMLA"). This article addresses that guidance. We note, however, that each workplace and workforce is different, and may be subject to potentially differing state and local employment laws. In addition to the various applicable laws, employers will also need to take into account the characteristics of their workforce, their internal policies, employment agreements and relevant collective bargaining agreements in addressing pay and wage issues.

DOL Guidance on the Fair Labor Standards Act

The DOL's guidance on the FLSA—in the form of questions and answers—provides guidance on the following topics, among other things. As noted above, employers also should consider whether any state and local obligations apply. See generally UNITED STATES DEPARTMENT OF LABOR, *COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers*, March 2020, <https://www.dol.gov/agencies/whd/flsa/pandemic> (last visited March 11, 2020).

- **Pay to Non-Exempt Employees During Business Closures.** Under the FLSA, employers are obligated to pay non-exempt employees only for the hours worked, not hours the employee otherwise would have worked if the employer's business had not closed. If telecommuting or working from home is provided as a reasonable accommodation, the employer must pay non-exempt workers the minimum wage, and at least time and one half the regular rate of pay for overtime hours, for hours telecommuting or working from home. Employers are still required to maintain an accurate record of hours worked for all employees, including those participating in telework or other flexible work arrangements. Employers may want to consider implementing methods by which employees who are teleworking can check-in and check-out of work each day, such as daily emails, calls or video conferences at the beginning and end of their shift. Employers may also want to notify employees of any limitations on their overtime hours, such as number of overtime hours permitted in a specific time period or written approval to work overtime.
- **Pay to Exempt, Salaried Employees, Including Requiring Such Employees to Use Vacation or Leave Without Pay During Business Closures.** Under the FLSA, employers are generally obligated to pay exempt, salaried employees their full salary in any week in which they perform any work, with limited exceptions. The FLSA does not require employer-provided vacation time. Where an employer offers a bona fide vacation plan, the employer may require a salaried employee to use accrued leave or vacation days as long as the employee still receives payment equal to the employee's guaranteed salary. If an employee does not have enough accrued time to cover the absence, the employer must still pay the employee the full guaranteed compensation amount in order for them to remain exempt. Employers may not deduct from the predetermined compensation amount for absences occasioned by the office closure during a week in which the employee performs any work. Employers are not required to pay exempt, salaried employees in weeks in which they perform no work

- **Increased Expectations for Employees Able to Work.** Due to increased absenteeism, employers may need to ask other employees to increase their work schedule or perform duties typically outside the scope of their job. Employers may also offer telecommuting as a reasonable accommodation or infection prevention strategy.
 - **Hours/Days.** The FLSA does not limit the number of hours per day or per week that employees aged 16 and over can be required to work. Again, employers should be mindful of other restrictions, such as state and local laws and wage requirements.
 - **Job Duties.** Employees aged 18 and over may be asked to perform work outside of their job description. The DOL notes that employers may wish to consult bargaining unit representatives if they have a union contract. Employers may also want to consult their human resource teams if they anticipate assigning employees work outside of their job description during a pandemic.
 - **Use of Volunteers.** Private sector employers who are short-staffed may seek to use volunteers to perform business tasks. The DOL notes that the FLSA has “stringent requirements with respect to the use of volunteers.” In general, under the FLSA, covered, non-exempt workers working for private, for-profit employers have to be paid at least the minimum wage and cannot volunteer their services. Employers that are private, not-for-profit organizations or public agencies may fall under certain exceptions and are encouraged to check the DOL rules governing the circumstances where volunteering in the public and private, non-profit sectors may be allowed.
 - **Temporary Employees.** If an employer brings on temporary employees from a staffing agency to supplement its workforce during staffing shortages, an employer may be jointly and severally liable for any unpaid wages if the employer is deemed a joint employer. The DOL recently updated and revised its joint employer guidance, and employers are encouraged to review this guidance before bringing on temporary employees.
 - **Offering Alternative Work Arrangements to Quarantined Employees.** Employers are encouraged “to be accommodating and flexible with workers impacted by government-imposed quarantines. Employers may offer alternative work arrangements, such as teleworking, and additional paid time off to such employees.” The DOL specifically notes that telecommuting may be offered as a reasonable accommodation, and employers must provide employees participating in telecommuting with the same hourly rate or salary.
 - **Requiring or Encouraging Other Employees to Telework.** An employer may encourage or require employees to telework as an infection control or prevention strategy. In doing so, employers must not single out employees in violation of any Equal Employment Opportunity (“EEO”) laws. If teleworking is not being provided to an employee pursuant to a contractual requirement or as part of a reasonable accommodation, the employer must pay the employee for the hours actually worked and at least at the minimum wage for regular hours worked and at least time and half the regular pay for hours worked in excess of 40 hours in a workweek. As noted above, employers are still required to maintain an accurate record of hours worked for all hourly employees, and are encouraged to work with employees to establish hours of work for employees who telework and a mechanism for recording each teleworking employee’s hours of work.
- Reimbursement for Telework Expenses.** If an employee is required to work from home, an employer may not require an employee to pay for or reimburse the company for business expenses of the employer where doing so reduces the employee’s earnings below the required minimum wage and overtime compensation. The DOL’s guidance does not directly address whether an employer must reimburse home expenses used to telework, such as Internet and phone service. Employers may want to consider communicating with their employees regarding equipment or supplies they anticipate needing in order to telecommute and determining how best to provide these supplies.

