



Employers: Things to Consider Concerning COVID-19 (March 16, 2020)

There aren't any universal employer responsibilities that crop up as soon as something is declared a pandemic. That said, pay attention to federal, state, and local authorities to see if they are rolling out benefits or prohibitions that you need to be aware of.

Each employer must make the ultimate decision on when, if at all, to allow employees to work from home or to continue payment for sick time or to continue benefits. The decisions are very financial in nature and unique to each group. ETC leadership has compiled a list of things you might want to consider when dealing with this unique time in our business environment.

I. Communications

- Consider sending out a general communication to staff ensuring your commitment to the safety and health of employees. Remind them of the CDC's published and recommended preventative measures along with COVID-19 symptoms.
- Recommend and communicate any expectations relative to a clean workspace.
- Understand that what employees do in their non-work time remains their personal business. Should employee wish to travel, eat out for lunch and dinner, partake in large crowd events, it is their choice and should not be dictated by an employer.
- Keep employees up to date – as conditions change relative to the recommendations of federal, state and/or local institutions, review the impact on the organization and make reasonable operational decisions with a focus on the welfare of employees and business needs.
- Address individual employee needs and concerns. It is important to allow employees to voice any concerns and/or specific needs to ensure that the health and safety needs for them and their family are met.
- Consider providing tissues, hand sanitizer & disinfectants for each office space. Provide resources to assist employees in keeping themselves and their workspace clean and healthy.
- If appropriate, consider deep cleaning of office spaces and/or increased cleaning service frequency.

II. Continuing Business Operations

- Absences & Need for Time Off/PTO vs Unpaid leave.
Consider loosening any strict sick time policies which may be normal practices of the organization. Remind employees of expectations such as those surrounding call-in procedures and need for time off. If employees have Paid Time Off, such should be used for any needed time off as a result of being impacted by COVID-19 and/or resulting school/work closures. Understand that employees may be facing financial and possible childcare hardships and special circumstances may cause for special allowances.

Q: Can employer send employees home who are exhibiting COVID-19 symptoms?

A: Yes.

The Centers for Disease Control and Prevention (CDC) has [advised employers](#) that employees who appear to have symptoms of COVID-19 (e.g., fever, cough, shortness of breath) should be separated from other employees and sent home immediately. If the employee feels well enough to work, consider whether they can effectively telecommute.

Unless otherwise required by individual state regulations, employers are **not obligated** to provide paid time off and/or sick time, at this time. Many employers may allow for some additional paid leave; however, that can prove to be a financial hardship. Remember, the law does not require it. You must make a prudent business decision.

Be prepared for employees who express anxiety about coming to work and evaluate any request on a case-by-case basis. Ease fears based on reliable virus transmission and prevention data from the CDC, if possible.

Q: Can an employee refuse to come to work because of fear of infection?

A: Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13 (a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring travel to China or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. Once again, this guidance is general, and employers must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work. In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in "protected concerted activity for mutual aid or protection." Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers. On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, "talking with one or more employees about working conditions," "participating in a concerted refusal to work in unsafe conditions," and "joining with co-workers to talk to the media about problems in your workplace." Employees are generally protected against discipline or discharge for engaging in such activity.

Employers should consider and even encourage employees to take time off, if needed, to care for themselves or family members who may be ill due to COVID-19. We recognize the increased difficulty of managing the situation considering seasonal allergies and other cold viruses during the Spring as some symptoms a hard to differentiate for many employees. Additionally, employers should refer to CDC guidance to assess risk and determine next steps—see Tables 1 and 2 in the [CDC's Interim US Guidance for Risk Assessment and Public Health Management](#). Employer are advised to use caution and up-to-date published guidelines in this situation. Employers should also use caution when asking about illness and COVID-19.

Q: Can an employer ask employees calling in sick about their symptoms?

A: Yes, but there's a right way to do it and a wrong way to do it. Sample suggested communication: "Thank you for staying home while sick. In the interest of keeping all employees as safe as possible, we'd like to know if you are having any of the symptoms of COVID-19. Are you experiencing a fever, cough, and/or shortness of breath?"

Reminder: Medical information must be kept confidential.

Additionally, if employees do not have childcare available and schools are closed, it is recommended that employers not be punitive in such situations. A collaborative, proactive approach will assist all parties as we are all in this together. Start surveying employees by department to see who may be affected should schools in the local area be shut down and create an appropriate action plan to ensure business operations can continue. (See also telecommuting option section)

