

## Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

The spread of the novel coronavirus (COVID-19) across the globe remains a significant concern in the workplace. Home care employers are confronting difficult questions regarding how to handle labor/management relations, leave and accommodation, safety and health, and other employment issues. The following Frequently Asked Questions (FAQs) are designed to provide general advice to help address some of the more common questions that home care employers currently face. Developments related to the COVID-19 pandemic are evolving on a daily basis and, as such, the advice provided is subject to change. We will continue to update these FAQs as more information becomes available. Please note the questions and answers on this FAQ are current as of the "Last Updated" date located at the top of this document. Toolkit subscribers will automatically receive the most recent version of the FAQs within their Toolkit, as updates are made available. If you are not a Toolkit Subscriber, we will distribute the updated version of the FAQ to your company's COVID-19 Policy Package Main Contact periodically via email. Home care employers are also encouraged to consult relevant FAQs put forth by the [Centers for Disease Control](#) (CDC) and the [Equal Employment Opportunity Commission](#) (EEOC).. Please keep in mind that different or additional facts can impact how the situation should be handled. For information specific to your business needs, please contact your Littler attorney

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### OVERALL:

**Q: What are the essential documents an employer in the home care industry should have to respond to the COVID-19 pandemic?**

*For more information on obtaining the COVID-19 Policy Package, please contact Melissa Mann at [mmann@littler.com](mailto:mmann@littler.com).*

**A:** At a minimum, home care agencies should use the following documents:

- **Notice to Employees** – tells employees what you will expect of them regarding the COVID-19 Plan (such as that you will require them to certify each time they go into a home that they do not have symptoms, etc.).
- **Notice to Clients Regarding the COVID-19 Plan** – tells clients what to expect regarding the COVID-19 Plan (such as that you won't care for someone who tests positive for COVID-19 and that you will require caregivers to certify each time they go into a home that they do not have symptoms, etc.).
- **Employee Certification of Lack of Exposure** – Creates a record showing that your caregivers do not have symptoms and have not been to "hot spots." This may help you defend an allegation that a client contracted COVID-19 from your caregiver.
- **Client Certification of Lack of Exposure** - Creates a record showing that your clients do not have symptoms and have not been to "hot spots." This will help you determine how (if at all) to staff a case and keep your caregivers safe.
- **Visitor Declaration Form** – This will help you determine if someone coming to your office should not be allowed in.

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- **Communicable Disease Policy** – addresses policies and procedures for your agency in dealing with issues arising from communicable diseases like COVID-19. Some states require such policies by regulation, therefore, you may not need this policy if you have something like it already in place.
- **Telework Program Policy** – Even if you don't need it yet in your area, a telework policy is a good thing to have. It doesn't mean that all of your office employees get to work from home. Rather, it explains when they might and the criteria used to determine if that is an option for them.
- **Fitness for Duty Form** – This is a good document that will be useful even outside the COVID-19 application. You complete the first page and the employee's healthcare provider completes the rest. When completed, you can rely upon it to allow your employee to return to work. Please note that under the current circumstances, the caregiver may not be able to get his or her provider to complete it. In that case, rely on your local or state health department guidelines to determine when the caregiver can return to work.
- **Notice Regarding Confirmed Communicable Disease** – This is a form you can provide your employees and clients when/if an employee is confirmed to have been infected with COVID-19.

An optional document you might want to use is the Client Waiver. Because community-wide transmission of COVID-19 is occurring, anyone letting someone into their home may be putting themselves at risk for contracting the disease. But many of your clients have retained your services because they cannot live without them. This form memorializes that the clients are accepting some risk and agreeing to retain your services nonetheless. It also purports to waive their right to sue you if they contract COVID-19. We cannot guarantee that this waiver of liability will be enforceable in every case and this waiver cannot be used to alleviate an agency's responsibility to take necessary precautions to protect their clients and patients. And you may not want to use this form at all as it may unnecessarily heighten the hysteria surrounding the outbreak. However, it is an optional additional measure that some agencies may elect.

## CLIENT/PATIENT:

**Q: Should a non-medical home care agency care for a person who is symptomatic and has tested positive for COVID-19, is asymptomatic but quarantined or a person under investigation for having contracted COVID-19?**

A: The answer to this question will depend on several legal and business factors. First, you should look to your existing policies, such as a communicable disease policy to see if your policy or governing board has already answered this question. You should also look to any regulations that govern your agency to see if this issue is addressed. If there is no prohibition, you should then determine whether you have sufficient personal protective equipment (PPE) for a caregiver to treat the client. You should also determine whether the caregiver has the proper training to use the PPE correctly. You should also examine your workers' compensation policy to determine if sending a caregiver to care for a client with a respiratory communicable disease would be excluded from coverage if the caregiver were to contract COVID-19. Finally, you should determine whether any of your caregivers would be willing to care for such a client.

If, after running this gauntlet, you think that you would be able to competently care for such a patient, you should also consider whether you would assign the caregiver to care for any other non-COVID-19 clients, which is not recommended. For clients who are diagnosed with COVID-19, if the proper PPE is not used correctly, or the caregiver comes into direct contact with infectious secretions or excretions of the client, then the caregiver would have to be quarantined for 14 days following the last contact with the client (or until the caregiver receives a fitness for duty release). Note, the caregiver's quarantine would not be necessary if the client was just under quarantine or has a negative COVID-19 test after becoming symptomatic. And if the caregiver tests positive for COVID-19, then any other client the caregiver cared for also would have to be quarantined for 14 days following the last contact with the caregiver. Many of our non-medical home care agency clients are electing to opt-out of caring for COVID-19 positive clients and referring these clients to home health agencies due to the concern of inadequate training of many non-medical caregivers in treating clients with communicable diseases.

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**Q: Can we have a waiver of liability form related to infectious disease outbreak (COVID-19) signed as part of providing services to their in-home care clients?**

A: Yes, a template client waiver form is available in the Home Care Industry COVID-19 Response Package. Please note that it is unclear whether such a waiver will be enforceable in every jurisdiction every time. You should consult counsel if you have questions. It is unlikely that this waiver will exempt an agency from negligent or unlawful conduct that results in the unnecessary risk to the client/patient.

**Q: What should we do if someone in a caregiver's household is diagnosed with COVID-19? Should we notify the client?**

A: The caregiver should not be allowed to return to work for 14 days following the diagnosis of the person in the caregiver's home (assuming the caregiver can isolate away from the diagnosed person). Requirements to notify are state-specific. You should check your state and local health departments for more information. We are not aware of any states where an agency would be required to notify the client that the caregiver had been exposed to COVID-19 and was under quarantine. Indeed, the CDC guidance available [here](#), [here](#) and [here](#) suggests the client is not at a materially increased risk if the caregiver was asymptomatic while caring for the client. But the client will wonder why the caregiver isn't working, and you may have a perception of transparency issue if the client later learns that the caregiver had been exposed to COVID-19.