Telework or Home Office Requirements. The DOL’s Occupational Safety and Health Administration (“OSHA”) does not have regulations regarding telework in home offices. In February 2000, OSHA issued a directive stating that it “will not conduct inspections of employees’ home offices, will not hold employers liable for employees’ home offices, and does not expect employers to inspect the home offices of their employees.” If OSHA receives a complaint about a home office, it may informally let employers know about such a complaint but will not follow up with the employer

or employee. Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for maintaining such records, even if injuries or illnesses occur in the home office. Employers may want to work with their internal team responsible for maintaining these records on a process to continue to maintain these records as more employees work from home. Employers should also bear in mind that other regulations, state and local requirements, may require reporting of employees infected with Coronavirus.

DOL Guidance on the Family and Medical Leave Act

The DOL's guidance on the FMLA—in the form of questions and answers—provides guidance on the following topics, among other things. As noted above, employers also should consider whether any state and local obligations apply. *See generally* UNITED STATES DEPARTMENT OF LABOR, *COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers*, March 2020, <https://www.dol.gov/agencies/whd/fmla/pandemic> (last visited March 11, 2020).

- **Employees Infected with Coronavirus May Be Entitled to FMLA.** Employees who are infected with Coronavirus or who are caring for a family member who is sick with Coronavirus “may be entitled to leave under the FMLA under certain circumstances” “where complications arise that create a ‘serious health condition’” as defined by the FMLA. To be eligible for up to 12 weeks of unpaid, job-protected FMLA leave, employees must meet certain requirements if they work for a covered employer, including (1) employment by their employer for at least 12 months, (2) at least 1,250 hours of service over the previous 12 months and (3) work at a location where at least 50 employees are employed by the employer within 75 miles. “Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.” The DOL's guidance further notes that workers who are ill with pandemic influenza or have a family member with influenza are urged to stay home to minimize the spread of the pandemic, and employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.
- **No Entitlement to FMLA Leave to Avoid Exposure.** The guidance states that “FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under FMLA.”
- **No Federal Obligation to Provide Private Sector Employees With Leave to Take Care of Healthy Children Dismissed from School.** At this time, no federal law requires an employer to provide non-government employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or childcare. That being said, the DOL encourages employers to “review their leave policies to consider providing increasing flexibility to their employees and their families” “given the potential for significant illness under some pandemic influenza scenarios.” Employers should also review state and local laws which may entitle employees’ to leave to care for dependents during a health emergency.
- **No Federal Requirement to Provide Paid Leave.** Federal law does not require employers to provide paid leave to employees who are absent from work because they are sick with pandemic flu, have been exposed to someone with the flu or are caring for someone with the flu. Although pursuant to [Executive Order 13706](#), some federal contractors may be required to provide paid leave to employees under certain circumstances. Again state and local laws should be independently considered. As the Coronavirus situation progresses, it is possible that federal, state and local governments may take measures to provide paid leave to employees in order to encourage individuals to stay home and prevent the spread of Coronavirus. As with all Coronavirus guidance, employers should continue to monitor developments.
- **Sending Employees Home.** Employers may send employees home if they show symptoms of pandemic influenza. Employers must be sure to apply any policies or protocols in a uniform, neutral manner and in compliance with laws prohibiting discrimination in the workplace on the basis of race, sex, age, color, religion, national origin, disability, union

