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Frequently Asked Questions for US Employers Facing Coronavirus in the Workplace

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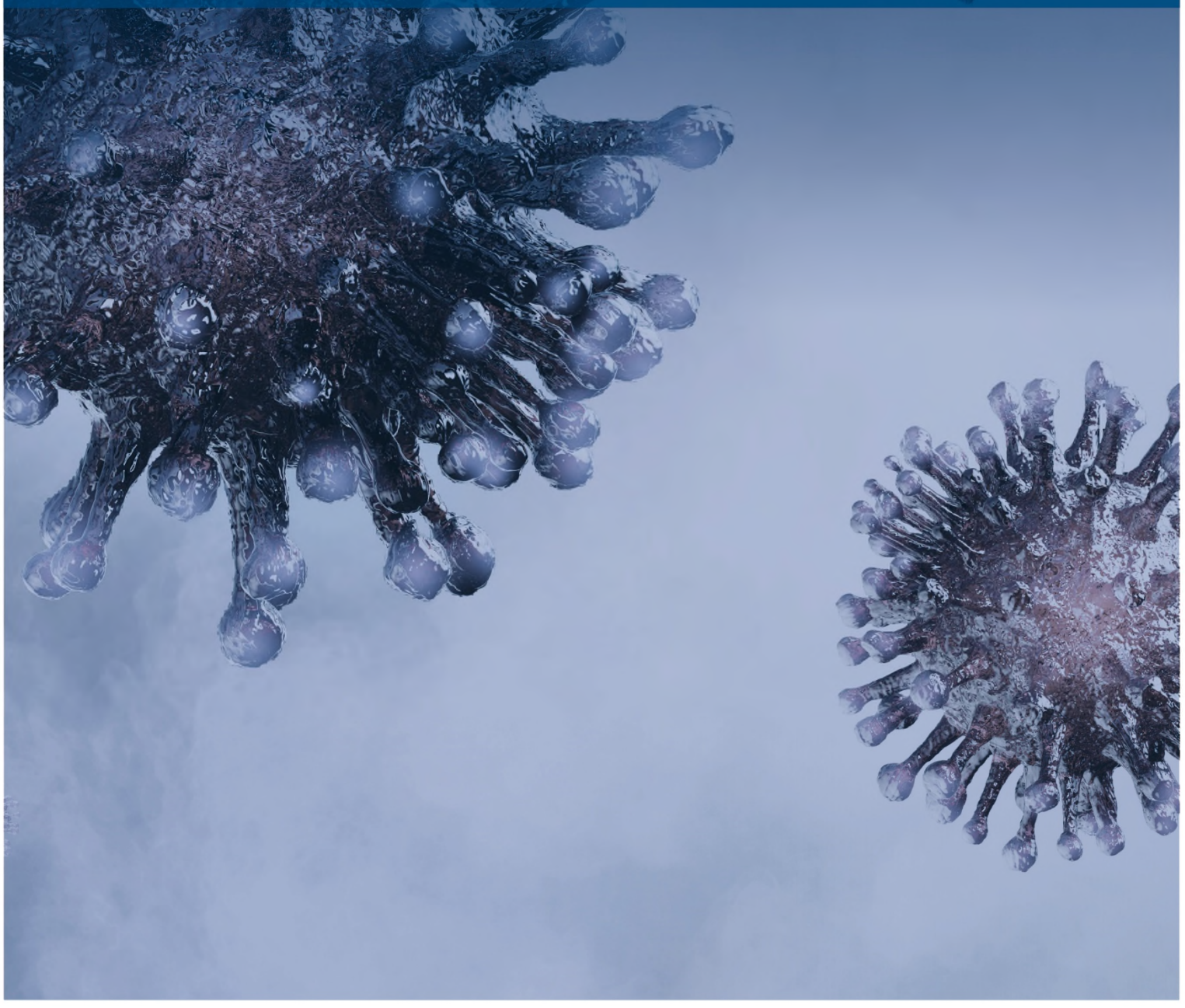

On March 11, 2020, the World Health Organization ("WHO") officially declared the global outbreak of COVID-19, an international pandemic. On March 13, 2020, President Trump declared the COVID-19 outbreak a "national emergency." As the world continues to grapple with the effects of this pandemic, employers are increasingly facing uncertainty over employment-related questions. On March 18, 2020, the Equal Employment Opportunity Commission ("EEOC") issued guidance to employers on how to handle COVID-19: What You Should Know About the ADA, the Rehabilitation Act, and COVID-19.

