

Managing the Workplace in A Pandemic: Tips for Employers to Survive the Era of COVID-19

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Overview of Today's Program

- Return to Work Safety Tips
- Strategies for Preventing Coronavirus-Related Litigation
- Complying with the Families First Coronavirus Response Act

Pillars to a Safe & Effective Return-to-Work Protocol

1. Employee Testing and Screening Procedures
2. Employee Safety Precautions
3. Employee Leave Options
4. Staggered Work Schedules
5. Revised Policies and Handbooks
6. Regular and Effective Communication

Employee Testing and Screening Procedures

- COVID-19 related inquiries and medical exams may be done if job-related and consistent with a business necessity
- Options for effective testing and screening:
 - Daily tests and/or screening
 - Must be “accurate and reliable” according to the EEOC
 - Can include temperature checks and symptom questionnaires
 - Results must be kept confidential
 - If implemented, employer should consult with counsel and a healthcare provider to ensure a lawful protocol is in place
 - Daily or weekly symptom self-certifications
 - May not screen out all infected employees, but cost-effective mitigation strategy
 - Results must be kept confidential

Employee Testing and Screening Procedures

- Are employee testing and screening procedures mandatory?
 - No, but some type of screening is recommended by OSHA and CDC
- What are the Pros and Cons of workplace testing and screening?
 - Pros: evidence that the employer is engaged in good-faith efforts to protect employees
 - Cons: if inaccurate, may create a false sense of either security or concern
 - Quick result tests might have a false negative rate of up to 15%
- What should an employer do if an employee tests positive for COVID-19?
 - Inform others who work at the same office that an employee tested positive
 - Do not disclose the identity of the employee
 - Provide general details about the employee's job duties and general workspace within the office or work space
 - Allow employees to self-quarantine if they believe they have been exposed

When Can an Infected Employee Come Back?

- People who have been sick with COVID-19 symptoms and/or infection should stay away from others until:
 - They have gone at least three days with no fever (without the use of fever-reducing medication), AND
 - All of their symptoms have improved, AND
 - It has been ten days since they first noticed symptoms.

Depending on their healthcare provider's advice and the availability of testing, the person might want to get tested to see if they still have COVID-19. If they get tested, they can be around others when they have no fever, their symptoms have improved, AND they receive two negative test results in a row, at least 24 hours apart.

Asymptomatic people who test positive should wait for ten days after a positive test before mixing with other people again. People who are exposed to someone with COVID-19 need to self-quarantine for at least 14 days.

Employee Safety Precautions

- Require employees who are sick (whether or not they have been tested for COVID-19) to stay home
- Allow all employees to wear masks over their noses and mouths, and gloves.
 - Provide this PPE to employees, if possible
 - May require that PPE be worn while at work
 - May be required to provide alternative PPE, as a reasonable accommodation
- Advise employees to avoid physical contact with others whenever possible.
 - Encourage the use of telephonic and/or video meetings whenever possible
 - Limit the number of attendees for any in-person meetings
 - Encourage employees to keep six feet away from each other, and anyone else with whom they interact
 - Reconfigure work spaces, whenever possible, to maximize social distancing

Employee Safety Precautions

- Require employees to use their own dishes and silverware, and to bring their own water and/or coffee to work
- Close or restrict use of common areas, lobbies, break rooms, and conference or meeting rooms
- Restrict outside visitors to the workplace and encourage online meetings
- Promote personal hygiene and make alcohol-based hand sanitizer and cleaning supplies widely available
- Where office supplies and equipment are shared, provide alcohol-based wipes to clean them before and after use
- Improve air circulation and open doors and windows where/if possible
- Encourage employees to report workplace health and safety concerns immediately

