

Coronavirus FAQs for Employers No. 3

John L. Litchfield, Carrie Hoffman, Kamran Mirrafati, Taylor Eric White
16 March 2020

Coronavirus Resource Center

This is Foley's third installment to the Coronavirus FAQs for Employers. We will continue to publish additional FAQs based on inquiries from clients – including best practices as this workplace challenge continues to develop.

No. 26: May I take my employees' temperatures to determine whether they have a fever?

Under normal circumstances, no. However, now that COVID-19 [has been declared to be a pandemic by the World Health Organization](#), the [EEOC's pandemic flu guidance](#) may be used as a reference. The EEOC states that while measuring an employee's body temperature is a "medical examination," an employer may do so if the pandemic becomes widespread in the community according to state or local health authorities or the CDC. EEOC cautions employers to keep in mind, however, that not all infected employees will have a fever (in the flu context, at least, and is the current thinking about COVID-19 as well). Moreover, employers that decide to take employees' temperatures should be sure they are not doing so in a discriminatory manner. Develop – and stick to – an objective procedure and/or protocol for taking temperatures.

When we provided our Answer to FAQ No. 4, COVID-19 had not yet been declared a pandemic. So this Answer represents an updated response in light of more recent events.

No. 27: If I decide to take employees' temperatures or other health screening procedures, does the person administering the screening need to be a medical professional?

Not necessarily, but if you have a medical professional on staff or available at the worksite, then it is logical that person should be considered to administer screenings. If no medical professional is available, it is prudent to have one or a limited number of employees (ideally within HR or senior management) who are designated and trained to take temperatures so there is consistency to the process. Moreover, remember, employee health information is confidential and should be kept as such, and not be documented in employees' personnel files.

No. 28: Can I require my employees to provide a doctor's note that they are fit to return to work after they have been gone during a pandemic?

Yes, according to the [EEOC's pandemic flu guidance](#) referenced above. However, employers should be realistic in their demands for an employee to see a medical provider under the current circumstances. The healthcare system may become overwhelmed and even now, many healthcare providers are using

telemedicine to “see” patients. Thus, it may actually be impossible for an employee to get a doctor’s note.

No. 29: Can I review I-9 forms remotely?

No. DHS specifically requires that an authorized representative must review original documents and the guidance prohibits reviewing them “via webcam.” However, any authorized representative can be “any person” the employer designates to review the documents and complete page 2, provided the employer ensure that person understands the requirements.

No. 30: Can an employee use paid sick leave in California for quarantine time?

Yes. According to California’s [Labor Commissioner](#), paid sick leave can be used for self-quarantine due to COVID-19 exposure if recommended based on civil authority or travel to a high-risk areas. Despite that, employers cannot require employees to use sick leave in these circumstances. Employees may also be eligible disability benefits.

No. 31: If I decide to shut a worksite over COVID-19 concerns, do I have to provide notice under the WARN act?

Under the WARN Act, employers with 100 or more employees are required to 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 a layoff of the affected employees of at least 6 months or at least a 50 percent reduction in hours of work of the affected individual employees during each month of any 6-month period of the shutdown. This notice is not required if the closure/shutdown is a result of a “natural disaster” or “unforeseeable business circumstances.” WARN does not address whether a pandemic fits within these definitions, although an “unanticipated and dramatic economic downturn” might be considered “not reasonably foreseeable.” Even assuming that the COVID-19 situation qualifies, employees must still provide as much advance notice as practicable and in compliance with the WARN act. Of course, some states have their own so-called “mini-WARN” acts that may cover smaller companies and or require notice for smaller closures, so those requirements should be consulted as well.

No. 32: What OSHA regulations or requirements, if any, are applicable to the COVID-19 outbreak?

Under the [General Duty Clause](#), all employers have a duty under the law to maintain a safe workplace for employees. This means that OSHA may hold employers responsible for not doing enough to protect their employees against the virus. In addition, the Clause gives the agency some flexibility in doing so.

While there are no new OSHA regulations specific to the coronavirus, OSHA points out that employers should be specifically aware of OSHA’s existing standards on [PPE](#), [bloodborne pathogens](#), and [sanitation](#), among others. OSHA also suggests that employers consult California’s [standards](#) on preventing infectious diseases that can be transmitted by inhaling air, which are mandatory for certain healthcare employers in the state. Each of these standards and requirements have potential applicability in dealing with the coronavirus and/or may provide a “framework that may help control some sources of the virus.” Employers should

therefore consult these standards in implementing an appropriate preparation and response plan to reduce the likelihood of drawing an OSHA citation due to a COVID-19 situation.

No. 33: Do I have to record my employee's confirmed case of COVID-19 on my OSHA 300 log?