The following FAQs are intended to provide guidance regarding recent employment-related challenges that have arisen as the COVID-19 pandemic has progressed, and to supplement the Legal Update that we issued on March 9, 2020. These FAQs are not intended to provide an exhaustive analysis of these issues, as every circumstance is unique and should be addressed on a case-by-case basis.

1. What Information may an employer request from an employee who calls in sick during this pandemic?

Employers may ask employees who call in sick whether they are experiencing symptoms of COVID-19, including fever, chills, cough, shortness of breath or a sore throat. Employers must treat all information about employee illness as a confidential medical record and keep it confidential in compliance with the Americans with Disabilities Act (ADA) and related guidance of the Centers for Disease Control (CDC).

2. If an employee tests positive for COVID-19, what information can an employer disclose to other employees?

Notwithstanding the employer's obligations to keep information about employee illness confidential, the CDC has advised that "employers should inform fellow employees of their possible exposure to COVID-19 in the workplace" while maintaining the infected employee's confidentiality. Accordingly, the employer should advise employees who worked near the infected employee that a co-worker has tested positive for COVID-19 without disclosing the employee's identity or details regarding that employee's medical condition. To ensure that the employer notifies all potentially impacted employees, the employer should ask the infected employee to provide a list of all other employees with whom he/she worked or came in contact for the preceding 14 days.

As a practical consideration, protecting employee confidentiality will help to reduce the risk of potential harassment, threats, or retaliation against the infected employee by co-workers or others.

3. If an employee tests positive for COVID-19, is an employer required to quarantine all employees who worked in the same office as that employee?

The CDC recommends that employers inform fellow employees of their possible exposure to COVID-19 if a co-worker has tested positive (subject to the confidentiality obligations described above) and then refer the exposed employees to CDC guidelines on how to conduct a risk assessment of their potential exposure. Based on each such employee's individual risk assessment, employees and employers should follow CDC guidance as to whether they need to self-quarantine.

Employers are not necessarily obligated to quarantine all employees who worked in an office where someone tested positive for COVID-19. The CDC's current risk assessment guidelines advise that anyone who has been in "close contact" with an infected person should self-quarantine for 14 days after exposure. Close contact means either being within approximately six feet of a person with COVID-19 for a prolonged period of time, or having direct contact with infectious secretions of a person with COVID-19 (e.g., being coughed on).

According to the CDC, merely working in the same building or office with someone diagnosed with COVID-19 without having "close contact" with that individual is considered "low risk."

However, from a practical perspective, a conservative approach would be to ask employees who were exposed to the infected employee to self-quarantine for 14 days following their exposure, even if there is some uncertainty as to whether there was sufficiently "close contact."

4. If an employee tests positive for COVID-19, do employers have obligations to report the positive test to government agencies, such as the CDC?

There is no specific federal statute or regulation that requires an employer to report a positive COVID-19 test. The federal Occupational Safety and Health Administration (OSHA) recently advised that "COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties." Although the OSHA injury and illness recordkeeping regulations generally exempt recording the "common cold and flu," OSHA has determined that employers are responsible for recording cases of COVID-19 on their OSHA 300 logs if all of the following conditions are met:

- The case is a confirmed case of COVID-19;
- The case is work-related as defined by OSHA regulations; and
- The case involves one or more of OSHA's general recording criteria, such as days away from work, job transfer, and medical treatment.