Employee Leave and Accommodation Options

- Employees may be eligible for leave and/or accommodations under any (or a combination of) the following:
 - FFCRA: Families First Coronavirus Response Act (EPSL and EFMLA)
 - FMLA: Family and Medical Leave Act
 - ADA: Americans with Disabilities Act
 - State paid sick leave laws
 - Workers' compensation laws
 - Employer sick leave and PTO benefits
- Requests should be considered and evaluated on a case-by-case basis

Employee Leave and Accommodation Options

- Employers should be aware of the CDC's guidance regarding the “high-risk” characteristics:
 - Age 65 or older
 - Living in a nursing home or long-term care facility
 - People with underlying medical conditions, including:
 - Chronic lung disease or moderate to severe asthma
 - Serious heart conditions
 - Immunocompromised (ex: many types of cancer treatments, smoking, bone marrow or organ transplant recipients, immune deficiencies, poorly treated HIV/AIDS, prolonged use of corticosteroids and other immune weakening medicines)
 - Diabetes
 - Severe obesity
 - Chronic kidney disease treated with ongoing dialysis
 - Liver disease

Employee Leave and Accommodation Options

- EEOC Guidance (as of 5/7/2020):
 - If an employee does not request an accommodation, the employer is not required to provide one, even if the employee may qualify for one
 - If an employer knows that an employee has a “high-risk” characteristic, the employer cannot exclude him/her from the workplace or take other adverse action solely because of that characteristic
 - Exception: The ADA allows such action if the employee’s disability poses a direct threat to his or her health that cannot be eliminated with reasonable accommodations
 - “Direct Threat”: the disability poses a “significant risk of substantial harm” to the employee’s own health
 - This is based on the employee’s specific disability and condition, not the disability in general
 - Even if the employee’s disability poses a direct threat, employer must try all reasonable accommodations before excluding the employee from the workplace or other adverse action
 - Potential accommodations: physical barriers between employee with “high risk” characteristic and other employees, elimination or substitution of “marginal” job functions, temporary modification of job schedule or workplace, teleworking

Use of Staggered Work Schedules

- Employers may give employees the option to continue teleworking and return to the office voluntarily
- Employers may stagger the days or shifts during which employees return to the office
 - Example: 50% work M, W, F; 50% work T, TH in the office
- Employers may stagger the hours or periods during which employees take lunch or breaks

Revised Policies and Handbooks

- Employers should consider revising their policies and handbooks to address the new COVID-19 rules and requirements:
 - If employers revise their policies or handbooks, they should be recirculated to employees for their review and acknowledgment
 - Acknowledgment of the new policies should be kept in employee personnel files
 - Employees should be informed that any violation of the new policies may lead to disciplinary action, if necessary and appropriate
 - Employers should consider how they will enforce the new policies and procedures if employees disagree with or challenge them

Regular and Effective Communication

- Employers should regularly communicate with their employees about revised policies and directives
- Employees who feel that their employer cares about their health and safety are less likely to complain to outside entities
- Effectively communicating policies that prioritize health, safety, and well-being can also prevent liability

Potential Protection from Liability for AZ Businesses?

- Workers' compensation might be an infected employee's exclusive remedy for potential damages, but WC insurers will make coverage determinations on a case-by-case basis.
- Arizona law permits workers' compensation coverage of infectious diseases, provided a relationship is demonstrated between the illness and the individual's work duties. Employers must investigate the circumstances of the employee's infection to determine whether they need to record it in their OSHA 300 log.
- HB 2912: The House passed this bill on May 22, 2020. It protects schools, churches, businesses, employers, etc. from COVID-19 liability based on claims of strict liability, premises liability, or negligence EXCEPT in cases of "gross negligence." The burden of proof is clear and convincing evidence.
- The Senate convened on May 26, 2020, but it did not vote on or pass any bills. They were expected to hold two special sessions this summer to address COVID-19 and budget issues, but they have not yet done so.