**Q: If we have a resident in a group home and we have a caregiver take the resident to the doctor and he tests positive for COVID-19, what do we do? We don't have quarantined homes. The resident is going to continue to need 24/7 care. What happens if we can't provide our caregivers with PPE?**

A: The CDC provides Interim Guidance for Implementing Home Care for People Not Requiring Hospitalization [here](#). In this guidance, the CDC says that people with confirmed or suspected COVID-19 infection, including persons under investigation, are eligible for a home care if the residential setting is appropriate. This guidance covers patients evaluated in an outpatient setting who do not require hospitalization (*i.e.*, patients who are medically stable and can receive care at home) or patients who are discharged home following a hospitalization with confirmed COVID-19 infection. In general, the CDC says, people should adhere to home isolation until the risk of secondary transmission is thought to be low. A key consideration the CDC recommends a healthcare professional consider when assessing the viability of home care is whether the patient can recover in a separate bedroom without sharing immediate space with others. Additionally, the patient and other household members should have access to appropriate, recommended personal protective equipment (at a minimum, gloves and facemask) and are capable of adhering to precautions recommended as part of home care or isolation (*e.g.*, respiratory hygiene and cough etiquette, hand hygiene). Finally, home care is not recommended where there are household members who may be at increased risk of complications from COVID-19 infection (*e.g.*, people >65 years old, young children, pregnant women, people who are immunocompromised or who have chronic heart, lung, or kidney conditions).

The CDC also provides advice for household members, intimate partners and caregivers of a patient with symptomatic COVID-19 or a patient under investigation [here](#). Among other advice, household members should stay in another room or be separated from the patient as much as possible. Household members also should use a separate bedroom and bathroom, if available. In addition, household members should perform hand hygiene frequently. Wash your hands often with soap and water for at least 20 seconds or use an alcohol-based hand sanitizer that contains 60 to 95% alcohol, covering all surfaces of your hands and rubbing them together until they feel dry. Soap and water should be used preferentially if hands are visibly dirty.

The CDC explains that a patient should wear a facemask when they are around other people. If the patient is not able to wear a facemask (for example, because it causes trouble breathing), the caregiver should wear a mask when in the same room as the patient.

The caregiver also should wear a disposable facemask and gloves when touching the patient's blood, stool, or body fluids, such as saliva, sputum, nasal mucus, vomit, urine. The disposable facemasks and gloves should be thrown out after using them. Do not reuse them. Additionally, when removing personal protective equipment, first remove and dispose of gloves. Then, immediately clean your hands with soap and water or alcohol-based hand sanitizer. Next, remove and dispose of facemask, and immediately clean your hands again with soap and water or alcohol-based hand sanitizer.

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Before agreeing to care for such a patient, you should check your communicable disease policy. You should also ensure you have the proper personal protective equipment, and your employees are trained on using it. You should also check with the state or local health department for additional information.

**Q: What should an acute care facility include in its COVID-19 policy for healthcare workers who work for more than one facility? For context, a hospital will not generally send every healthcare worker home who is called on to care for a COVID-19 patient. Would / should they allow staff who cared for such a patient at their other job to come to work?**

A: The CDC guidance available [here](#) should help you evaluate whether this person is poses a significant risk of exposing your patients to communicable diseases, including the novel coronavirus/COVID-19. Many state health departments also have a tool to assist with risk management, monitoring and work restriction decisions for healthcare personnel with potential exposure to COVID-19 in the healthcare setting. You also may ask the employee if he or she is experiencing any of the symptoms of COVID-19 (fever above 100.4°F, cough or shortness of breath), and if the employee has been in close contact (within 6 feet for a prolonged period) of anyone diagnosed with the novel coronavirus/COVID-19 or another communicable disease, or had unprotected direct contact with infectious secretions or excretions of the patient (e.g., being coughed on, touching used tissues with a bare hand) in the past 14 days without appropriate protection.

## PRIVACY/HIPAA:

**Q: If one of our employees is quarantined, what information can we share with our employees? Who can we share it with?**

A: If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to [this CDC guidance](#) for how to conduct a risk assessment of their potential exposure.

**Q: What privacy concerns do we need to be aware of when we are asking for health information of our employees in order to evaluate whether they need to be quarantined?**

A: Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, sore throat, cough, and shortness of breath. Federal or state law may require the employer to handle the employee's response as a confidential medical record. To help mitigate this risk, employers should maintain the information in a separate, confidential medical file and limit access to those with a business need to know. A template Employee Certification Regarding Lack of Exposure is available on the Home Care Industry COVID-19 Response Package. Please Reference the Employee Certification Regarding Lack of Exposure document that is part of your COVID-19 Policy Package.

**Q: Can a doctor provide the names of workers with COVID-19 to the employer without the employee's consent?**

A: In all likelihood, yes, HIPAA would allow a doctor to disclose a COVID-19 diagnosis to an employer because the disease is a pandemic and communicable. But even if that were to happen an employer would need to keep this diagnosis confidential unless the employee authorizes disclosure due to FMLA, ADA and/or state law confidentiality obligations. For more information on what to do if an employer learns that an employee has been diagnosed with COVID-19, see answer above on this topic.

**Q: Does HIPAA protect information provided to the employer by the employee's doctor to support a leave claim?**

A: No, HIPAA is not the source of the employer's confidentiality requirement. Instead, the FMLA, ADA and/or state law has its own confidentiality provision. That confidentiality requirement would apply to protect the information.

**Q: Can an employer disclose to its clients where the company's employees have traveled or where they plan to travel?**

A: Yes.

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**Q: Are there any privacy issues if the employer singles out a sick employee and sends the employee home? Is the employer somehow disclosing Personally Identifiable Information about a medical condition (since other employees may notice) when they send the employee home?**

A: Merely sending an employee home does not trigger any privacy issues. But the employer should instruct employees to maintain the confidentiality of health information regarding any such employee.

**Q: May an employer require new entering employees to have a post-offer medical examination to determine their general health status?**

A: Yes, if all entering employees in the same job category are required to undergo the medical examination and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

## ADA CONSIDERATIONS

**Q: What if a caregiver calls in sick with symptoms related to COVID-19? How long do we keep them off assignment? Do we need documentation to permit them back to work? Do we have to disclose to any or all people that may have been in contact with said caregiver? Notification requirements to government entity?**

A: The response to a caregiver calling in with symptoms consistent with COVID-19 will depend on the circumstances and guidance provided by your state or local health department.

If the caregiver has been in close contact without appropriate protection with someone who has been diagnosed with COVID-19, the caregiver should be quarantined for 14 days from the date of the last potential contact and asked to monitor their health. You should also direct the caregiver to contact their physician immediately. The caregiver may return to work earlier if cleared by a physician.

If a caregiver tests positive for COVID-19 and is isolating at home, the person should remain under home isolation until released to return to work by a physician or as allowed by health department guidance.

If the caregiver has not been in close contact with anyone known to have been diagnosed with COVID-19, then they may return to work once they have been free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g., cough suppressants), or as allowed by your state or local health department.

Please note that given the current state of our system, it is possible a caregiver would not be able to obtain a physician release. In those cases, you should look to your state or local health department for further guidance. In most areas, the health department will advise that the employee may return to work after 24 to 72 hours of being symptom-free without the use of medications (whether over the counter or prescription) that may mask the symptoms.

