COVID-19: guide for US businesses

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FAQs

With the COVID-19 pandemic continuing to affect every facet of life, businesses have much to consider. This article covers the provisions available to employers in the United States and the key questions that they are asking, including topics such as the Families First Coronavirus Response Act, furlough, access to the workplace, reductions in hours and employers’ obligations concerning employees who are experiencing symptoms.

FAQs

Has the United States enacted any special labour or employment measures to deal with COVID-19?

There are two pieces of federal legislation with labour and employment measures meant to deal with COVID-19:

- the Families First Coronavirus Response Act (FFCRA); and
- the Coronavirus Aid, Relief and Economic Security Act (CARES Act).

The FFCRA was signed into law on 18 March 2020 and became effective on 1 April 2020. The FFCRA requires most employers with fewer than 500 employees to provide two work weeks of emergency paid sick leave for six covered reasons relating to COVID-19, including:

- if the employee has tested positive for COVID-19;
- if the employee has symptoms of COVID-19; or
- if the employee needs to stay at home to care for a child whose school or childcare provider has closed because of COVID-19.

The FFCRA then requires the same employers to provide an additional 10 work weeks of leave at a reduced rate (two-thirds pay) for just those employees who need to stay at home to care for a child whose school or childcare provider has closed because of COVID-19. The costs of providing this leave is reimbursable by the federal government through payroll tax.

The CARES Act was signed into law on 27 March 2020. Among other things, the CARES Act greatly expands unemployment benefits for those unemployed as a result of COVID-19 by limiting certain eligibility requirements, increasing the unemployment benefit and increasing the length of unemployment availability. The CARES Act also provides an employee retention tax credit for employers that keep employees on payroll despite loss of revenue or business suspension due to COVID-19.

Can employers furlough employees during the COVID-19 health crisis?

Yes.
**Are the federal, state or municipal governments providing any type of economic relief or support for employers and employees during this health crisis?**

In addition to the federal relief set out in the FFCRA and the CARES Act, several states and municipalities have enacted their own analogues to the FFCRA, as well as measures to relax unemployment insurance (UI) eligibility requirements both to increase the number of individuals eligible to collect benefits and ensure that individuals can receive benefits expeditiously. For example, New York state enacted paid sick leave and paid quarantine leave laws on 18 March 2020, that provide job-protected sick leave to employees who are subject to mandatory or precautionary orders of quarantine issued by the state, a health department or another governmental entity due to COVID-19.

Nearly all 50 states have enacted UI initiatives to eliminate work search and waiting requirements. Employees may claim UI benefits in several states if:

- they have had their hours reduced;
- they are temporarily furloughed;
- their employer temporarily shuts down operations; or
- they are temporarily or permanently laid off.

The $600 per week UI benefit under the CARES legislation is provided on top of any state UI benefits for which the employee may be eligible.

**What are employers’ obligations if the competent authority issues a stay-in-place or similar order?**

When a stay-in-place or similar order is implemented, employers should:

- transition to work-from-home status all workers who can conceivably work from home;
- assess whether the remaining workforce qualifies as essential under the order;
- schedule essential workers and consider furloughing non-essential workers who are unable to work from home; and
- coordinate closely with all essential and work-from-home workers to re-assign work from those who are sick, quarantined or must stay home to care for children whose schools or places of childcare are closed.

**Can employers deny an employee access to the workplace if symptoms of COVID-19 are detected?**

Yes, the Centres for Disease Control advises that employees who appear to have symptoms (eg, a fever, a cough or shortness of breath) on arrival at work or who develop symptoms during the workday should immediately be separated from other employees, customers, clients and visitors and sent home. The Equal Employment Opportunity Commission (EEOC) has reiterated that employers can send home employees with COVID-19 or symptoms associated with it. Employers should actively encourage employees who are experiencing flu-like symptoms to stay home and seek medical care as needed.

**Can employers implement a mandatory screening programme for COVID-19 symptoms?**

On 23 April 2020 the EEOC updated its guidance confirming that employers may administer COVID-19 tests to determine if employees entering the workplace have COVID-19. The EEOC also noted that employers should look to guidance from the Food and Drug Administration regarding diagnostic tests to ensure that any testing which they implement is accurate and reliable. Employers must still ensure that tests are implemented in a uniform or equitable manner.

**Are employees obligated to disclose to their employer if they have tested positive for COVID-19?**

In general, no. However, the EEOC has stated that employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. This guidance suggests that employers may ask employees to inform them of any positive COVID-19 test results so that they can take measures to protect the health and safety of other workers – an obligation that employers bear under the Occupational Safety and Health Act (OSHA). Employers should make every effort to maintain all information about employee illness as a confidential medical record for purposes of Americans with Disabilities Act compliance.
**Can employers have a policy requiring employees to report if they or their co-workers have COVID-19 symptoms?**

In general, yes. Based on the abovementioned EEOC guidance permitting employers to ask employees about their symptoms to determine if they have or may have COVID-19, employers may also ask employees to self-report if they experience symptoms. Employers may want to consider implementing reporting mechanisms (e.g., a report hotline) that will help employees to feel comfortable reporting this type of information and also allow the employer to efficiently track the information.

