



## **Frequently Asked Questions Answered by HR Professionals**

### **Questions about Employee Safety**

- [Can employees refuse to travel to areas considered safe from COVID-19?](#)

You can require employees to travel as long as you meet your general duty under OSHA to provide a workplace (including any travel location) that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. To ensure that you are not subjecting an employee to excessive risk, check the CDC's Traveler's Health Notices for the latest guidance and recommendations for each country where the employee is traveling.

Perhaps more important than whether you can force an employee to travel is whether you should. Requiring a fearful employee to travel will erode trust and confidence and likely cause them significant anxiety. Consider video calls or videoconferencing as an (inexpensive!) alternative to traveling for the next few weeks or months.

Also keep in mind that employees who are immunocompromised or have other relevant disabilities may be entitled to an accommodation (such as not traveling, given current conditions) under the ADA.

- [Can we send employees home if they are symptomatic?](#)

Yes. The Centers for Disease Control and Prevention (CDC) has advised employers that employees who appear to have symptoms of COVID-19 (e.g., 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.

Note: Non-exempt employees may be entitled to a few extra hours of pay if you're in a state with reporting time pay, but this cost will be well worth it to maintain the safety of the workplace.

- [What if my employee discloses that their family member or roommate has COVID-19?](#)

Our recommendation is to follow guidance from the Centers for Disease Control and Prevention (CDC). Employers should ask employees who live with someone confirmed to have COVID-19 to notify a designated HR representative or their supervisor as soon as possible. The employer and employee should then 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.

- [Given COVID-19, if an employee is out of the office due to sickness, can we ask them about their symptoms?](#)

Yes, but there's a right way to do it and a wrong way to do it. In most circumstances, employers shouldn't ask about an employee's symptoms, as that could be construed as a disability-related inquiry. Under the circumstances, however—and in line with an employer's responsibility to provide a safe workplace—we recommend asking specifically about the symptoms of COVID-19 and making it clear that this is the extent of the information you're looking for.

Here's a 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?"

Remember that medical information must be kept confidential as required by the ADA. If the employee does reveal that they have symptoms of COVID-19, or has a confirmed case, you should see the CDC's Interim Guidance to determine next steps. Tables 1 and 2 will help you assess risk and determine what steps, if any, should be taken.

- [We are an essential business where there's a shelter-in place-rule and an employee is refusing to work as they say it's not safe. Can I discipline them?](#)

This is certainly a difficult situation to be in. We recommend extreme caution in disciplining or terminating an employee who refuses to work in a location that has shelter-in-place rules in effect, as it poses several types of legal risk. Generally, employees do not have a right to refuse to work based only on a generalized fear of becoming ill if their fear is not based on objective evidence of possible exposure. In that case, you would be able to enforce your usual attendance policies. However, under the current circumstances, where COVID-19 cases are increasing and many cities and states are implementing drastic public health measures to control spread of the virus, we think it would be difficult to show that employees have no reason to fear coming in to work, particularly in a location with a shelter-in-place rule.

#### **Are You an Essential Business?**

Guidance has been released as to who and what qualifies as an essential worker or essential business. Please reference [this document](#) to see if your business and workers qualify.

While this document is specific to California, if you are in another state that has not yet released guidance on who or what is essential, this is probably a very good reference and may be identical to what your state releases in the near future.

## Provide Reasonable Accommodation

Employees who are in a high risk category – either because they are immunocompromised or have an underlying condition that makes them more susceptible to the disease – should be granted a reasonable accommodation under the ADA and/or state law. Employees who live with someone who is high risk should be granted a similar accommodation. It would be a reasonable accommodation under the circumstances to allow the employee to work from home or take a non-working leave, if working from home is not possible. Under OSHA rules, an employee's refusal to perform a task will be protected if all of the following conditions are met:

- Where possible, the employee asked the employer to eliminate the danger, and the employer failed to do so; and
- The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists; and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

## No Punishment or Retaliation for Raising Safety Concerns

An employer cannot retaliate against an employee for raising a safety concern. Additionally, employees who won't work because of safety concerns may be considered to be engaging in protected concerted activity under the National Labor Relations Act (NLRA) if they have a "good faith" belief that their health and safety are at risk.

## Incentivize Employees Instead

Instead of disciplining employees who express fear at this time, we recommend you consider methods to encourage employees to come to work and to help put their minds at ease. Consider emphasizing all of the safety methods you have put in place (e.g., scheduled hand-washing, frequent disinfection of surfaces, social distancing rules, reduced customer capacity, staggered shifts, or more extreme measures if warranted by your industry). We recommend relying heavily on CDC and local health department information in establishing safe working conditions at this time. You might also consider offering premium pay or additional PTO for use in the future to employees who must come to work.