You should notify the local health department and all clients with whom the caregiver was in close contact during the preceding 14 days if the caregiver tests positive for COVID-19. You should check your state and local health departments for additional guidance. We are not aware of any states where an agency would be required to notify the client that the caregiver had been exposed to COVID-19 and was under quarantine. Indeed, the guidance suggests the client is not at a materially increased risk if the caregiver was asymptomatic while caring for the client. However, a client may wonder why the caregiver isn't working, and you may have a perception of transparency issue if the client later learns that the caregiver had been exposed to COVID-19.

**Q: What do I do if an employee refuses to work with a COVID-19 client/patient?**

A: As long as there is sufficient Personal Protective Equipment for employees qualified to care for COVID-19 patients, an employee who refuses to care for such a client or patient should be disciplined for insubordination and even, potentially, patient abandonment. However, if there is no PPE available (or the employee is not certified or trained on use of the PPE), employees may be given the right to refuse to treat such a client or patient.

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**Q: What if a caregiver specifically requests to avoid a client who is showing symptoms of or tested positive for COVID-19?**

A: Caregivers who refuse to treat a COVID-19 client or client who may have this virus, should be handled on a case-by-case basis. If the caregiver has access to and properly wears all necessary PPE, then the caregiver should be protected against the risk of infection arising from "contact" with an exposed/infected client. In such case, generally speaking, the employee who refuses to care for such a client or patient should be disciplined for insubordination or, if applicable, patient abandonment. If the caregiver has a medical condition that makes them more susceptible to infection (suppressed immune system, pregnancy, etc.), however, it would make sense to avoid placing those individuals in a potential exposure situation. In those cases a reasonable accommodation discussion may be needed. If necessary PPE is not available, the employee may be given the right to refuse. And, if PPE is not available, the agency should strongly consider not servicing or restricting the services provided to the client while showing symptoms of COVID-19 or while deemed contagious.

**Q: What do I do if an employee indicates that he or she suffers from an impairment that potentially affects his or her ability to care for a COVID-19 patient (e.g., a compromised immune system, asthma, etc.)?**

A: Such employees should be treated like other disabled employees under the Americans with Disabilities Act, and any similar state law. Employers should immediately engage in the interactive process to identify and implement a reasonable accommodation. Such accommodations may include additional or improved PPE, limited exposure to COVID-19 clients or patients, and the like. If it is possible to do so, the best course may be to assign such employees to work involving non-COVID-19 patients. If reassignment is impossible, employers should consider placing the employee on a leave of absence until there is sufficient work available.

**Q: Can I require employees to be tested for COVID-19 and or to submit to temperature checks?**

A: Temperature checks and testing normally constitute overly broad medical exams under the ADA and various state laws. As such, a mandatory testing and temperature checks are usually inherently risky. But the EEOC has now explained on its [website](#): "Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever."

It is important to note that the New York Department of Health, Division of Home and Community Based Services issued a guidance letter on March 14, 2020 stating that all caregivers "must be screened for respiratory and fever symptoms upon arriving at work." The guidance goes on to state: "Staff showing symptoms of illness must not be permitted to remain at work or visit patients and must not return to work until completely recovered." Please note, this guidance is limited to New York State and you should check your own state or local health department for additional guidance.

Also, a temperature check program should only be one element of a comprehensive program, in which other components should include employee education, employee and visitor questionnaires related to other risk factors, limitations on non-essential travel, encouragement of work from home, and assessment of paid leave.

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## **Q: How can I implement a temperature check requirement to ensure a consistent process?**

A: At minimum:

- Checks must be conducted on all employees each time they enter a client's home. For the office, if temperature checks are implemented, they should be performed on everyone entering, regardless of whether an employee, client, vendor or visitor.
- The check may be conducted by the caregiver. In the office, it should be conducted by someone who has adequate training to perform the check consistently and safely (without risking their own health or those being checked) and operate the equipment properly.
- The check should be documented appropriately and confidentially, and the documentation stored securely, noting that each check represents individual medical data that may be subject to various privacy requirements. A single log book is not sufficient.
- There must be an objective cutoff for elevated temperature e.g., all persons registering 100.4°F or higher will be excluded from caring for clients and the office's premises for at least 14 days or until provision of a negative test result for COVID-19 and flu.
- All persons whose temperature exceeds the cutoff must be excluded for the requisite time, regardless of their status.

## **Q: What should I do if an employee refuses a temperature check or other required testing?**

A: When an employee objects to having their temperature taken (or other testing) and is disciplined or sent home, there is the potential for a retaliation claim or a disability discrimination claim under a "regarded as disabled" theory. Based upon the nature of the employee's job, employers should consider allowing work from home or sending the employee home without pay (if work cannot be performed from home). The employer should consult any policies that may bear on this situation and should strongly consider not disciplining the employee other than the loss of pay.

## **Q: What if an employee requests to wear a mask as an accommodation?**

A: The CDC does not recommend that people in non-healthcare occupations who are well wear a facemask to protect themselves from respiratory disease, including COVID-19. This guidance, however, does not apply to healthcare workers. The CDC recommends that healthcare workers who care for patients with known or suspected COVID-19 use respirators if medically cleared, trained and fit-tested pursuant to a [respiratory protection program](#) and, when no longer available, facemasks.

The CDC explains that facilities that do not currently have a respiratory protection program, but care for patients infected with pathogens for which a respirator is recommended, should implement a respiratory protection program.

The CDC does recommend that facemasks should be used by people who show symptoms of COVID-19. However, if an employee shows symptoms or as been diagnosed with COVID-19, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask. For more information, click [here](#).

If an employee asks to wear a face mask as an accommodation of another condition (such as an autoimmune condition that, the employee reports, may cause a "direct threat" of harm to the employee if he/she contracts the virus), the employer should, at the very least, engage the employee in the interactive accommodation process before denying the employee's request to wear the mask. Pending the conclusion of the interactive process, such an employee should not be required to remain in the workplace. If, through the interactive process, the employer determines that the employee does, indeed, have a disability that would pose a direct threat and that wearing a face mask is the only accommodation that will sufficiently reduce or eliminate the threat, the employer should allow the employee to wear a face mask unless it would interfere with the employee's ability to perform his/her essential job functions or it would pose an "undue hardship."

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**Q: Are employees eligible for state disability and/or paid family leave insurance as a result of an employer-instituted quarantine or temporary shutdown?**

A: Currently, in most states, the answer is no. But this issue is rapidly developing. New York, Colorado, and Washington are among the states that have passed specific laws requiring pay for absences due to COVID-19, and federal law is being developed.

An employer-instituted shutdown probably would not qualify under state disability and/or paid family leave laws. However, if the business closure was by order of a public official due to a public health emergency, employees would qualify for paid sick leave under many state and/or local paid sick leave laws.

**Q: Does contracting COVID-19 constitute having a disability under the ADA?**

A: For exposed employees who experience no symptoms, or only mild, temporary symptoms, COVID-19, standing alone, likely would not qualify as a "disability" under the ADA. However, an employee who contracts COVID-19 may be entitled to reasonable accommodation and protection under the ADA if the employee's reaction to COVID-19 is severe or if it complicates or exacerbates one or more of an employee's other health condition(s)/disabilities.

Employers should assess whether a particular employee is "disabled" under the ADA on an individualized basis, taking into account the employee's particular reaction to the illness, their symptoms and any other relevant considerations. In addition, COVID-19 may qualify as a disability under applicable state disability laws with definitions of "disability" that are less stringent than the ADA's definition.