Employers may have to record the confirmed case of COVID-19 on their OSHA 300 log under certain circumstances. While OSHA regulations state that the common cold or flu is generally not recordable, OSHA [indicates](#) that COVID-19 can be a recordable illness "when a worker is infected as a result of performing their work-related duties." That is, *if* the employee has a "confirmed case" of COVID-19, *if* the case is "work-related" as defined in the [regulations](#) (*e.g.*, exposure in work environment caused or contributed to the illness), *and if* the case meets one of the general recording criteria under the [regulations](#) (*e.g.*, days away, medical treatment beyond first aid, etc.), it must be recorded. Of course, the difficult task for employers (and OSHA, for that matter) is determining when and how an employee contracted the virus. This is a fact-intensive inquiry that will require some consideration of whether, among other things, the employee's coworkers have previously exhibited COVID-19 symptoms, whether the employee has engaged in work travel to any areas with high virus activity, and/or whether the employee has come into contact with customers or vendors who have previously exhibited COVID-19 symptoms.

No. 34: Do I have to report my employee has confirmed case of COVID-19 to OSHA?

Generally, yes, employers may have to report the confirmed case of COVID-19 to OSHA, if two requirements are met: (1) the confirmed case of COVID-19 is "work-related," and (2) the employee is hospitalized as an in-patient or dies because of the confirmed case of COVID-19. Deaths must be reported to OSHA within 8 hours, and in-patient hospitalization must be reported within 24 hours. That said, OSHA does not require reporting if the in-patient hospitalization occurs more than 24 hours after the work-related incident leading to the infection, or if the death occurs more than 30 days after the work-related incident leading to the infection. Again, the "work-related" inquiry is the difficult task in determining whether to report the occurrence to OSHA.

No. 35: I have non-exempt employees who are essential to the operation of our business who cannot work remotely. Knowing that a mandatory work from home policy or government mandate may put added financial burden on them due to increased childcare costs, we would like to help. If I pay a bonus or additional compensation to offset additional childcare costs during the COVID-19 outbreak, must that bonus be factored into the calculation of the regular rate of pay on which overtime pay is calculated?

Historically, payments for childcare are expenses personal to the employee and as provided for in 29 CFR 778.217(d) must be included in regular rate. In December 2019, the Department of Labor revised the regulations and contained in the commentary of the Federal Register notice is the following: "routinely-provided childcare" must be included in the regular rate, but emergency childcare services does not need to be included. The DOL summary says, "Emergency care is provided in the case of unforeseen circumstances, such as when schools or daycares are closed for bad weather or when a child is sick... they can be excluded from the regular rate." While this commentary is not official law, it is hard to fathom that that the

Department of Labor would not consider this situation an emergency and require the addition of a childcare bonus into the calculation of the regular rate. Nevertheless, an opportunistic plaintiffs' employment lawyer might attempt to challenge the exclusion of such bonus from the regular rate in court litigation arguing the comments are not binding law. We recommend working with legal counsel before implementing such a program.

No. 36: If I implement a voluntary work from home policy for the next several weeks or a month for employees who are able to work remotely, do I need to reimburse them for internet, phone or mobile device expenses incurred during that period of time?

Generally, no, but employers should consider specific state laws. [The DOL's guidance](#) does not mandate reimbursement for expenses employees have incurred as a result of a work from home policy implemented during a pandemic. However, employers cannot require employees to reimburse employers for expenses the employee incurs as a result of such a policy, unless doing so would bring the employee's take home pay below minimum wage. In practice, this would only apply to low wage earners and even then is difficult to track unless the employer is certain the employee did not have internet or phone expenses prior to the work from home policy. Moreover, under the Americans with Disabilities Act, no such expenses can be denied for reimbursement if the work from home is provided as an accommodation to a qualified individual with a disability (such as those with HIV, lupus, etc., who are immunosuppressed).

However, state law must be considered, too. In Illinois, for example, state law requires reimbursements for "necessary expenditures," which includes "all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer." Under a voluntary work from home policy, Illinois's law does not require reimbursement under the question posed because (a) the work from home policy is not required, and (b) unless the employer knows the employee did not already have internet/phone access prior to now, such usage is not primarily for the benefit of the employer. If, however, circumstances change and the employer requires an employee who exhibited symptoms of or was exposed to someone with COVID-19, to work from home, or if a government proclamation mandates it, then employers should reevaluate and consider reimbursing if the employee is actually working from home during that period of time. California law is similar to Illinois law, but omits the "primary benefit to the employer" language, and as such, regardless of whether the employee previously had phone or internet service prior to a mandatory work from home policy, reimbursement is likely required (but may not be under a voluntary policy). Other state laws may impose other requirements, so we recommend consulting legal counsel if you do not want to reimburse employees for these expenses.

[Coronavirus FAQs for Employers No. 1](#)

[Coronavirus FAQs for Employers No. 2](#)