Tips on How to Protect From Potential Lawsuits During COVID

Re: Reasonable Accommodation, Wage & Hour, OSHA

- Businesses are understandably concerned about the threat of being sued if their employees and customers get COVID and claim they got it from their return to work. And businesses, especially through the Chamber of Commerce, are pushing for states and Congress to have some kind of broad liability protections from lawsuits related to the pandemic for businesses that do their best to comply with safety standards. Others oppose that as unfair to workers.
- In the meantime, businesses are trying to figure out how best to protect themselves from potential lawsuits, even using liability waivers to have customers acknowledge the inherent risk of exposure to COVID and voluntarily release the employer/business from liability. Whether such waivers are actually enforceable is an open question.
- While these issues continue, ultimately the best way for employers to protect themselves is by doing everything they can to keep their employees and customers healthy – as already discussed.
- In addition, it is also critical for employers to **proactively** anticipate and properly deal with key issues and avoid common mistakes to help further protect against or defend lawsuits. One area for employers to pay careful attention to during COVID to *help avoid* needless lawsuits or EEOC charges is: **Teleworking**. Several aspects of teleworking involve tricky issues such as telework as a reasonable accommodation, managing teleworker performance, telework & wage/hour risks, and safety & related issues.

Teleworking as a reasonable accommodation under ADA

- Reasonable accommodation is any **change in the work environment** or in the way things are usually done that enables an individual with a disability to participate in the hiring process, perform the essential functions of a job, or gain equal access to the benefits and privileges of employment.
- **Teleworking may be reasonable accommodation**, even if an employer does not have a teleworking policy or program.
- Employers may require **medical documentation** to support a telework request under the ADA.
- The ADA does not require an employer to provide teleworking as a reasonable accommodation if it causes **undue hardship**, but employers must consider alternatives.
- **COVID-19 and related government restrictions** have influenced how employers may/should evaluate a teleworking request.

What should telework policies address?

- Continued compliance with all company policies
- Injury/illness reporting
- Work schedule and compensation
- Outline any new/changed job functions
- Payment, if any, for equipment or office expenses
- Company's right to ensure safety in the home office and employee obligations
- Use and return of company property
- Data privacy and confidentiality obligations
- Voluntariness and employee's and/or company's right to end arrangement

Will teleworking require the employer to remove an essential function of the job?

- Teamwork
- Personal Interaction
- Close Supervision
- Access To People Or Documents

(Hint: Job descriptions are key)

Undue Hardship

- Substantial increased expense
- Hiring extra staff or over-burdening co-workers
- Unlimited absenteeism
- Changing conduct rules or performance standards
- Creating a new job
- A position isolated from criticism and supervisor contact
- Reassignment of essential functions to others

No Undue Hardship

- Assignment to a new space
- Adjusting work schedule of disabled employee or other workers
- Parking reimbursement
- Leave of absence (varying length)
- Permanent Reassignment

Undue Hardship & COVID

- Significant Difficulty Posed By Teleworking
 - Needs assessment
 - Acquisition of certain items
 - Performance deliverables
- Significant Expense Of Teleworking
 - Cash flow
 - Discretionary funds

Accommodations: Temporary or Permanent?

- Temporary reasonable accommodations are permissible and may shorten the interactive process
- Accommodations may change as pandemic restrictions change
- OK to provide accommodations on interim or trial basis, with an end date

Permanent?

- Of course not!
- Employers are not automatically required to grant a telework request as a reasonable accommodation just because teleworking was allowed for the purpose of slowing or stopping the spread of COVID-19

“Work at Home/Telework as a Reasonable Accommodation”

<https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>

Managing Telework Performance

- Tracking productivity
 - Metrics will depend on job duties, and may sometimes need to be subjective
- Supervision through video check-ins and calls
- Revise job descriptions to refine the essential functions of the position
 - Incorporate performance metrics?
 - “Optimization”?