**Q: When should we require a fitness for duty test and/or return to work clearance?**

A: Employers may request a fitness for duty or return to work certification if an employee has been quarantined by a treating medical provider or public health official or the employer has placed the employee off work based upon reasonable, objective evidence that the employee may pose a direct threat of harm in the workplace (such as because he or she exhibits the symptoms of COVID-19). However, the certification should be narrowly tailored to seek information that is job-related and consistent with business necessity. Also note, given the current circumstances, it may be difficult for an employee to obtain a fitness for duty release.

**Q: Should the employer pay for the employee's medical examination in conjunction with requesting a fitness for duty or return to work certification?**

A: The EEOC says employers that require employees to go to a healthcare provider chosen by the employer should pay all costs associated with the visit. Employees permitted to go to a provider of their choice generally may be required to cover the cost of any medical examination permitted by the ADA. For more information, click [here](#).

**Q: Should hourly employees be paid for time spent receiving temperature checks and/or other testing?**

A: Yes. Any temperature checks or other testing should be performed while the employee is "on the clock."



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## LEAVES OF ABSENCE\*\*\*

\*\*\*It is likely that the federal government will be enacting new legislation that will impact the answers to these questions. We will supplement those answers if that happens. Please continue to monitor these FAQs or look for an email update if you are not a Littler Home Care Toolkit subscriber.

### **Q: What can we do to help our employees deal with child care needs when schools are closed?**

A: Employers should not hurriedly create an onsite child care center. Child care centers are heavily regulated by government agencies and subject to a multitude of licensing requirements which vary by jurisdiction. Given this, and the liability risks associated with such operations, especially in a pandemic situation, we recommend employers leave these types of operations to licensed, professional child care service providers. These types of providers can, and do, operate onsite child care centers for many employers throughout the country, however, these centers generally require extensive time and advance planning before being launched.

There are ways that employers can help their employees care for their children during unexpected school closures. One way is to provide emergency child care stipends or subsidies. Some states have restricted child care centers to children of employees working in the health care field. While it is currently uncertain whether such payments qualify as tax-free disaster payments under Internal Revenue Code Section 139 (meaning employers can make these payments to employees without having to withhold or pay income and payroll taxes), it is certain that such emergency payments can be excluded from an employee's regular rate of pay when performing overtime calculations under the Fair Labor Standards Act, so long as the monies are not tied to the quality or quantity of work performed.

It is also important to note that several states have forms of "school activities leave" which require protected leave for certain child-related activities, including to address a child care provider or school emergency, including school closures. See, e.g., Cal. Labor Code § 230.8. In addition, pursuant to many states' paid sick leave laws, employees have the right to take paid sick time for school closures ordered by a public official due to a public health emergency. For example, Oregon's and New Jersey's enforcement agencies have specifically advised in connection with COVID-19, that employees may use statutory, paid sick leave if their child's school or daycare is closed due to COVID-19. We expect additional states to take this approach.

### **Q: Are employees required to stay home because of COVID-19 entitled to paid sick leave?**

A: Employees who are actually sick may be entitled to paid sick leave where such leave is available under state or local laws and or employer policies. However, such paid leave may not fully cover an ill employee's recovery time, and likely does not cover employees required to be away from work as a precautionary measure or other COVID-19-related issues such as school closures.

Many employers are creating a new bucket of paid sick leave benefits specific to COVID-19 absences – including infection, quarantine, sick time for corona virus-like symptoms, and school closures, which would apply to such employees who cannot otherwise work from home. This seems like an important step to prevent employees who are sick from coming to work.

Pay for employees' loss of work due to COVID-19 might be mandated by new paid leave laws developed specifically to address the pandemic (and by other paid leave laws generally). New York, Colorado, and Washington are among the states that have passed specific laws requiring pay for absences due to COVID-19, and federal law is being developed. The House of Representatives recently passed significant legislation that includes expanded paid and unpaid leaves related for certain reasons related to COVID-19. The House legislation leaves many questions unanswered and is likely to change significantly as it makes its way through the Senate.

The Washington Department of Labor & Industries (L&I) announced on March 5, 2020 that it is immediately changing its policy around workers' compensation coverage for health care workers and first responders who are quarantined by a physician or public health officer. Under the new policy, L&I will provide benefits to these workers during the time they're quarantined after being exposed to COVID-19 on the job.

Employers should consult counsel to assess where pay might be required.

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**Q: Do we need to provide additional paid sick leave for COVID-19 symptoms in addition to what we already provide?**

A: No.

**Q: Can we bring in nurses or other healthcare professionals from other states to meet patient demand?**

A: Many states recognize the Nurse Licensure Compact (NLC). Under the NLC, nurses licensed in one NLC state can practice in other NLC states, without having to obtain additional licenses. Currently, 32 states have implemented the NLC. In non-NLC states, nurses must be licensed by the state in which they intend to practice.

**Q: Can we allow employees to use paid sick leave even if a mandatory paid sick leave law does not cover the absence?**

A: Yes. Even if only temporarily, employers can allow employees to use paid sick leave for non-paid-sick-leave purposes such as COVID-19 related absences. Employers should provide employees written notice that explains the policy change and the reason for the change. The notice should make clear that the change is temporary and that the company reserves the right to discontinue the policy change at its sole discretion.

If employers use an accrual-based system and implement an accrual cap, or frontload leave, the written notice should explain what impact, if any, there will be concerning the amount of leave an employee can accrue or the company will frontload. For example, say a law allows a 40-hour annual accrual cap, the employee accrued that amount, and used those hours for a non-paid-sick-leave COVID-19 purpose. Will the company create a temporary exception to the accrual cap and allow the employee to accrue additional hours to replenish the amount of available paid sick leave should the employee experience a covered paid sick leave absence later during the year?

**Q: Can we force an employee to take sick time if they are showing symptoms of COVID-19? Do we have to pay for the testing for the caregiver if we are mandating they take time off?**

A: An employer can send an employee home if they are showing symptoms of COVID-19. While the employer can “encourage” an employee to voluntarily use any available sick leave, an employer generally speaking cannot mandate such use. See, e.g., Cal. Labor Code section 246 (k) (“An employee may determine how much paid sick leave he or she needs to use”). Thus, the employer could certainly advise employees regarding their available sick leave and remind them that it provides paid time off that could be applied to their circumstances, but it cannot force them to use it.

Employer also can “encourage” employees to be evaluated by their doctors, but we generally do not recommend an employer “force” an employee who is sick to go to the doctor. However, it is permissible under federal and California law to require a medical examination of a current employee when it is: (1) job related and consistent with business necessity; or (2) there is a reasonable belief that the employee may pose a direct threat. Note, an employee likely would not be deemed to pose a “direct threat” due to COVID-19, **unless** the employee is known to have contracted the virus, has traveled to a high risk area within the last 14 days, has come into close contact with someone known or likely to have the virus in the last 14 days, or is exhibiting symptoms that may be associated with the virus (fever, cough and/or shortness of breath).

