
COVID-19: Employment Law FAQs for March 18, 2020

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Together with the WilmerHale Coronavirus Task Force, WilmerHale's Labor and Employment Group has been keeping abreast of the rapidly evolving COVID-19 pandemic. Informed by governmental and health guidance, legislative developments, and industry practices, the WilmerHale team has been counseling clients grappling with legal and practical challenges. Below we share some common workforce-related questions fielded over the past several days, along with general answers. Of course, as is the case with most employment law and HR issues, the right answer for your business may depend on many factors, including the nature of your workforce, operational concerns, financial considerations and industry requirements. We encourage you to reach out directly for more tailored guidance.

1. Can I ask my employees to disclose whether they are experiencing COVID-19-related symptoms; whether family members are experiencing these symptoms; or whether they, their family members or a close contact have tested positive for COVID-19?

Yes. Although these types of questions are ordinarily very restricted under the Americans with Disabilities Act (ADA), we believe, consistent with previous Equal Employment Opportunity Commission (EEOC) guidance, that the "direct threat" exception to the ADA—which allows for employers to make certain inquiries where an employee poses a direct threat to themselves or others—allows an employer to ask these questions. Any information obtained, however, should be maintained as confidential consistent with employer obligations under the ADA.

2. Can I take my employees' body temperature before allowing them in the workplace?

Yes. Although employers are generally restricted from taking their employees' temperatures as a condition of entering the workplace, we believe that, due to the severity of the COVID-19 outbreak, doing so is currently permissible pursuant to the EEOC guidance referenced above, which was issued in connection with a prior pandemic. As a reminder, any such screening must be done on a nondiscriminatory basis, and the information should be maintained by an employer as confidential (with limited exceptions, including for members of company management with a true need to know). In addition, it is important for employers to remember that taking an employee's temperature is not a panacea for mitigating COVID-19 risk, as it is possible for individuals to be contagious without exhibiting fever or other symptoms.

3. My employee has tested positive. Who do I need to report this to?

The Centers for Disease Control and Prevention (CDC) guidance for employers does not include an obligation to report an employee's confirmed COVID-19 diagnosis to the CDC. Nor do most state and local health agencies require employers to report confirmed or suspected COVID-19 cases, but there are a couple of outliers, so it is worth checking (or reviewing with counsel) in each jurisdiction where a case is confirmed. As we described in our March 16 alert focused on Occupational Safety and Health Administration (OSHA) related issues, there may be an obligation to report a confirmed COVID-19 diagnosis to OSHA if the virus was transmitted in the workplace and requires hospitalization within a certain time frame. And in any case, per CDC Interim Guidance for Businesses and Employers and consistent with an employer's general duty under [OSHA](#) to protect against workplace hazards, employers should notify other employees who may be at risk of exposure (while maintaining confidentiality consistent with ADA obligations, which is discussed in more detail below).

4. Do these government shutdowns require my business to shut down?

It depends. Although most cities and states have not mandated that businesses close their offices, localities are increasingly issuing "shelter in place" orders or other directives that may functionally limit a business's ability to operate. This is one of many areas where the "fine print" is important, as there are exceptions for certain industries and certain workers. Given the rapid pace of these developments, consultation with state or local authorities for more guidance may be necessary.

Absent a shutdown, it is also important to review the restrictions on gatherings and events in your jurisdiction to evaluate whether those restrictions mandate any changes to the way you are conducting business (even if you have already made some changes). Some jurisdictions specifically exempt typical business operations or office work from their orders, while others do not.

Beyond these requirements, it is essential for employers to remain focused on their general duty to provide as safe a workplace as is reasonably possible. As every employer has heard repeatedly over the past couple of weeks, best practices include allowing telework where feasible and, where telework is not possible, implementing other practices, such as staggered/rotating shifts, social distancing and virtual meetings.

5. I have no work for my employees right now, and resources are limited. What can I do?

For employers that wish to avoid widespread layoffs and do not have the luxury of being able to provide full payment to employees during the pandemic, furloughs during which employees are instructed not to work for some period of time, or reductions in hours, may be options. Where a furlough arrangement merely reduces an employee's hours and corresponding pay, employers will need to ensure that the new arrangement is solely prospective in nature, that nonexempt employees are paid in compliance with minimum wage and overtime laws, and that exempt employees still receive the minimum salary required to maintain the exemption for their jurisdiction. For employees who will be unpaid during the furlough period, it is essential that they be relieved of all work. This is also an area where a number of other issues may require navigation, such as

continuity of employee benefits (e.g., determining whether the duration of the furlough and/or the reduction of hours regularly worked will require a plan amendment to maintain health coverage or alternatively will trigger a COBRA event), availability and use of accrued paid time off, and eligibility for unemployment benefits.

If layoffs are necessary, there may be additional considerations, including contractual severance entitlements and whether the federal or any state WARN acts are implicated.

Finally, special consideration needs to be given to employment arrangements that are subject to a collective bargaining agreement, which may require negotiating with a union.

6. I have employees whose work cannot be performed remotely, and I need them to show up to work. What do I do?

It depends. First, it is important to review government restrictions to determine whether there is a shelter-in-place order or other restriction that limits your operations. For those businesses where at least some work must be performed on-site, we recommend distinguishing between work that can be performed remotely (which should be so performed) and work that cannot. Employers may generally require “essential employees” needed to perform the on-site work to come in but must, at a minimum, be responsive to requests for accommodation based on existing health conditions. We also recommend adopting other practices intended to mitigate risk in the workplace, such as instructing exposed or sick employees not to come to work; taking body temperatures before allowing employees to enter the worksite; allowing employees who rely on public transportation to travel at off-peak times; adopting “social distancing” guidelines in the business environment; ensuring regular cleanings and the availability of soap, sanitizer and tissues; and thinking creatively about how to organize and rotate shift work.

7. My employees are working from home, but some of them can't find child care. Do I make them use their accrued Paid Time Off?

This is *mostly* a business decision. Many employers already have rules that require teleworking employees to certify that they have child care coverage and a suitable place to work prior to permitting them to work from home. Although these rules ordinarily make a lot of sense, the availability of such child care arrangements may be limited during the current pandemic. We are seeing many employers temporarily suspending these standard work-from-home conditions and trusting that employees will do the best they can to perform their work during these difficult times. If, however, an employer does require employees to certify as to child care coverage (or any other prerequisite for remote work), it should ensure that such rule is enforced consistently and on a nondiscriminatory basis.

8. What do we do about contractors and vendors?

It is important to remember that other members of the community also have an impact on the safety of our workplaces and employees. Businesses should be regularly communicating with contractors, vendors and other business partners and ensuring that they employ the same types of precautionary measures and protocols for their own workforces. Employers should ensure that their

business partners communicate any known risks or exposures as soon as they arise, and employers should likewise provide such partners with the reciprocal commitment and courtesy (while maintaining appropriate confidentiality of employee information). Lastly, businesses should carefully review their contracts with contractors, vendors and other partners to determine their respective rights and responsibilities in the case of work disruption.

9. I've heard about the new federal bill that will require paid sick leave and change a bunch of other rules. What do I need to know right now?

There are many questions about the Families First Coronavirus Act, which has not yet been signed into law. You have likely heard that this bill would provide paid sick and quarantine leave for employees adversely impacted by COVID-19 and would expedite eligibility for unemployment benefits. Although there is an expectation that this act will be signed soon in some form, it is still under consideration. We plan to provide an update when legislation is approved.

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