Counseling and terminations by videoconference

- Basic rules don't change
- Risks of recording the conference
- Return of employer property

5 Common Telework Wage-and-Hour Compliance Pitfalls (& How to Avoid Them)

- **Reminder:** COVID-19 generally **has not changed** employer wage-and-hour obligations under the FLSA and state law.
- Employer wage-and-hour obligations **remain intact** when employees telework.
 - **Exempt employees** must be paid fixed weekly sum for each workweek in which work is performed without regard to the quantity or quality of work (i.e., **on a salary basis**).
 - **Non-exempt employees** must be paid at least minimum wage (\$7.25 (fed)) **plus overtime** for hours worked in **excess of 40** in a workweek.

No. 1: Failing to pay for all hours worked

The Pitfall:

- FLSA requires non-exempt employees to be paid for all work that is **“suffered or permitted.”** (29 CFR §785.11)
- When non-exempt employees work from home, distinctions between what is work and what is not work are blurred.
 - Constant connectivity—answering e-mails anytime, day or night
 - Informal work-related communication—texting, including “after hours”

Related, Higher-Level Challenges:

- DOL's "continuous workday rule" (29 CFR 790.6(b))
 - Suspended, but only if telework is for COVID-19-related reasons (29 CFR 826.10(a))
- Commute time may become compensable when employee is required to come into the office

Risk Mitigation:

- Teleworking policy/teleworking agreements
 - Must require reporting of all hours worked
- Require work to be performed (typically) on a regular schedule
- Require express approval for overtime hours

Train managers—communication curfew?

No. 2: Failing to accurately track time worked

The Pitfall:

- FLSA requires accurate time records for non-exempt employees.
- Failing to keep accurate time records leads to failure to pay for all hours worked.
- When non-exempt employees work from home, there is risk that not all hours worked will be reported, leading to inaccurate records and FLSA violations.

Risk Mitigation:

- Tech solutions for timekeeping (mobile phone apps)
- Require employee certification of hours worked
- Teleworking policy/teleworking agreements
- Procedure for reporting unpaid hours worked
- Specifically address meal and rest breaks
- Audit timekeeping records

No. 3: Failing to reimburse work-from-home
business expenses

The Pitfall:

- FLSA requires wages to be paid “**free and clear**”—that is, without the requirement of a direct or indirect “**kickback**” to the employer. (29 CFR §531.35)
- If non-exempt employee is required to incur unreimbursed work-from-home business expenses (e.g., laptop, printer, internet connection) and the value takes employee below minimum wage, FLSA violation exists.
 - Example: In 2015, Domino’s pizza repeatedly sued for reimbursing low hourly wage delivery drivers only \$1 for each delivery.
- Several states have enacted laws requiring reimbursement of business expenses
 - E.g., California, Illinois, D.C., Montana

Risk Mitigation:

- Before telework begins, employer should evaluate expenses necessary to outfit home office.
- Telework policy/agreement should expressly address expenses and how they will be covered or reimbursed.
- Special attention should be paid to teleworkers who are paid at or near minimum wage.

No. 4: Failing to pay overtime on
nondiscretionary bonuses

The Pitfall:

- FLSA requires all compensation paid to an employee, with limited exclusions, to be included in the employee's "regular rate" to determine the employee's overtime rate.
- Only **discretionary** bonuses (e.g., unannounced holiday bonus) are excludable; nondiscretionary bonuses **must** be included in the regular rate calculation. (29 CFR §778.200(a)(3))
- Some employers are attempting to incentive non-exempt teleworker performance by offering bonuses to these employees.

Risk mitigation:

- Assume overtime is owed on incentive payments made to non-exempt employees unless analysis has confirmed discretionary nature of payment.
- If nondiscretionary bonuses are paid, ensure overtime is being properly calculated.

No. 5: Risking exempt status by changing
job duties



The Pitfall:

- To be exempt from the FLSA's overtime requirements, employee must be paid on a salary basis and must satisfy duties test (e.g., Executive, Administrative, Professional). (29 CFR §541)
- To satisfy the duties test, “primary duty” must be performing exemption-qualifying work.
- Employers have implemented significant layoffs resulting from COVID-19. These reductions and telework arrangements have resulted in informal modifications to job duties, putting exempt status at risk.