If employer does require an employee to see a doctor for a fitness for duty exam or to obtain a release to return to work, the examination should be narrowly tailored and based on an objectively reasonable assessment that the employee would otherwise present a direct threat to a vulnerable patient population. In addition, the employer would be obligated to pay for the examination if it sent the employee to a health care provider of its choosing. However, if the employee voluntarily goes to the doctor or goes to a doctor of the employee’s own choosing, the employee would be responsible for paying for the visit.

# Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

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## WAGE & HOUR

**Q: Can I send non-exempt employees home without pay (e.g., furloughs, quarantines, etc.)?**

A: Generally, an employer can send a non-exempt employee home without pay and, so long as the employee performs no compensable work, no wages are due. As a practical matter, however, paying employees for missed shifts or for an employer-mandated quarantine period would encourage compliance with any company COVID-19 or other communicable disease policy (requiring employees to call in sick and not report to work, for example), bolster employee morale in uncertain times, and likely slow any spread of COVID-19 in the workplace by encouraging important “social distancing.”

Each employer must consider both legal and operational factors when determining the best approach for its business. Certain jurisdictions also require reporting time pay to compensate the employee for reporting to work even if no work was performed or if the employee was sent home prior to working a full shift.

Jurisdictions with some version of a reporting time pay law include California, Connecticut (for hospitality or mercantile only), District of Columbia, Hawaii, Massachusetts, New Hampshire, New Jersey, New York, Oregon, and Rhode Island. Employers with non-exempt employees in these jurisdictions should consult applicable law to assess when and how much reporting pay is owed. Note also, that paid sick leave laws also may apply.

**Q: Do scheduling changes as a result of COVID-19 events qualify as an exception under scheduling law?**

A: The state and/or local laws regarding predictive scheduling of which we are aware and that are currently in effect do not regulate employment in the home care or health care industries.

**Q: What if the employer has to cut hours because of loss of business?**

A: When an employer shuts down its operations because of a health issue for less than a full workweek, exempt employees must be paid their full salary. This rule also applies if exempt employees work only part of a day. Thus, if an employer decides to send staff home early, it may not dock exempt employees’ pay.

Nonetheless, and barring any state law or overly restrictive company policy to the contrary, exempt employees may be required to use accrued leave or vacation time (in full or partial days) for their absences, if the accrued leave policy expressly permits the Company to require its use. While it might not be a popular move, an employer can direct exempt employees to take paid time off for the closure, pursuant to the employer’s bona fide leave or vacation policy. If, on the other hand, an employee does not earn or does not have any available leave time, the employee is entitled to his or her full guaranteed salary if the employer decides to close due to the conditions.

If an employer is open for business, on the other hand, an exempt employee who elects to stay home due to the health situation is considered absent for personal reasons. In lieu of paying salary, an employer with a bona fide leave or vacation policy may require the employee to use his or her accrued paid time off to cover the absence, if the accrued leave policy expressly permits the Company to require its use. As long as it is permitted by state law and by the Company’s leave program, leave time in this circumstance may be taken in full or partial days.

If an employer has a leave policy, but the absent non-exempt employee does not have a leave account balance, the employer is not obligated to pay the non-exempt employee. The employer can place the non-exempt employee on unpaid leave for the full day(s) that he or she failed to report to work for personal reasons.

Additionally, there are certain reporting time pay laws in some states. Those laws are discussed below. For a more robust analysis, see [Littler’s GPS survey](#) on this issue, here, which is included in the subscription Littler Home Care Toolkit subscribers.

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<b>Hours Worked: Reporting Time Pay</b>	
<b>California</b>	<p><b>General Rule.</b> An employee who reports to work on a scheduled work day but is not put to work or is furnished with less than half his or her usual or scheduled day's work must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at the employee's regular rate of pay. If an employee is required to report to work a second time in a scheduled workday and is furnished less than 2 hours of work, he or she must be paid for 2 hours at his or her regular rate. California Wage Orders Nos. 1-15, § 5(A), (B).</p> <p>"Reporting for work" may mean telephoning the employer two hours prior to the start of a shift to determine if an employee should physically come in to work. Employees will be owed reporting time pay for this on-call time. <i>Ward v. Tilly's, Inc.</i>, 2019 WL 421743 (Cal. Ct. App. Feb. 4, 2019).</p> <p>A notable exception is that reporting time pay does not apply when "operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities." It also does not apply when the "interruption of work is caused by an Act of God or other cause not within the employer's control"</p>
<b>District of Columbia</b>	<p><b>General Rule.</b> An employee who reports for work under general or specific instructions but is given no work or is given less than 4 hours of work must be paid for a minimum of 4 hours. However, if an employee is regularly scheduled for less than 4 hours a day, the employee must be paid for the hours regularly scheduled.</p> <p><b>Calculation of Wages.</b> The minimum daily wage must be calculated using the employee's regular rate for hours worked plus payment at the minimum wage for hours not worked. D.C. Mun. Regs. tit. 7, § 907.1.</p>
<b>Massachusetts</b>	<p>When an employee who is scheduled to work 3 or more hours reports for duty at the time set by the employer, and that employee is not provided with the expected hours of work, the employee shall be paid for at least 3 hours on such day at no less than the basic minimum wage.</p> <p>If an employee is, in good faith, scheduled for less than three hours, the employer may pay the employee for only the hours worked.</p> <p><b>Exceptions.</b> The reporting time pay requirement does not apply to organizations granted status as charitable organizations under the Internal Revenue Code. 454 Mass. Code Regs. § 27.04.</p>
<b>New Hampshire</b>	<p><b>General Rule.</b> An employee who reports to work at the employer's request must be paid for at least 2 hours of work at his/her regular rate of pay. An employer who makes a good faith effort to notify the employee not to report is not required to pay the two hour minimum. However, if an employee reports to work after the employer's attempt to notify is unsuccessful or the employer is prevented from making notification, the employee shall perform whatever duties are assigned by the employer at the time he/she reports to work.</p> <p><b>Exceptions.</b> The above provisions do not apply when: (1) an employee reports to work and requests to leave on the basis of illness, personal emergency or family emergency provided a written explanation, initialed by the employee, is entered on the employee's time slip or card; (2) an employee who is hired and reports to work with the expectation that he or she will work less than 2 hours and is notified in writing in advance of his or her schedule; or (3) in the case of healthcare employees of community-based outreach services providers, when an employee voluntarily makes a scheduling change to meet physically or mentally infirm clients' needs, if they signed a statement at the time of hire stating they understood this job requirement was exempt from the reporting time pay requirement.</p>

# Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

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<b>Hours Worked: Reporting Time Pay</b>	
<b>New Jersey</b>	An employee who by the request of an employer reports for duty on any day must be paid for at least 1 hour at the employee's regular rate. This provision does not apply to an employer who made available the minimum number of hours agreed upon between the employer and employee before the work began on the day involved.
<b>New York</b>	<b>General Rule.</b> Miscellaneous Industries: An employee who by request or permission of the employer reports for work on any day must be paid for at least 4 hours, or the number of hours in the employee's regularly scheduled shift, whichever is less, at the basic minimum hourly wage. N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.3.
<b>Rhode Island</b>	<b>General Rules.</b> An employer who requests or permits any employee to report for duty at the beginning of a work shift and does not furnish at least three (3) hours work on that shift, shall pay the employee not less than three (3) times the regular hourly rate. Provided, however, that shifts scheduled for less than three (3) hours are permissible when entered into voluntarily and agreed upon by both the employer and employee. In the event that an employee reports for duty at the beginning of a work shift and the employer offers no work for him or her to perform, the employer shall pay the employee not less than three (3) times the regular hourly rate or the amount they would have earned for any shifts consisting of less than three (3) hours, as allowed under this section.  <b>Exceptions.</b> The above provision does not apply if an employee is prevented from working a normal shift by reason of events beyond the employer's control or by acts of God.