- [What should we do if an employee says their symptoms are not related to COVID-19?](#)

This is a tough situation. The Equal Employment Opportunity Commission (EEOC) and the Centers for Disease Control and Prevention (CDC) advise employers to send employees home when they have COVID-19 symptoms (fever, cough, shortness of breath). Employees should not return until they are symptom free for at least 24 hours without symptom-altering medication (e.g., Tylenol, cough suppressants). The CDC is asking employers not to request a doctor's note because of the current strain on our healthcare system due to the pandemic.

If an employee claims that their symptoms are attributed to another cause (e.g., allergies, asthma), the most risk-adverse response would be to send employees home when they have COVID-19 symptoms, with pay. We understand that providing paid leave for all employees is not feasible for every business, but paid leave will incentivize employees to be honest and help you keep your workplace safe. We would also note that, based on news reports, some people have tested positive for COVID-19 without any known exposure.

- [Is it safe for my employees to keep working? How do I decide whether to keep employees working or not?](#)

Ultimately each company will need to determine how it will fulfill its duty to provide a safe workplace to its employees. It's very important to pay attention to federal, state, and local authorities to see if they are rolling out specific guidance or prohibitions that you need to be aware of. For example, some locations have issued an order for individuals to "shelter in place," which drastically limits what workplaces can remain open and provides some guidance for those who can remain working.

COVID-19 is a breaking issue, so guidance has been changing from day to day and region to region. We recommend keeping up with the latest information on the Centers for Disease Control (CDC) Coronavirus [home page](#), related pages on that site, and your local health department for the most up to date guidance for your region and operations.

## Questions about Employees Working from Home

- [Can we require or allow certain groups of employees, but not others, to work from home?](#)

Yes. Employers may offer different benefits or terms of employment to different groups of employees as long as the distinction is based on non-discriminatory criteria. For instance, a telecommuting option or requirement can be based on the type of work performed, employee classification (exempt v. non-exempt), or location of the office or the employee. Employers should be able to support the business justification for allowing or requiring certain groups to telecommute.

- [How do I make a telecommuting policy?](#)

Although some employers will be comfortable sending everyone home with their laptop and saying, go forth and be productive, most will want to be a little more specific. A good telecommuting policy will generally address productivity standards, hours of work, how and when employees should be in contact with their manager or subordinates, and office expenses.

For instance, your policy might require that employees are available by phone and messaging app during their regular in-office hours, that they meet all deadlines and maintain client contacts per usual, and that they check in with their manager at the close of each workday to report what they have accomplished. Be sure to let employees know whom to contact if they run into technical difficulties at home.

You'll also want to specify how expenses related to working from home will be dealt with. If you don't expect there to be any additional expenses involved, communicate this. You don't want employees thinking this is their chance to purchase a standing desk and fancy ergonomic chair on your dime. That said, you should consider whether employees will incur reasonable and necessary expenses while working from home. Some states mandate reimbursement for these kinds of expenses, but it's a good practice to cover such costs even if it's not required by law.

## Questions about Layoffs and Furloughs

- [What's the difference between a furlough and a layoff?](#)

First, you should note that the language used when sending employees home for a period of time is less important than communicating your actual intent. Since temporary layoffs and furloughs are only used regularly in certain industries (usually seasonal), you should not assume that employees will know what they mean. Be sure to communicate your plans for the future, even if they feel quite uncertain or are only short-term.

### **Furlough**

A furlough continues employment, but reduces scheduled hours or requires a period of unpaid leave. The thought process is that having all employees incur a bit of hardship is better than some losing their jobs completely. For example, a company may reduce hours to 20 per week for a period of time as a cost-saving measure, or they may place everyone on a two-week unpaid leave. This is typically not considered termination; however, you may still need to provide certain notices to employees about the change in the relationship, and they would likely still be eligible for unemployment.

If the entire company won't be furloughed, but only certain employees, it is important to be able to show that staff selection is not being done for a discriminatory reason. You'll want to document the non-discriminatory business reasons that support the decision to furlough certain employees and not others, such as those that perform essential services.

### **Layoff**

A layoff involves terminating employment during a period when no work is available. This may be temporary or permanent. If you close down completely, but you intend to reopen in the relatively near future or have an expected reopening date—at which time you will rehire an employee, or all employees—this would be considered a temporary layoff. Temporary layoffs are appropriate for relatively short-term slowdowns or closures. A layoff is generally considered permanent if there are no plans to rehire the employee or employees because the slowdown or closure is expected to be lengthy or permanent.