Risk Mitigation:

- Before telework begins, employer must evaluate whether work-from-home arrangement will alter job duties. If so, exemption analysis should be conducted.
- Employer should consider whether telework position requires its own job description.
- Remember salary basis and threshold (\$684/week) remain in place, even for teleworkers.

What are an employer's obligations to ensure employee safety at home?

- Federal OSHA will not inspect home offices
- However, employers must comply with OSHA injury and illness reporting obligations
 - Must determine whether an injury or illness was contracted in connection with work or merely the home environment. See 29 CFR 1904.5(b)(7)
 - This includes COVID-19, despite the difficulties in tracing – see OSHA guidance issued on May 19, 2020
- Workers' comp typically applies
 - Employers have incentive to evaluate safety
 - Virtual inspections?
 - Employee self-inspection and reporting?

Home offices

- Data privacy and confidentiality
 - Secured internet connections
 - Firewalls, encryption, passwords
 - Shredding
 - Prohibit or disincentivize use of personal email accounts, hard drives, or cloud storage
 - Time for a Personal Device policy?

Emergency Paid Sick Leave


- Which employers are required to provide paid sick leave? **Employers with 500 or fewer workers, government employers, and employers subject to a “multi-employer” agreement.**
- How much paid leave must an employer provide? **2 weeks (80 hours).**
- Which employees are entitled to paid sick leave? **All employees affected by the coronavirus, regardless of time employed with the employer.**
- What rate are these employees paid?
 - If the individual employee is affected: regular rate, capped at \$511/day, or \$5,110 in the aggregate.
 - If the employee is taking leave to care for an individual subject to a quarantine, or for children whose schools have been closed: two-thirds regular rate, capped at \$200/day, or \$2,000 in the aggregate.
- What if the employee makes more than \$130,000 per year? **The employee only receives the capped amount.**
- What if the employee has accrued PTO? **Employees may choose to use the paid sick leave provided by the FFCRA first, and the employer can't force them to use accrued PTO before or in place of the emergency paid sick leave.**

Paid Family Leave (Expansion of FMLA)

- Which employers are required to provide paid family leave? **Employers with 500 or fewer workers, government employers, and employers subject to a “multi-employer” agreement.**
- How much paid family leave must be provided? **Up to 12 weeks**
- Who is entitled to paid family leave? **Employees who have been employed for at least 30 days and are caring for children whose schools are closed because of the coronavirus.**
- Is the entire leave period paid? **No.**
 - **First 10 days: Unpaid (employee may use FFCRA paid sick leave or other accrued leave)**
 - **Remainder (10 weeks): Paid by employer**
- What rate are these employees paid? **Two-thirds of their regular rate.**
 - **Capped at \$200/day, or \$10,000 in the aggregate.**
- What if the employee makes more than \$75,000 per year? **The employee only receives the capped amount.**

Recap: how much paid leave can an employee take?

- From: <https://www.dol.gov>




You are following a federal, state, or local quarantine or stay-at-home order or are quarantined by a health care provider

OR

You have COVID-19 symptoms and are seeking a diagnosis

TIME OFF
Up to two weeks or 80 hours of paid sick leave at higher of regular rate or minimum wage*




You must care for someone under a federal, state, or local quarantine or stay-at-home order or are quarantined by a health care provider

OR

You must care for your child whose school, child care provider, or place of care is unavailable due to COVID-19

TIME OFF
Up to two weeks or 80 hours of paid sick leave at higher of 2/3 regular rate or minimum wage*



You must care for your child whose school, child care provider, or place of care is unavailable due to COVID-19

AND

You've been employed at least 30 calendar days

TIME OFF
Up to 10 additional weeks of family leave paid at 2/3 regular rate*

*Paid leave is capped at specific maximum amounts per worker

How Do Employers Afford This?