**Q: How much notice must I give employees of a reduction in pay?**

A: Employers should provide written notice no later than the day before the change will be effective. These states require earlier advance notice: State Notice Requirement

**Alaska**

Notice by the payday before the change becomes effective

**Maine**

One working day's advance notice

**Maryland**

One pay period's advance notice

**Missouri**

30 days' advance written notice (the sole remedy for violations of this statute, however, is a penalty of \$50 per employee)

**Nevada**

Seven days' advance written notice is generally required, but is not required if the "employer complies with the requirements relating to the decrease that are imposed on the employer pursuant to the provisions of any collective bargaining agreement or any contract between the employer and the employee."

**New York**

Seven calendar days' advance written notice

**North Carolina**

Twenty-four hours' advance written notice

**Pennsylvania**

Notice by the payday before the change becomes effective

**South Carolina**

Seven calendar days' advance written notice

**Virginia**

One pay period's advance notice

New York, Washington D.C and the City of Minneapolis also require employers to obtain signed acknowledgements by employees of the notice of pay change.

California, Washington D.C., and New York require notices of pay reductions to be provided in the employee's primary language. States with unique "wage theft prevention" laws may require particular format for written notice, depending on the circumstances.

# Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

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**Q: Can I reduce the pay of exempt employees to reflect a reduced workload related to a furlough, quarantine, etc.?**

A: Exempt employees must be paid their full salary for a workweek if they perform any work in the week (whether approved in advance or not, and including minimal tasks, such as checking emails). On the other hand, if an exempt employee performs no work in a 7-day workweek, the employer need not pay the employee's salary for that week. However, most employers grappling with the COVID-19 downturn hope to continue their exempt employees' work in some capacity each week, even if limited.

The issue may be avoided (within limits) by structuring the partial-week furlough as an advance, lengthy reduction in the employee's salary rate, combined with a reduced work schedule. Any programs that combine salary rate reductions with workweek expectation reductions should follow the following rules:

First, any combined work schedule and salary rate reductions should be in place for a substantial period. Guidance from the U.S. Department of Labor has consistently rejected short-term reductions in salaries. Reductions need not last forever – they may be reversed after economic conditions improve. However, no guidance exists on how briefly a reduction may be in place. Given the lack of guidance, partial-week furloughs should be intended to continue indefinitely while unusual economic difficulties continue, and generally for months, not weeks.

Second, employers should not adjust salary rates and schedules in concert too often. If an employer varies work schedules and salary rates in concert too often, they will be treating the employee too much like an hourly employee (varying pay in relation to the amount of work performed), and exempt status may be lost.

**Q: Can I reduce the pay of exempt employees while maintaining their workload to reflect current economic conditions?**

A: Employers considering advance salary reductions due to reductions in their business activity, without reducing employees' work schedule expectations, should also take care not to adjust salary rates too often. Frequent changes would tempt a court to invalidate exempt status. To maintain exempt status, reduced salary levels must not fall below the higher of the federal and applicable state minimum salary rates required for exempt status. These minimum rates are not pro-rated for reduced work schedules. For 2020, the minimum federal salary rate is \$684 per week. Higher minimum 2020 salary rates exist in Alaska, California, Colorado, Maine, and New York.

**Q: Can I mitigate some of these issues by converting exempt employees to non-exempt status?**

A: Yes. Business requirements may dictate that employers keep some salaried exempt workers on part-time at weekly pay levels not high enough to maintain exempt status. If so, the employer must convert the employees to non-exempt status, subject to all resulting obligations including time keeping, minimum-wage compliance, overtime payments calculated on all wages (including bonuses and other incentive pay), and meal and rest breaks where required. In addition, when the employer can later return the workers to full-time, they may want to consider leaving the employees as hourly non-exempt, to avoid the claim that their loss of salary protection during the downturn shows that they are no longer paid on a salary basis.

# Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

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## WARN ACT

### Q: If the employer has to lay off employees, are there notification requirements under WARN?

A: There may be. Federal WARN and state mini-WARNs require employers to provide advance notification (60 days or 90 days, depending on the jurisdiction) to employees and government officials of certain group employment terminations. Not all layoffs trigger these requirements, however, and exceptions may apply. Temporary layoffs of less than six months in length are not considered to be employment losses under federal WARN, and the same is true under many, but not all, state mini-WARNs. (California WARN, for example, can be triggered by a short-term layoff, but is not necessarily triggered by a short-term layoff imposed to address potential contagion.)

The size of the layoff also matters. Federal WARN is not triggered unless, at a minimum, there are 50 employment losses at a single site of employment in a 90-day period. State mini-WARNs can be triggered at lower levels. For example, New York WARN can be triggered by 25 employment losses at a single site of employment, and effective July 19, 2020, New Jersey WARN can be triggered by 50 employment losses aggregated across all sites in the state.

Even if one of these statutes is triggered, however, an exception in the statute may apply. For example, many (but not all) jurisdictions permit shortened WARN notice when layoffs are the result of an unforeseeable business circumstance. Reliance on shortened notice, however, requires actually giving written WARN notice, with as much advance notice as can be given. It is important to consult the laws of the specific jurisdiction involved.

Jurisdiction	Reduced Notification Requirement
Federal	<b>Exceptions That Reduce the Amount of Notice Required:</b> <ul style="list-style-type: none"><li>The dislocating event is caused by business circumstances that were not reasonably foreseen 60 days prior to the layoff or plant closing.</li><li>The closing or layoff was a direct result of a natural disaster.</li></ul> In the above situations, the employer must give as much notice as is practicable, and include a statement of the basis for the reduced notice.
Connecticut	<b>Exclusions.</b> A closing does not include: Covered establishments shutting down operations due to natural disasters.
Delaware	<b>Exceptions.</b> Employers are not required to provide notice: <ul style="list-style-type: none"><li>if the mass layoff or plant closing is caused by business circumstances that are not reasonably foreseeable (examples include a principal client's sudden, unexpected termination of a major contract, a strike at a major supplier, an unexpected dramatic major economic downturn, or a government shutdown of the site without prior notice);</li><li>if the mass layoff or plant closing is due to a natural disaster, such as a flood, earthquake, or drought; or</li></ul> Employers unable to provide notice due to one of these instances must provide as much notice as practicable with a brief statement of the basis for the reduced notification period.