membership, veteran status, and other categories that may be protected under state and local laws. Employers must obtain objective evidence that the employee poses a direct threat (i.e., a significant risk of substantial harm) and determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat. Employers' policies on sick leave as well as any applicable employment contracts or collective bargaining agreements could determine whether employers must pay employees who are not at work. Employers may also want to consider reviewing their current sick leave policies to determine whether additional leave or flexibility is warranted at this time.

- **Ability to Seek Medical Information From Employees Returning to Work.** Employers may require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work; however, the DOL asks that employers bear in mind that during a pandemic, "healthcare resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious." Employers are required to notify employees in advance if the employer will require a fitness for duty certification to return to work. If state or local law or terms of a collective bargaining agreement govern an employee's return to work, those provisions should be applied.
 - Under the Americans with Disabilities Act ("ADA"), an employer is permitted to require a doctor's note, a medical examination, or a time period during which the employee has been symptom-free before allowing an employee to return to work. The employer must have a reasonable belief based on objective evidence that the employee's present medical condition would (1) impair his or her ability to perform essential job functions with or without reasonable accommodation or (2) pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.
- **Employers' Ability to Modify Paid Leave Policy if Become Unable to Pay.** "Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done" in a non-discriminatory manner. Before making any changes to their leave policies, employers should consult state and local laws and any applicable collective bargaining agreements and employee contracts. Employers whose employees are covered by the FMLA must have a sick leave policy that complies with the FMLA.
- **Lay-Offs of Some Employees.** If an employer temporarily closes because of a pandemic and chooses to lay off some but not all employees, employers must bear in mind that federal laws that prohibit discrimination still apply. Employers may not discriminate against an employee because he or she has requested or used FMLA leave or similar leave under state or local laws. The Worker Adjustment and Retraining Notification ("WARN") Act helps ensure advance notice in cases of qualified plant closings and mass lay-offs. The DOL encourages employers to "consider other options such as telecommuting" "[i]n lieu of laying off employees" who are taking leave to care for sick family members.
- **Employer Policies to Prevent Abuse of Leave.** Under FMLA, employers may require employees seeking to use FMLA leave to provide 30-day advance notice of the need to take leave when the need is foreseeable and such notice is practicable. Employers may also require employees to provide:
 - Medical certification supporting the need for leave due to a serious health condition affecting the employee or a covered family member, including periodic recertification;
 - Second or third medical opinions at the employer's expense;
 - Periodic reports during leave regarding the employee's status and intent to return to work; and
 - Consistent with a uniformly applied policy or practice for similarly situated employees, a fitness for duty certification. Employers should note that such certifications may be difficult to obtain during a pandemic.

In certain circumstances, employers may be permitted to require the use of paid sick and paid vacation or personal time as a substitute for FMLA leave. Employers should keep in mind that under the ADA, qualified employees may be entitled to unscheduled or unpaid leave, or modifications to the employer's sick leave policies as reasonable accommodations.

Conclusion

This analysis is based on the DOL's March 9, 2020 guidance concerning Coronavirus and the FLSA and FMLA. As the situation continues to develop, employers should anticipate being flexible and reacting to additional information as needed. Of course, in addressing employee leave and compensation issues, employers should also consider any additional requirements under any applicable employee policy, handbook or contract, together with any obligations under state and local laws.

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