Asking employees to report their co-workers' symptoms could present more challenges than solutions. This runs the risk of inviting employees to make reports based on possible biases and stereotypes based on national origin or other protected categories. Instead, employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19, particularly if they suspect possible exposure, and self-report accordingly.

**Can employers force employees to take holiday time during the COVID-19 health crisis?**

There is no federal legislation that explicitly prevents employers from generally forcing employees to take holiday time during the COVID-19 crisis. However, there are a few issues that may arise if doing so in certain circumstances. First, if an employee qualifies for the leave provided by the FFCRA, the employer cannot require them to first take accrued holiday time, other sick leave or paid time off (PTO) prior to the federally provided emergency leave. Second, if an employee is taking unpaid leave under the Family and Medical Leave Act (FMLA), the employer can require them to use any accrued holiday time, other sick leave or PTO, unless they are receiving money either through a disability benefit plan or a workers' compensation plan.

Further, employers may require that employees use any accrued holiday or PTO during unpaid leaves of absence, depending on applicable state laws and the employer's holiday and PTO policy. However, as discussed above, to the extent that employees are eligible for the FFCRA, employers must allow employees to exhaust FFCRA leave entitlements prior to requiring employees to use any other accrued holiday or PTO.

**Are employers relieved from severance liabilities should a reduction in workforce be needed due to the COVID-19 health crisis?**

No, a contractual promise to pay (e.g., an executed employment contract, collective bargaining agreement or severance pay plan) is enforceable. Inability or refusal to pay contractually agreed on severance pay obligations may subject employers to breach of contract or other claims from terminated employees in the future (assuming there was no material breach by the employee).

**If a temporary operational shutdown is ordered by the competent authority, can employers interrupt the accrual of seniority and other employment benefits during that period?**

If workers cannot work from home, the answer depends on the collective bargaining agreement, if any. In general, seniority will continue to accrue but other benefits will not accrue. Typically, during a temporary shutdown, employees are entitled to unemployment benefits and, if the employer has a supplemental unemployment benefits (SUB pay) plan, SUB pay as well. Employers may continue employees' medical, dental, vision and possibly other benefit plans during the shutdown, but this is generally not legally required unless mandated by a collective bargaining agreement.

**Can employers negotiate or institute a temporary workplace shutdown or reduction in hours along with a temporary reduction in salary and benefits?**

Yes, a temporary workplace shutdown or reduction in hours may need to be negotiated for workers governed by a collective bargaining agreement. Otherwise, employers may institute a temporary shutdown or reduction in salary. Benefit entitlements will be governed by the terms of the benefit plans.

**If employees refuse to come to work, can their employment be terminated for job abandonment?**

In many cases, employers can terminate the employment of employees who refuse to come to work where the essential job functions cannot be performed from home. However, determining whether an employee can be terminated for job abandonment requires an assessment of the facts relating to that particular employee. If the employee is entitled to leave...
under the FMLA, a paid sick leave law or other similar law, the employer must grant leave for the required purpose and duration. For example, if an employee is entitled to FMLA leave due to a serious health condition, such leave generally cannot exceed 12 weeks – and the employee’s doctor must certify the continuing need for the leave. After such leave has ended, if the employee does not return to work (or begin to work from home), the employer should consider whether a reasonable accommodation should be made (under the Americans with Disabilities Act or similar state or local laws) to enable the employee to perform their essential job functions from home.

**Do employers have an obligation to report instances of their employees testing positive for COVID-19 to the health authorities or other employees?**

Employers covered by OSHA's record-keeping requirements must log all illnesses caused by, or at, the workplace. However, due to community-spread COVID-19, OSHA has acknowledged the inherent difficulty with knowing whether an employee contracted COVID-19 in the workplace instead of through another means. Therefore, OSHA has narrowed the record-keeping requirement to include only those cases that:

- are confirmed cases of COVID-19,
- are work related (as defined in Title 20 of the Code of Federal Regulations (CFR) 1904.5); and
- involve one or more of the general recording criteria set out in Title 29 of the CFR 1904.7 (e.g., requires treatment beyond first aid or days away from work).

Aside from OSHA, employers are not required to report employees' positive COVID-19 test results.

Employers may inform employees that one (or more) of their colleagues has a suspected or confirmed case of COVID-19 – particularly if the sick employee may have come in contact with those colleagues or if there are steps that those colleagues might or should take to protect themselves and others from further transmission. However, employers must maintain sick employees' confidentiality to the extent possible.

For further information on this topic please contact Brian S Cousin at McDermott Will & Emery by telephone (+1 312 372 2000) or email (bcousin@mwe.com). The McDermott Will & Emery website can be accessed at www.mwe.com.

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