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Jurisdiction	Reduced Notification Requirement
Iowa	<p><b>Exceptions &amp; Special Circumstances</b></p> <p><i>Unforeseeable business circumstances</i></p> <p>An exception to the 30-day notice requirement will exist if all of the following conditions are met:</p> <ul style="list-style-type: none"> <li>• Business circumstances occurred that were not reasonably foreseeable at the time that the 30-day notice would have been required.</li> <li>• The employer must, at the time notice is actually given, provide a statement of explanation for reducing the notice period in addition to the other general notice requirements</li> <li>• An important indicator of a reasonably unforeseeable business circumstance is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer’s control.</li> <li>• The employer exercises commercially reasonable business judgment as would a similarly situated employer in predicting the demands of the employer’s particular market. The employer is not required to accurately predict general economic conditions that also may affect demand for products or services.</li> </ul> <p><b>Natural disasters</b></p> <p>An exception to the 30-day notice requirement will exist concerning natural disasters (floods, earthquakes, droughts, storms, tornadoes, and similar effects of nature are natural disasters) if:</p> <ul style="list-style-type: none"> <li>• A natural disaster occurred at the time notice would have been required.</li> <li>• The employer, at the time notice is actually given, provides a statement of explanation for reducing the notice period in addition to the other general notice requirements</li> <li>• An employer demonstrates that the business closing or mass layoff is a direct result of the natural disaster.</li> </ul> <p>However, if a business closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the unforeseeable business circumstance exception may be applicable.</p>
New Hampshire	<p><b>Notice Exceptions Include:</b></p> <ul style="list-style-type: none"> <li>• The need for notice was not reasonably foreseeable at the time notice would have been required; or</li> <li>• The mass layoff or plant closing is necessitated by a physical calamity, natural disaster, or an act of terrorism</li> </ul>
New Jersey	<p>Termination of Operations is the permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within in single establishment. It does not include the termination of operations made necessary by a natural disaster, national emergency, act of war, civil disorder or industrial sabotage, etc.</p>



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Jurisdiction	Reduced Notification Requirement
New York	<p><b>Exceptions That Reduce the Amount of Notice Required:</b></p> <ul style="list-style-type: none"> <li>The dislocating event is caused by business circumstances that were not reasonably foreseen 90 days prior to the plant closing;</li> <li>The closing or layoff was a direct result of a natural disaster;</li> </ul> <p>In the above situations, the employer must give as much notice as is practicable, and include a statement of the basis for the reduced notice.</p>
Philadelphia, PA	<p>This ordinance does not apply to involuntary closings. Under the ordinance, involuntary closings are any closing pursuant to a court order or any closing caused by, fire, flood, natural disaster, national emergency, acts of war, civil disorder, or industrial sabotage</p>
Vermont	<p><b>Unforeseen Business Circumstances:</b> The business closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time the 45-day notice would have been required. A business circumstance that is not reasonably foreseeable may be established by the occurrence of a sudden, dramatic, and unexpected action or condition outside the employer’s control. Examples include a principal client’s sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, an unanticipated and dramatic major economic downturn, or a government-ordered closing of an employment site which occurs without prior notice.</p> <p><b>Disaster:</b> The business closing or mass layoff is due to a disaster beyond the employer’s control. The employer must show that: 1) The closing or layoff was the direct result of a natural disaster including fire, floods, earthquakes, droughts, storms, or other similar effects of nature; and 2) It provided as much notice as was practicable and available under the circumstances, either in advance or after an employment loss caused by the disaster. When a plant closing or mass layoff occurs as the indirect result of a disaster, the exception does not apply, but the exception for unforeseeable business circumstances may be applicable.</p>
Wisconsin	<p><b>Events that do not Trigger Notice Requirements Include:</b></p> <ul style="list-style-type: none"> <li>A natural or man-made disaster beyond the control of the employer</li> <li>A temporary cessation in business operations, if the employer recalls the affected employees within 60 days</li> </ul>

**Q: Is there an exception to WARN for epidemics?**

A: No. Federal WARN and CA WARN each have provisions addressing terminations due to natural disasters. 29 U.S.C. Sec. 2101(b) (2) (shortened notice permitted for “natural disasters such as floods, earthquakes or drought”); Cal Labor Code Sec. 1401(c) (notice not required for “physical calamity or act of war”). We think these provisions cannot be stretched to cover an epidemic. This is particularly so for CA WARN, which requires a “physical calamity or act of war.” Neither statute has an exception specific to epidemics.

# Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

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## WORKERS' COMPENSATION

### **Q: What are the employer's workers compensation obligation if an employee tests positive for COVID-19?**

A: Generally speaking any illness or injury arising out of or in the course of employment is an industrial injury. Any contagious disease contracted at work would be industrial.

The problem with such illnesses is whether we know for sure where the worker contracted it, so as to prove that work is more likely than not the cause. This is even more difficult if the caregiver works for multiple agencies. Determining whether the injury will be deemed industrial will depend on who the caregiver interacted with and when. If one of the caregiver's clients becomes ill with COVID-19, and then the caregiver is also diagnosed, then there is a good chance the illness will be deemed industrial.

Many states have statutory provisions that indicate that when in doubt, disputes should be resolved in favor of providing benefits. So where it may be impossible to know for sure when or where the worker contracted the illness, the worker may prevail.

Most states' workers' compensation laws require that the workplace present an "increased risk" or "risks peculiar" to the workplace as well. So, a home care or healthcare worker who contracts a communicable disease (such as COVID-19) would be more likely to have a compensable claim than an office or factory worker – particularly in areas where community spread is occurring.

## HEALTH AND SAFETY

### **Q: Outside of the CDC, where can I find information related to OSHA and COVID-19?**

A: The federal OSHA has prepared a document called: "Guidance on Preparing Workplaces for COVID-19." It is available [here](#). OSHA also maintains a website devoted to this topic, which can be found [here](#). Please keep in mind several states also have occupational health and safety laws and agencies. You should consult your own state's laws and agencies for additional information.

### **Q: Is COVID-19 Considered an "Illness" under OSHA's Recordkeeping Rules?**

A: OSHA's recordkeeping rules only apply to injuries or "illnesses." The rule defines an injury or illness as "an abnormal condition or disorder." "Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning." Despite this broad definition, OSHA has essentially excluded from coverage cases of common cold or the seasonal flu.

OSHA has made a determination that COVID-19 should not be excluded from coverage of the rule – like the common cold or the seasonal flu – and, thus, OSHA is considering it an "illness." However, OSHA has stated that only confirmed cases of COVID-19 should be considered an illness under the rule. Thus, if an employee simply comes to work with symptoms consistent with COVID-19 (but not a confirmed diagnosis), the recordability analysis would not necessarily be triggered at that time.

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## **Q: When is a COVID-19 Case Considered Recordable?**

A: If an employee has a confirmed case of COVID-19, the employer would need to perform an assessment as to whether the case was “work-related” under the rule and, if so, whether it met the rule’s additional recordability criteria (*i.e.*, resulted in a fatality, days away from work, restricted duty, or medical treatment beyond first aid). Given current protocols for treating COVID-19, it is likely that for any case that is confirmed, the additional severity criteria will be met, as affected persons are instructed to self-quarantine and stay home. Thus, the primary issue for employers is whether a particular case is “work-related.”

A particular illness is work-related under the rule if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for illnesses that result from events or exposures in the work environment, unless it meets certain exceptions. One of those exceptions is that the illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside of the work environment. Thus, if an employee develops COVID-19 solely from an exposure outside of the work environment, it would not be work-related, and thus not recordable.

