# COVID-19 MASTER OSHA, CONSTRUCTION AND EMPLOYMENT LAW FAQs

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As COVID-19 continues to affect our daily lives, it is crucial for employers to be aware of the steps the government is taking to reduce infection, how those steps affect your business, and the protocols your business needs to implement to ensure you are complying with what is required under these abnormal circumstances. Below is a list of the most frequently asked questions we are receiving from our clients, ranging from employment issues to OSHA compliance. Our hope is that the advice we provide will help you navigate some of the novel workplace issues that the outbreak continues to present the industry.

**Am I allowed to ask employees if they have or think they might have COVID-19?**

Yes. The Equal Employment Opportunity Commission (EEOC) released guidelines in 2009 amidst the H1N1 ("swine flu") epidemic that give employers crucial guidance for maintaining a safe workplace while avoiding violating an employee's rights. In taking the position that illnesses related to global pandemics – which COVID-19 is now considered – are dissimilar to the disabilities that the Americans with Disabilities Act (ADA) and other employee's rights laws were designed to protect, the EEOC allows employers more flexibility in performing health inquiries and screenings of their employees.

**When and what can I ask?**

According to the EEOC, employers should follow the Interim Guidelines issues by the Center for Disease Control (CDC) and Occupational Health and Safety Administration (OSHA) when determining the risk an employee poses to the jobsite or workplace. The CDC suggests screening employees who exhibit symptoms associated with COVID-19, such as dry coughing, wheezing, or those showing signs of fever. Employers are also encouraged to ask employees if they have recently traveled, if they have exhibited COVID-19symptoms in the last 14 days, or if anyone they live with or have been in contact with has been infected.

Finally, employers may require employees to have their temperature taken, so long as doing so is "consistent with a business necessity" or if the employer has "a reasonable belief the employee poses a direct threat to the health or safety" of others and the workplace. Whether or not an employee poses a direct threat to the workplace relies largely on their answers to screening questions. However, it is important to note that employer screenings cannot be discriminatory – meaning employers cannot be selective in who they screen and who they do not. For example, if one employee is screened because he or she is experiencing a dry cough, all other employees who exhibit a dry cough must also be screened.

**Are there any questions I can't ask?**

Yes. When conducting screenings regarding COVID-19, employers must be careful not to ask employees about any disabilities that they may have unless the employee brings up such information voluntarily. The screening must be limited to the subject of possible infection of COVID-19. Additionally, employers may not ask questions that could be seen as discriminatory or those that could be viewed as harassment. Finally, it is imperative that all information obtained from an employer screening is kept confidential.

**What do I do if an employee poses a "direct threat" to the workplace or jobsite?**

According to relevant government agencies, you should send the employee home. In fact, pursuant to OSHA's General Duty Clause found in Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 USC 654(a)(1), employers are required to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm []." In this context, you have a general duty to send employees home who pose a direct threat to the health and safety of your other employees, or at the very least, a duty to separate those employees from your general workforce. This would include employees who are exhibiting symptoms associated with COVID-19 or who have traveled to locations that put them at a significantly increased risk of infection. Pursuant to CDC guidelines, employees who return from traveling to a country designated a Level 3 Travel Zone[1] should be quarantined for at least 14 days prior to returning to work.

If one of your employees is confirmed to have contracted COVID-19, you are directed to contact all employees and customers who may have come in contact with the infected employee and encourage them to take proper precautions. However, in doing so, you should not disclose the infected employee's identity unless reasonably necessary to maintain the safety of your workplace.

**Do I have to pay employees who are sent home due to Coronavirus?**

[1] Currently China, Iran, South Korea, Malaysia, Ireland, United Kingdom (England, Scotland, Wales, and Northern Ireland), and the Schengen Area of Europe (Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Monaco, San Marino, and the Vatican City).

The short answer: it depends. As an initial matter, if the employee is performing work remotely, you must pay the employee for that work. But if the employee is not performing work remotely, whether you must still pay the employee depends on several factors.

If the employee has a contract or collective bargaining agreement regarding the terms of their compensation, that agreement may dictate whether you must pay the employee while he or she is on leave. There may also be state wage and hour or employee leave laws implicated. However, federal wage and hour law only requires employers pay employees for the actual time the employees work. That being said, if you have employees with salary-based exemptions from overtime and minimum wage requirements, you may risk forfeiting those exemptions if you do not pay them their normal, predetermined salary. Additionally, if the employee has accrued paid time off (including sick time, vacation time, etc.) under a leave/benefits policy you may have, the employee may be entitled to use that accrued paid time off while on leave pursuant to the terms of the policy.