- The FFCRA provides a tax credit to employers to cover the costs.
 - To take immediate advantage of the paid leave credits, businesses can retain funds that they would otherwise pay to the IRS in payroll taxes, including federal income tax withheld from employees, the employees' share of social security and Medicare taxes, and the employer's share of social security and Medicare taxes with respect to all employees.
 - If an employer is paying more in COVID-19-leave than its payroll tax liability, the employer can immediately file a refund with the IRS
 - The credits covers 100% of up to ten days of qualified sick leave wages and up to ten weeks of qualified family leave wages, plus the amount of the employee's share of Medicare taxes imposed on those wages

Refund Example

- Employer pays \$10,000 in qualified sick leave wages and qualified family leave wages in Q2 2020. Its credits equal \$10,145, which include the \$10,000 in qualified leave wages plus \$145 for the employer's share of Medicare tax. This amount may be applied against any federal employment taxes that Employer is liable for on any wages paid in Q2 2020. Any excess over the federal employment tax liabilities is refunded in accordance with normal procedures. Employer must still withhold the employee's share of social security and Medicare taxes on the qualified leave wages paid.

50 Employees or Less Loophole:

- Small businesses with fewer than 50 employees, including religious and nonprofit organizations, are exempt from paid sick leave due to school closure, place of care closure or child care provider unavailability for COVID-19 related reasons; and emergency paid leave under the Family and Medical Leave Act (FMLA) if offering leave would **jeopardize the viability of the business**
- The exemption applies only to paid leave due to school or child care closures or child care unavailability for coronavirus-related reasons.
- Businesses electing to apply the small business exemption are not obligated to send any documentation to the Department of Labor.
- Businesses applying for the exemption are expected to document why offering paid sick leave or supplemental family and medical leave under these conditions would jeopardize the company. All documentation should be retained for four years.

What is Jeopardizing the Viability of the Business?

An employer with fewer than 50 employees may claim an exemption if the authorized officer determines at least one of the following applies:

- (a) providing the leave would result in the small business' expenses and financial obligations exceeding available business revenues and cause the employer to cease operating at a minimal capacity;
- (b) the absence of the employee or employees requesting such leave would entail a substantial risk to the financial health or operational capabilities of the employer because of their specialized skills, knowledge of the business or responsibilities; or
- (c) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting the leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Department of Labor Guidance

- On April 1, 2020, the DOL issued its final rule implementing and interpreting the FFCRA. Key takeaways:
 - If the employer does not have work for the employee, the employee does not qualify for leave
 - Provides guidance regarding the documentation required to support an employee's request for leave
 - Employees can take intermittent leave only if employer and employee mutually agree
 - A school or place of care is “closed” for FFCRA purposes even if instruction is being provided online.

State of New York v. U.S. Department of Labor

- On August 3, 2020, a New York federal district judge struck down portions of DOL guidance.
- The court's ruling:
 - Struck down work availability requirements for EPSLA and EFMLEA;
 - Vacated the definition of “health care provider”
 - Vacated, in Part, the Final Rule's Intermittent Leave Provisions
 - Invalidates the DOL's Temporal Documentation Requirements

Takeaways from the Decision

- Employers need to monitor the DOL's next steps, which could include anything from seeking a stay, appealing the decision, or creating new rules or interim guidance.
- Given this decision was decided by a single judge in New York, there is a question as to whether this decision is only applicable to New York employers. While the state of New York sought an injunction and declaratory relief that the regulations be struck down, the Court's decision is silent as to its scope.
- But the statutory language of the APA suggests that this is a nationwide abolition of the regulations. That question remains unresolved.
- While non-New York employers may be able to argue that the decision does not apply to them, they are proceeding at their own peril.
- Employers should seek legal counsel when making decisions on FFCRA and other paid leave compliance.



Questions?

Thank you!