### **Pay for Exempt Employees (those not entitled to overtime)**

Exempt employees do not have to be paid if they do no work at all for an entire workweek. However, if work is not available for a partial week for an exempt employee, they must be paid their full salary for that week, regardless of the fact that they have done less work. If the point is to save money (and it usually is), it's best to ensure that the layoff covers the company's established 7-day workweek for exempt employees. Make it very clear to exempt employees that they should do absolutely no work during any week you're shut down. If exempt employees do any work during that time, they will need to be paid their normal weekly salary.

### **Pay for Non-Exempt Employees (those entitled to overtime)**

Non-exempt employees only need to be paid for actual hours worked, so single day or partial-week furloughs can be applied to them without worrying about pay implications.

We recommend that you engage in open communication with the affected employees before and during the furlough or temporary layoff period.

## Questions about Pay

- [If we choose to close temporarily, do we need to pay employees?](#)

It depends on the employee's classification.

Non-exempt employees only need to be paid only for actual hours worked. For these employees, you may:

1. Pay the employee for the time, even though they did not work;
2. Require they take the time off unpaid;
3. Require they use any available vacation time or PTO; or
4. Allow employees to choose between taking an unpaid day or using vacation or PTO.

All four options are compliant with state and federal law. We generally recommend option 4—allowing but not requiring employees to use vacation time or PTO. If your office is required to close by health authorities and your state has a sick leave law, employees may be able to use accrued paid sick leave during the closure.

Exempt employees must be paid their regular salary unless the office is closed for an entire workweek and they do no work at all from home. You can, however, require them to use accrued vacation or PTO during a closure if you have a policy that indicates you will do so, or if this has been your past practice. When it comes to accrued vacation or PTO, it is safest to give employees advance notice if there are situations where you will use their accrued hours whether they like it or not.

- [Can we reduce pay because of economic slowdown due to COVID-19?](#)

You can reduce an employee's rate of pay based on business or economic slowdown, provided that this is not done retroactively. For instance, if you give employees notice that their pay will change on the 10th, and your payroll period runs from the 1st through the 15th, make sure that their next check still reflects the higher rate of pay for the first 9 days of the payroll period.

**Non-exempt employees (those entitled to overtime)**

A non-exempt employee's new rate of pay must still meet the applicable federal, state, or local minimum wage. Employees must be given notice of the change at the time of the change, or before. This gives them the ability to stop working if they don't agree with the new rate of pay and can help prevent a wage claim.

**Exempt employees (those not entitled to overtime)**

An exempt employee's new salary must still be at or above the federal or state minimum for exempt employees. The federal minimum salary is \$684 per week. Several states have weekly minimums that are higher than that (California and New York, for instance, are in the \$1,000 per week range). The minimum may not be prorated based on hours worked.

**Exempt employee reclassification**

If an exempt employee has so little work to do that it does not make sense to pay them the federal or state minimum (or you simply cannot afford to), they can be reclassified as non-exempt and be paid by the hour instead. This must not be done on a very short-term basis. Although there are no hard and fast rules about how long you can reclassify someone, we would recommend not changing their classification unless you expect the slowdown to last for more than three weeks. Changing them back and forth frequently could cause you to lose their exemption retroactively and potentially owe years of overtime.

**Employees with contracts or CBAs**

If employees have employment contracts or are subject to collective bargaining agreements, you should consult with an attorney before making any changes to pay.

## Questions about Leaves of Absence

- [How are we supposed to pay for the sick leave and FMLA leave mandated by the Families First Coronavirus Response Act?](#)

On Friday, March 20, the U.S. Treasury, IRS, and U.S. Department of Labor announced their plans for making the paid leave provisions in the Families First Coronavirus Response Act (FFCRA) less burdensome for small businesses. Key points include:

- To take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released next week.
- The Department of Labor will release "simple and clear" criteria for businesses with fewer than 50 employees to apply for exemptions from the leave provisions related to school and childcare closures; and
- There will be a 30-day non-enforcement period for businesses making a reasonable effort.

We know that for many of our clients, business slowdowns related to the spread of COVID-19 have made it hard to imagine how they could bear any additional expenses. We encourage anyone with these concerns to read the linked announcement carefully.

The full announcement can be found here: [Treasury, IRS, and Labor Announcement on FFCRA Implementation](#).

Including the information in the link above, this is all we currently know about the payroll tax credit under the FFCRA and how to access or administer it. We will update the HR Support Center as soon as new information or guidance is available. You can learn more about the details of the leaves (who is covered, what it's for, duration, etc.) on the HR Support Center by searching for "FFCRA."

## Questions about Unemployment

- [If we close temporarily, will employees be able to file for unemployment insurance?](#)

Depending on the length of the closure, employees may be able to file for unemployment insurance. Waiting periods range from 1-3 weeks and are determined by state law. Be prepared to respond to requests for verification or information from the state UI department if you close for longer than the mandatory waiting period.