As a practical matter, given the way in which COVID-19 spreads, it may be difficult to assess whether an employee was infected at work. But a positive COVID-19 diagnosis is more likely to qualify as recordable under OSHA if two or more employees who work within the same vicinity of each other are all diagnosed with COVID-19.

Importantly, depending on the industry and jurisdiction in which the employer operates, an employer may have mandatory reporting requirements under state law.

Mandated reporting of infectious diseases to public health authorities is largely governed by state regulations. These laws vary by jurisdiction, including with respect to which diseases must be reported, who must report, to whom reports must be sent, and the timing of such reports. While most states mandate that health care providers, clinical laboratories, and others in the healthcare industry report instances of certain communicable and infectious diseases, some states require broader reporting. For example, some states, like Illinois, have public health regulations that include general catch-all provisions requiring anyone who knows of an actual or suspected case of a communicable disease to report it to public health authorities.

Given the variance of state and/or industry-specific regulations, employers should confirm whether they are subject to any mandatory reporting requirements with their state's health department prior to filing a report.

5. Must employers continue to pay employees who are not coming to work because they or their immediate family members have tested positive for COVID-19?

It depends on whether the employee is working. If the employee is non-exempt and is not utilizing any paid leave, the employer generally is not required to pay the employee if he/she has not worked because non-exempt employees need only be paid for actual hours worked.

If the employee is exempt, the answer is more complicated. For example, under the Fair Labor Standards Act (FLSA) and accompanying regulations, exempt employees must be paid their full salary for the entire workweek if they perform any work during any portion of that workweek. As a result, if an exempt employee checks emails, participates in work calls, or otherwise works during the workweek, the employee must be paid his/her full salary for that week. There are exceptions for (i) full-day absences during which the employee is voluntarily absent; and (ii) absences covered by a bona fide sick leave policy. Further, if an exempt employee does not perform any work at all during a workweek, regardless of whether the absence is voluntary or involuntary, the employer need not pay the employee his or her salary for the week. If an employer fails to pay an employee's full salary for a workweek during which a non-exempt employee performed work, the employee's exempt status may be jeopardized.

Separately, employers must allow their employees to use any paid sick leave that they have accrued, either pursuant to state or local law/ordinances or company policies.

Over the past week, the federal government and a number of state and local governments have begun taking steps to enact new paid sick leave laws that will benefit workers impacted by COVID-19. The proposals generally expand currently existing sick leave and family leave rights and add protections for infected or quarantined employees. On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act ("FFCRA"), which takes effect no later than April 2, 2020. The FFCRA applies to employers with fewer than 500 employees and requires employers to: (a) provide employees with two weeks of paid emergency sick leave in the event they have a qualifying need not to work because of COVID-19; and (b) provide employees with up to 12 weeks of emergency leave in the event they have a "qualifying need" because of COVID-19; the first 10 work days are unpaid, but the following leave period of up to 10 weeks is paid leave. Both the paid sick leave and the paid family leave provisions are subject to daily and aggregate caps. Employers who are required to provide these paid leaves pursuant to the FFCRA are entitled to refundable tax credits against payroll taxes for the leave payments. We prepared a separate Legal Update with a more comprehensive analysis of the FFCRA.

6. Can employers require employees who have no symptoms of COVID-19 to come to work?

Perhaps. Employers should be mindful of shelter-in-place and other restrictions on movement and business activities that are being imposed by various state and local governments in determining whether to require their employees to attend work. Most of these new orders permit only "essential businesses"—

which vary among localities—to continue their operations (to the extent employees are unable to work from home in order to continue operating). Employers subject to shelter-in-place or similar directives should assess carefully whether they qualify as an "essential business" under the applicable order before requiring employees to report to work.

More generally, employees are entitled to refuse to work only if they subjectively believe they are in "imminent danger" under the Occupational Safety and Health Act and their belief is objectively reasonable. An imminent danger means a danger which could reasonably be expected to cause death or serious physical harm immediately or before OSHA can eliminate such danger through its enforcement procedures. For imminent danger caused by a "health hazard," the employee must reasonably expect that (1) toxic substances or other health hazards are present and (2) exposure to them will shorten life or substantially reduce physical or mental efficiency. The threat must be immediate or imminent, although the harm caused by a health hazard does not need to happen immediately.

