

GUIDANCE FOR EMPLOYERS AND EMPLOYEES DURING COVID-19 PANDEMIC¹

We provide this guidance as a general reference for employers during COVID-19 pandemic outbreak in the United States. The information contained herein does not, and is not intended to, constitute legal advice; This article contains links to third-party websites.

(i) Discrimination: Americans with Disabilities Act (“ADA”) - specific protections²

1. ADA-covered employers (15 or more employees) may ask employees who call in sick if they are experiencing symptoms such as fever, chills, cough, shortness of breath, or sore throat. All information about the employee’s sickness or temperature reading, as per #2 below, must be treated as a confidential medical record.
2. Employers may measure employees' body temperature. This is an exception to the ADA’s prohibition of employees’ disability-related inquires or medical examinations. In fact, under the ADA, an employer may not require an employee to undergo a medical examination (to measure an employee’s body temperature would be considered a medical examination), unless it is job-related and justified by a business necessity. Employers are advised to still pay employees sent home for high temperature to minimize legal risks.
3. Employers are allowed to (i) require employees to stay home if they have symptoms of the COVID-19, and (ii) ask employees to leave the workplace.
4. Under the ADA, employers are allowed to require doctors' notes certifying the returning employee’s fitness for duty. However, during COVID-19 pandemic, it is advisable to refer to local clinics, instead of doctors, to provide forms or emails certifying the fitness for duty documentation.
5. Under the ADA, an employer may screen job applicants for symptoms of COVID-19 only after making a conditional job offer, as long as it does so consistently for all new employees.
6. An employer may require employees to wear personal protective equipment during a pandemic.

(ii) **Safety: Occupational Safety and Health Administration (“OSHA”) - OSH Act of 1970**

Many employees are required to travel for business reasons (industrial technicians, sales personnel, employees working at customers’ premises, etc.), but may employers force them to travel domestically and/or internationally amid COVID-19 fears?

Under the Department of Labor’s OSHA standards, employers have the duty to provide a safe workplace³. Employees, in turn, may legitimately refuse to work⁴ where there is an objectively reasonable belief held in good faith of “*imminent death or serious injury*” arising from a hazardous condition and there isn’t enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels. Thus, during COVID-19 pandemic, it is important for employers to carefully evaluate the reasonableness of the employees’ fears before taking any corrective actions against those employees who refuse to work or travel to areas where clusters have been identified. For instance, employers shall consider the threat level of infection and/or whether there is a travel advisory or ban for the area to where the employee would be traveling, any underlying medical conditions, etc.

We urge employers to review additional COVID-19 resources provided by the Centers for Disease Control and Prevention (“CDC”) and the Occupational Safety and Health Act (“OSHA”) best practices on how to prepare and respond to COVID-19 disease. Please refer to:

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; and <https://www.osha.gov/Publications/OSHA3990.pdf>

(iii) **H.R.6201 - Families First Coronavirus Response Act⁵**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act 2020 (the “Act”), which will provide:

1. Free coronavirus testing⁶
2. Paid emergency leave
3. Enhanced unemployment insurance
4. Additional funding for nutritional programs
5. Protections for health care workers and employees responsible for cleaning at-risk places
6. Additional federal funds for Medicaid

These provisions take effect on April 2 and expire on December 31, 2020.

In relevant part, the Act provides for i. Emergency Paid Family Leave, and ii. Emergency Paid Sick Leave requirements.

i. **Emergency Paid Family Leave**

The Act has temporarily amended the Family Medical Leave Act (“FMLA”) to allow eligible employees (note: emergency measure applicable to employers with fewer than 500 employees, and employees who have been on payroll for at least 30 calendar days by the employer) to take up to 12 weeks of job-protected leave if the employee is “*unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency*”⁷ (i.e. COVID-19 declared by federal, state or local authority).

The first 10 days of this emergency leave may consist of unpaid leave; However, an employee can opt to substitute accrued vacation, personal or sick leave during this time, but an employer may not require an employee to do so. The employee must be paid for each subsequent day of leave. Benefits will be capped at \$200 per day and \$10,000 in the aggregate and will expire at the end of 2020.

The emergency FMLA leave requires employers to reinstate employees in the same job or an equivalent position when they return to work. There is an exception for employers with fewer than 25 employees if the position no longer exists due to economic conditions or operational changes that are made because of the public health emergency.

ii. **Emergency Paid Sick Leave**

In addition to amending the FMLA, the Act also requires employers to provide emergency paid sick leave benefits to an employee who is unable to work (or telework) for the following COVID-19 related reasons (please note the list is non-exhaustive):

- (1) The employee is subject to a federal, state, or local quarantine or isolation order
- (2) The employee has been advised by a health care provider to self-quarantine
- (3) The employee is experiencing symptoms and seeking a medical diagnosis
- (4) The employee is caring for someone who is in quarantine or isolation or has been advised to do so (see par. (1) and (2))

(5) The employee's child's school or place of care has been closed or is unavailable due to COVID-19 precautions.

Full-time employees are entitled to eighty (80) hours of paid sick leave benefits, which may be used immediately, while part-time employees must be provided a number of hours equal to the number of hours that such employee works, on average, over a 2-week period. Benefits will be capped at \$511/day for the employee's own care and \$200/day for the employee's care of someone else. The benefits will expire at the end of 2020.

An employer may not require an employee to use other paid leave provided by the employer before using the paid sick time under this new Act.

The aid package does not apply to employers with 500 or more employees. Small businesses with fewer than 50 employees may request to the Secretary of Labor to opt out "*when the imposition of such requirements would jeopardize the viability of the business*". Covered employers that are required to offer emergency leaves as per the above, will be eligible for refundable tax credits⁸.

(iv) Wage and Hour

Finally, federal rules are applicable to all the employers and employees not covered by the emergency Act under (iii). If an employee becomes sick with COVID-19, the general federal requirements are as follows:

1. **NON-EXEMPT** employees under the federal Fair Labor Standards Act (FLSA): employers are not required to compensate for any time not worked. However, it is advisable and good practice to provide some sort of compensation during this time.
2. **EXEMPT** employees: Exempt employees who work any part of a workweek, must be paid their salary for the full week. If an exempt employee does not work any time during a workweek, salary payment is not required. Employers may require employees to use PTO, sick or vacation time.

It should be noted that state and local laws may require paid sick time⁹, as well as additional arrangements may have been included in individual employment agreements and/or company policies.

¹ *For informational purposes only-nothing contained herein shall be deemed legal advice for any purpose; readers are cautioned not to rely on any information contained herein, nor should this information be considered an invitation for an attorney-client relationship.*

² https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

³ *Occupational Safety and Health Act of 1970, Section 5. Duties- General Duty Clause*

⁴ [https://www.osha.gov/laws-regs/interlinking/standards/1977.12\(b\)\(2\)](https://www.osha.gov/laws-regs/interlinking/standards/1977.12(b)(2)) 29 CFR Discrimination against Employees under OSHA Act of 1970

⁵ <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

⁶ *Full coverage without any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements (applicable to private and federally funded health plans; please refer to single plans for details as coverage may differ)*

⁷ *There are exceptions, such as for employees working for a health care provider or emergency responders*

⁸ *Division G-Tax Credits for Paid Sick and Paid Family and Medical leave - refer to a CPA or qualified accountant for details*

⁹ *i.e. New York City, Westchester County, New Jersey, Connecticut, California, D.C., Maryland, and many more*