The employer’s assessment should consider the work environment itself, the type of work performed, risk of person-to-person transmission given the work environment, and other factors such as community spread. Healthcare work environments, where job activities are more likely to result in person-to-person exposure, would present a more likely scenario of work-relatedness, than non-healthcare settings. However, each work environment is different, and employers must conduct an individualized assessment when a confirmed case of COVID-19 presents.

## **Q: When is a COVID-19 Case Reportable?**

A: As with the recordability analysis above, if an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees. It is important to note, however, that the reporting obligation is time limited. Thus, if a fatality due to COVID-19 occurs after 30 days from the workplace incident leading to the illness, an employer is not required to report it. Similarly, if the in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, an employer is not required to report. Given the nature of COVID-19 and the disease progression, this may result in fewer reports to OSHA despite expected hospitalization of cases going forward.

## **LABOR/MANAGEMENT RELATIONS**

### **Q: Do we have to bargain with the union over things like mandatory COVID-19 testing, required temperature checks, or other such changes to the terms and conditions of employment?**

A: Yes. Changes to employees’ terms and conditions of employment are mandatory subjects of bargaining. However, many collective bargaining agreements contain “management rights” clauses that expressly permit hospitals and medical centers to promulgate and enforce operational policies and practices and/or to dictate standards, methods, or procedures. Other collective bargaining agreements contain specific provisions allowing, or even requiring, employers to maintain the health and safety of the workplace or workforce. Such provisions should allow employers to require testing, temperature checks and the like. However, mandatory testing and/or temperature checks may implicate other workplace laws, [as discussed above](#).

### **Q: Does a government mandated quarantine or state of emergency excuse non-compliance with an existing collective bargaining agreement?**

A: Probably not. A government mandated quarantine or declared state of emergency only excuses compliance with a collective bargaining agreement when compliance with the mandated quarantine or state of emergency make compliance with provisions of the agreement impossible. It is not enough that contract compliance is made less convenient or more difficult.

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**Q: What is the impact of a government-declared quarantine or state of emergency on union contract provisions that would otherwise prohibit or limit an employer's ability to comply?**

A: A government-declared quarantine or state of emergency would excuse compliance with union contract obligations if and only to the extent the mandated terms of the quarantine or state of emergency make compliance with those obligations impossible. Note that it is not enough that contract compliance is made less convenient or more difficult or that the mandate has created new or expanded obligations. Compliance with existing contract obligations must be impossible in order for the obligation to perform to be excused.

**Q: What is the impact of a government-declared quarantine or state of emergency on NLRA bargaining obligations that would otherwise exist?**

A: Companies have no duty to bargain over the decision to implement non-discretionary changes in terms and conditions of employment mandated by law, though effects bargaining may still be required. To the extent a government ordered quarantine or state of emergency gives companies discretion over when and how to comply, companies will have a duty to immediately notify the union and, upon request, bargain over the decision absent proof its decision is covered by the CBA or exigent circumstances exist. Also note that bargaining over the discretionary aspects of a mandate is more akin to "effects" bargaining, and would encompass processes for achieving compliance with legal mandates in a manner consistent with contract obligations and existing policies or practices.

**Q: What do I do if an employee refuses to comply with a change in their terms and conditions of employment (e.g., testing, temperature checks, floating, etc.)?**

A: If employees refuse to comply – or if the union instructs employees not to comply – advise employees they may be subject to discipline if they continue to refuse. If they continue to refuse, consider disciplinary action for insubordination, if discipline is practical. Again, this may cause grievances and/or unfair labor practice charges that can be dealt with afterward. If discipline is impractical or impossible consider bringing in outside non-union staff, such as agency or contract employees. Also, consider the possible damages from any disciplinary action. Terminating employees creates greater potential liability than putting employees on disciplinary leave.

**Q: May "Act of God" or "actions beyond the control of the Company" language in a CBA apply?**

A: Yes. You should carefully review your CBA to determine if such language exists and may serve as a defense if actions you may want or be required to take to protect employee health and safety and/or your business are alleged to violate your CBA or NLRA bargaining obligations.

**Q: Do the above rules apply to actions a company may take in order to comply with food safety and other regulations?**

A: Yes. Whether or to what degree a company is excused from union contract and/or NLRA bargaining obligations will turn on whether the actions it takes are legally mandated or involve the exercise of some discretion.

**Q: Do the above rules apply to discretionary "best practice" actions companies may choose to implement?**

A: Yes. Companies would have legal risk if and to the extent such actions are not legally required, and violate union contract and/or NLRA bargaining obligations.

**Q: Do "Right to Work" laws in Alabama, Iowa, Indiana, North Dakota, Virginia, and Wisconsin supersede union contract restrictions that would apply to potential COVID-19 responses?**

A: No. These laws simply prohibit companies from enforcing union security clauses that require employees to maintain union membership and pay dues as a condition of employment.

# Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

Last Updated March 23, 2020

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**Q: What are the normal remedies for violating NLRA bargaining obligations?**

A: Unfair labor practice charges usually take 30-60 days for a regional NLRB office to investigate and, if a complaint is issued, a year or more to litigate with appeals. The normal remedies for such violations are:

- A cease and desist order requiring a return to the pre-violation status quo;
- An order that employees be made whole for economic losses (or a Transmarine remedy if the alleged violation only involves effects bargaining); and/or
- A Notice of Rights posting. It is unlikely in the current environment that the NLRB would seek or obtain interim 10(j) injunctive relief restoring the status quo while litigation is pending.

**Q: What are the normal remedies for CBA violations?**

A: If a union claims its rights under the CBA were violated, the grievance procedure could take a month or more, and arbitration, if requested, would take over a year to complete with appeals. The normal remedy for a CBA violation is an award requiring a return to the pre-violation status quo and that employees be made whole for economic losses. It is also possible a union will file a reverse Boys Markets action in federal court seeking a temporary injunction restoring the status quo pending arbitration (the union would have to prove a company's action threatens irreparable harm to the economic security of employees).

**Q: Are unions using COVID-19 as part of new organizing efforts?**

A: Yes. Unions are criticizing company responses (especially the lack of paid leave, sufficient staffing, and a process to address employee safety concerns) in recent organizing efforts. The best thing a non-union employer can do is be transparent. Develop and communicate a COVID-19 response that is compliant with state/federal mandates and "best practice" recommendations, be as flexible as is reasonably possible in balancing the interests of employees and the business, and regularly update employees. In short, Coronavirus responses should be tailored to comply with existing union contracts and bargaining obligations unless it is satisfied it can prove such compliance is truly impossible or unless it determines compliance is so impractical that it is worth assuming the legal risks associated with non-compliance.

**Q: What steps can unionized employers consider as a risk mitigation strategy?**

A: Steps can include:

- Immediately notifying unions that the company is developing a COVID-19 response plan. State: (1) safety is a shared priority; (2) The company is monitoring the situation to understand best practices and intends to comply with any legal mandates; and (3) The company appreciates the unions' cooperation.
- For non-discretionary responses or discretionary responses covered by your rights under a CBA, notify unions what you intend to do, when, and why, and request that questions be directed to a single point of contact. Give reasonable pre-implementation notice if possible and bargain over the effects upon request without delaying implementation.
- For discretionary decisions where union consent is needed or bargaining obligations are believed to apply, seek to fulfill these obligations if at all practical but not at the expense of more material business risk.