For many workplaces, there will not be an imminent danger of infection by COVID-19, and, consequently, employers can require their employees to attend work. However, employers must consider whether their work conditions might rise to the threshold of creating an imminent danger. For example, requiring an employee to work in a medical setting without proper protective gear or to travel to an area under travel restrictions due to the COVID-19 outbreak could potentially create an "imminent danger" to the employee.

Employers should be mindful, however, that certain employees may have unique circumstances, so careful consideration should be given to each particular employee's situation. For example, employees who have disclosed pre-existing conditions that compromise their immune system, are caregivers for elderly relatives in the same home, or are pregnant may require an employer to be more flexible, and potential leaves under the FMLA or ADA may come into play as well.

Employers should also keep in mind that the Occupational Safety and Health Act prohibits retaliation against employees for raising concerns about safety and health conditions.

7. During the COVID-19 pandemic, are employers permitted to ask health-related questions or take the body temperature of employees?

Yes.

The ADA generally prohibits employers from making disability-related inquiries or requiring medical examinations of employees unless they are job-related and consistent with business necessity, i.e., when an employer has a reasonable belief, based on objective evidence, that (i) the employee's ability to perform essential job functions will be impaired by the medical condition, or (ii) an employee will pose a direct threat to others due to the medical condition.

Making COVID-19-related health inquiries or measuring an employee's body temperature typically are regarded as medical examinations under the ADA. But the World Health Organization recently designated the COVID-19 outbreak as a pandemic and the CDC and state and local health authorities have acknowledged

community spread of COVID-19 and issued attendant precautions. Consequently, the EEOC has advised that health-related inquiries about COVID-19 symptoms and measuring employees' body temperatures are permissible. As a practical matter, employers should be mindful that inquiries and testing may only go so far in trying to prevent the spread of COVID-19, in part because the existence of a fever, while a symptom of COVID-19, does not conclusively establish whether an employee has COVID-19. Some people with COVID-19 do not have a fever, and merely having a fever 100.4 or above does not necessarily mean that an employee has COVID-19.

Importantly, all medical information gathered about any employees, either as a result of questions about their health or that result from temperature testing, must be kept confidential and maintained separate from an employee's personnel records.

8. In recent days, a number of states and localities have issued stay-at-home orders or similar limitations that impact business operations. Do businesses need to shift entirely to a work-from-home model if they are **not** subject to a government shutdown order?

Probably not. While employers should keep up-to-date on the most current CDC, state and local guidance and directives, and implement the measures recommended by the CDC in its Interim Guidance for Businesses and Employers, employers are not currently required to shut down their operations or implement a full work-from-home model (where possible).

However, employers should be mindful of their obligations under the Occupational Health and Safety Act's "general duty clause," which requires employers to provide a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Employers should take steps to minimize potential employee exposure to COVID-19 by allowing work-from-home to the extent possible and implementing other steps suggested by the CDC and state and local officials to reduce the risk of transmission within the workplace.

9. If employers close their business operations and furlough their employees because of COVID-19, do they need to provide prior notice under the federal WARN Act?

It depends on the circumstances.

The federal Worker Adjustment and Retraining Notification (WARN) Act generally requires covered employers to provide employees with 60 calendar days' advance notice of a "plant closing" or "mass layoff" that causes an "employment loss" as specified in the statute. If proper notice is not provided, an employer must pay the affected employees for each of the 60 days where notice was not provided, subject to some important exceptions discussed below.

Employers are subject to the WARN Act if they employ either 100 or more employees, excluding part-time employees, or 100 or more employees (including part-time employees) who work an aggregate of 4,000 hours per week (excluding overtime). An "employment loss" under WARN is: (a) an employment termination; (b) a layoff *exceeding 6 months*; or (c) a reduction in hours of work of more than 50% *during each month of any 6-month period*.