- ADA and FMLA Considerations.
 - If you are a Covered Employer under FMLA, be advised that 3 days absence related to an illness qualifies as an FMLA covered illness. Also, employees may need time off to care for family members affected by illness. FMLA provides job-protected leave of 12 weeks. Employers should expect to continue benefit coverage during the 12 weeks, and also expect employees to make their share of any benefit premium contributions timely during FMLA leave. Employers can potentially terminate group benefit coverage for non-payment should certain conditions apply. (ETC HR can assist and provide advice on how to best proceed in this matter. Proceed with caution and only under the advice of FMLA knowledgeable subject matter experts).
 - Non-FMLA Covered Employers should proceed with caution before terminating benefit coverage and initiating a COBRA/State Continuation situation. There is much to consider. (ETC HR can assist and provide advice on how to best proceed in this matter.) Consider allowing employees to take an unpaid leave should an employee and/or employee family member be affected by COVID-19, be exposed to an individual testing positive for COVID-19, and/or travel and return from an area significantly affected by the spread of the virus.
 - ADA Considerations. From an ADA standpoint, employers with employees who are elderly and/or immunocompromised should implement accommodations to meet these employees' needs. In your company communications, set expectations that employees with individual health concerns or needs are expected to bring such forward to discuss with the company. Please keep in mind that under ADA, most employers will have a difficult time providing adequate documentation to justify and demonstrate a financial hardship.
 - Reminder: Keep employee information secure and private relative to medical information.
- Telecommuting.

Employers should start evaluating if telecommuting is an option for employees. If this is not an option, evaluate whether some measures can be implemented to allow for the continuation of essential business operations remotely. Security of data, hardware needs, access to systems and software as well as telecommunication devices are the first step. Non-Exempt employees will remain accountable for recording and submitting on time records for all time worked. Employers should clearly review and communicate employee expectations while telecommuting. Additionally, employers should use caution not to fall into any discriminatory practices when evaluating this option.

- Travel: Business & Personal Implications.
 - Consider your position on business travel and communicate as appropriate with employees and clients. Self-isolation upon return from any travel may also be an option. Consider a general travel moratorium for a defined period and/or location specific travel moratorium. Keep in mind that the situation is rapidly changing and thus, continual monitoring important. [CDC Interim Guidance on Travel](#).
 - Personal Travel. Employers are encouraged to have employees self-report any personal travel to the employer. This will allow the employer to carefully and strategically consider each situation on its own merits based on exposure risk categories outlined by the CDC as well as any up-to-date CDC guidance.

III. Benefits

- Medical Benefit Eligibility.

For employees no longer working or who experience a reduction in hours, they may lose benefit eligibility. Employers should always defer to their group health plan documents to determine whether a loss of eligibility has occurred and when a COBRA notice must be sent. Employers with fully insured group health plans may want to reach out to their insurance carrier to determine whether they will allow for eligibility exceptions related to the coronavirus. Employers with self-insured group health plans should reach out to their stop-loss coverage insurance carriers before making an eligibility exception to ensure they will cover claims of these participants.
- Premium Considerations.

Regardless of whether an employee loses eligibility, Employers should also consider the possibility that some employees may not be able to pay their share of premiums due to not working or experiencing a reduction in hours. Currently, employees remain responsible for their share of any elected benefit premiums, and employers are not required to continue benefit coverage. However, Employers should consider reaching out to carriers providing health coverage regarding whether they will allow for any leniency or payment arrangement that would keep coverage in place. Additionally, Employers subject to FMLA should be mindful of any obligations they have to continue coverage, as described previously. Every situation will be different for every Employer, and we encourage all Employers to see advice before cancelling benefit coverage. The federal government has started to take steps to ease the financial impact on both employers and employee, which may be significant for some and felt by all, but nothing has been implemented at this time. As you continue to monitor the situation, things will evolve daily.
- Resources & Links

- **IRS Publication:** Notice 2020-15:
 - [HIGH DEDUCTIBLE HEALTH PLANS AND EXPENSES RELATED TO COVID-19](#)
 - <https://www.irs.gov/coronavirus>
- **Individual Medical or other health-related Carrier Websites**
- **CMS:**
 - [Individual Small Market COVID 19 Fact Sheet \(3.05.2020\)](#)

IV. General Resources

With the media heavily involved, it sometimes feels hard to separate fact from “fear-based marketing”, so be careful to use resources that focus on the facts.

- **Creditable Resources:**
 - CDC: <https://www.cdc.gov/coronavirus/2019-ncov/>
<https://www.cdc.gov/coronavirus/2019-ncov/hcp/assess-manage-risk.html>
[Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019](#)
 - WHO: <https://www.who.int/health-topics/coronavirus>
 - OSHA: [Guidance on Preparing the Workplace](#)
<https://www.osha.gov/>
<https://www.osha.gov/SLTC/covid-19/>
 - DOL: <https://www.dol.gov/coronavirus>
<https://www.dol.gov/newsroom/releases/osha/osha20200309>
[U.S. DEPARTMENT OF LABOR ANNOUNCES NEW GUIDANCE ON UNEMPLOYMENT INSURANCE FLEXIBILITIES DURING COVID-19 OUTBREAK](#)
<https://www.usa.gov/coronavirus>
 - State & Local Health Departments <https://www.dshs.state.tx.us/>
<https://www.dshs.state.tx.us/coronavirus/>
To easily route to individual states, use link and select state from dropdown menu:
<https://www.usa.gov/state-health>
[Local Health Entities \(by Texas County\)](#)
[US County Search](#)
 - IRS: Internal Revenue Service (IRS) [advice for deducting COVID-19 costs from your taxes.](#)
 - Small Business Administration (SBA) is [working with state Governors to provide low-interest loans to small businesses and non-profits](#) that have been severely impacted by the Coronavirus (COVID-19).