Just this week, the President Trump enacted the Families First Coronavirus Response Act (FFCRA), which includes two new employee leave laws that go into effect by April 2, 2020. Once these laws are in effect, they will be important factors when determining whether you must pay employees who are not working due to COVID-19.

First, the Emergency Family Medical Leave Expansion Act amends the preexisting Family Medical Leave Act (FMLA) to provide up to ten weeks of paid leave for employees who cannot work (or telework) because they must care for a minor child whose school or childcare was closed due to the COVID-19 pandemic. This new provision applies to employers with few than 500 employees and employees who have worked at least 30 days for such an employer.

The FFCRA also includes the Emergency Paid Sick Leave Act, which requires employers with fewer than 500 employees to provide up paid sick leave to any employee (full-time or part-time) who cannot work (or telework) for one of the following six reasons:

1) the employee is subject to a coronavirus quarantine or isolation order
2) the employee has been advised by a health care provider to self-quarantine due to coronavirus concerns
3) the employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis
4) the employee caring for an individual who (a) is subject to a coronavirus quarantine or isolation order, or (b) has been advised by a health care provider to self-quarantine due to coronavirus concerns
5) the employee is caring for the employee's child whose school or childcare has been closed due to COVID-19 precautions, or
6) the employee is experiencing "any other substantially similar condition specified by the secretary of Health and Human Services in consultation with the secretary of the treasury and the secretary of labor."

Under the Emergency Paid Sick Leave Act, full-time employees are entitled to up to 80 hours of paid sick leave, and part-time employees are entitled to the average number of hours the

employee works in a two-week period. If the employee is receiving paid leave for one of the first three reasons listed above, the employee must be paid at their regular pay rate, with a maximum cap of $511 per day. If the employee is instead receiving paid leave for one of the last three reasons listed above (nos. 4 – 6), the employee must be paid two-thirds of their regular pay rate, with a maximum cap of $200 per day.

With respect to both the Emergency Family Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, employers with less than 50 employees may be exempt from the requirements of those new laws if complying with those laws "would jeopardize the viability of the business as a going concern[.]"

**Are there any additional OSHA requirements I should be aware of?**

While OSHA has not yet issued any new regulations pertaining directly to the spread of COVID-19, many of the existing OSHA regulations lend themselves to protecting workers in the event of a viral pandemic like COVID-19. For example, OSHA's Personal Protective Equipment (PPE) standards, which require using gloves, eye and face protection and respiratory protection as is necessary to protect workers, can also be used to help prevent the spread of COVID-19. Construction employers should continue to develop and enforce their respiratory protection program in accordance with the Respiratory Protection Standard found in 29 C.F.R. 1910.134, not only to limit the risks traditionally found on construction sites, but also to prevent spread of COVID-19. Additionally, while OSHA's Bloodborne Pathogens standard found in 29 C.F.R. 1910.1030 is not required in the wake of the current outbreak – as viruses spread by respiratory secretions are not covered by the Bloodborne Pathogens standard – many of its provisions offer a general framework that may help control some sources of the virus, most notably exposures to body fluids. For example, the Bloodborne Pathogen standard requires employees wash their hands after removing PPE, which should be followed in workplaces when dealing with COVID-19 as well. Additionally, 29 C.F.R. 1910(d)(4)(ii)(A) requires that work surfaces that may have been contaminated by a bloodborne pathogen be decontaminated with appropriate disinfectant as soon as feasible. This is in line with the CDC's guidelines for employers amidst the COVID-19 outbreak.

**If an employee contracts COVID-19, should I report it to OSHA?**

Yes. If any workers are admitted to in-patient hospitals as a result of a COVID-19 infection, the employer must report the case to OSHA and identify the illness on its OSHA 300 Log.

**Am I responsible for delayed construction as a result of COVID-19?**

The answer largely depends on the language of your contracts. You should review the language of your force majeure, frustration of purpose and no damages for delay provisions (bit.ly/COVID-19-Contracts) and determine whether you are ultimately responsible for delays resulting from an act of god or unforeseeable event such as a global pandemic. If your contract is silent as to who is liable for such events, most jurisdictions allow an "impossibility" or "frustration of purpose" defense to breach of contract claims that would exempt a party from liability for unforeseeable circumstances that are out of one's control. The argument can be made that this

would apply to labor and material shortages from the virus, or government instituted bans on construction sites – which we have seen in major cities like San Francisco and Boston, and can expect to be enacted in many others.

These questions and answers will be updated as more information becomes available and further government action takes effect. As is the case with most legal issues, especially those dealing with unprecedented events like the outbreak of COVID-19, specific legal questions should be analyzed with your attorney on a case-by-case basis. For any questions of the sort, feel free to give us a call.

Author's note: The information contained in this article is for general educational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation.

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