Under the statute, a "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an **employment loss** (defined above) at the single site of employment during any 30-day period for 50 or more employees (excluding any **part-time employees**).

A "mass layoff" is a reduction in force that does not result from a plant closing, but results in an **employment loss** at a single site of employment during any 30-day period for: (a) at least 50 employees (excluding part-time employees) *and* 33 percent of the workforce; or (b) at least 500 employees (excluding part-time employees).

Accordingly, in the event that an employer anticipates a temporary interruption to its business from COVID-19 and furloughs its employees for a period of *fewer than six months* as a result of the pandemic, the federal WARN Act is unlikely to be triggered. Employers, however, should be mindful of the fact that the length of this pandemic and its effect on businesses is currently unknown. As a result, employers should give employees WARN notice as soon as reasonably practicable if they determine that their furlough will last more than six months.

Importantly, the federal WARN Act has two exceptions to the 60-day notice period that may be applicable under the current circumstances:

1. The "unforeseeable business circumstances" exception allows an employer to implement a mass layoff or plant closing before conclusion of the 60-day period if the plant closure or mass layoff "is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control" that was not "reasonably foreseeable as of the time that notice would have been required." The US Department of Labor (DOL) has specifically identified "an unanticipated and dramatic major economic downturn" as a possible unforeseeable business circumstance.
2. The "natural disaster" exception provides that no WARN Act notice is required if a plant closure or mass layoff is "due to any form of natural disaster, such as flood, earthquake, or drought." DOL guidance also includes "storms, tidal waves or other similar effects of nature" in that category.

Employers should be mindful of certain states' "mini-WARN" Acts, which often have different and broader eligibility requirements for employees and stricter obligations for employers, and should stay up-to-date regarding developments in the states and counties in which their employees operate. For example, on March 18, 2020, California Governor Gavin Newsom issued an Executive Order suspending the 60-day notice period required under the Cal-WARN Act because of COVID-19, though employers are still required to provide as much advance notice "as is practicable," with containing certain information. As of the time of this writing, the federal WARN Act has not been suspended.

10. If employers close their business operations and lay off or furlough employees because of a government order, do they need to provide prior notice under the federal WARN Act?

In addition to the considerations listed above, employers who are forced to lay off or furlough employees due to a government order can assert that the WARN Act notice requirements should not apply because the layoff or furlough was not the result of any volitional act of the employer. Some courts have concluded that WARN notice is not required when governmental action results in the inability of employees to work for their employer. See, e.g., *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1047 (9th Cir. 2006); *Buck v. FDIC*, 75 F.3d 1285 (8th Cir.1996). Accordingly, in the event of litigation related to COVID-19 mass layoffs or plant closings resulting in an employment loss, courts may be receptive to an employer's argument that the WARN Act does not apply because the government is effectively ordering the layoff by issuing stay-at-home orders that prohibit employers from operating. Such employers may also be exempt from the WARN Act notice requirements under what is known as the "unforeseeable business circumstances" exception to the Act because the closure of the business arguably was not reasonably foreseeable.

However, and as noted above, employers should stay up-to-date regarding developments in the jurisdictions in which their employees work, as states with mini-WARN Acts may issue state-specific guidance that bears on the necessity of giving notice.

11. Can employers screen job applicants and new hires for symptoms of COVID-19?

Generally, yes. The EEOC recently issued guidance that an employer may screen job applicants for symptoms of COVID-19 *after* making a conditional offer of employment, as long as it uniformly screens all applicants in the same type of job. Furthermore, an employer may delay a job applicant's employment start date if the applicant has COVID-19 or symptoms associated with COVID-19 because the CDC's current guidance provides that individuals who have such symptoms should not be in the workplace. For the same reason, an employer may withdraw a job offer made to an applicant who has COVID-19 or symptoms associated with it if the employer needs the applicant to start immediately. But any such screening should be limited to COVID-19-related symptoms.

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