

EMPLOYER FAQ AMID COVID-19 PANDEMIC



if the employer ordinarily has a policy that provides a wage replacement benefits (i.e. paid sick leave or similar) but that the employee has exhausted or not yet become eligible to receive.

If, however, an exempt employee was ready, willing and able to work but was unable to do so because the employer closed and did not make work available, then generally the employee must be paid for the week if he or she performed any work in that workweek (as noted above, whole workweeks in which no work is performed need not be paid). Please see the paragraph titled "Circumstances In Which The Employer May Make Deductions from Pay" at https://www.dol.gov/whd/overtime/fs17g_salary.htm and note that we are not aware that the law in your state differs on this. To the extent the employer implements a furlough, there is useful information published by the Department of Labor at <https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs> and we are not aware that state law differs on this, either.

Prorating the salary compensation of exempt employees for absences of less than a full day for personal reasons or for sickness are not permitted. In other words, if an exempt employee works any portion of a day, there can be no deduction from salary for a partial day absence for personal or medical reasons.

Employers can allow or require employees to use paid time off benefits in accordance with employer policy and practice. Paid sick leave, however, which is required in your state, can only be used in connection with specific reasons, which do not include an employee's discomfort in connection with reporting to work. For more information, please see <https://www.dol.gov/agencies/whd/flsa/pandemic>.

Question: Can we take our employee's temperatures before they start work?

Response: The EEOC's "Pandemic Preparedness and the Americans with Disabilities Act" guidance provides at question 7 that "measuring an employee's body temperature is a medical examination," and although employers in most cases cannot require or issue medical examinations to employees, "[i]f pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. However, employers should be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever." Although this guidance was issued in response to the H1N1 virus in 2009, to our knowledge it is largely still applicable, and can be reviewed here: https://www.eeoc.gov/facts/pandemic_flu.html.

Thus, there appears to be some support for employers to take the temperatures of its employees in limited cases as described, but as a best practice we would discourage this practice to the extent it requires personnel without medical training to come into close contact with co-workers who, potentially, could spread the virus. In other words, if an individual has a contagious condition (or has been exposed to one and thus can still transmit it to others), there is risk of spreading the virus or contagion by having one employee take the temperature of another, and particularly if neither employee is properly trained in nor using sufficient universal precautions to prevent contamination.

Given the recent outbreak of COVID-19 and the concern of contraction through close human to human contact, we do not recommend that the employer implement a policy or practice nor otherwise authorize

or even condone employees taking the temperature (or conducting any other medical examinations) upon co-workers or other personnel in the workplace, particularly if using an oral or ear-based thermometer.

If, however, the employer seeks to utilize an infrared/laser or similar thermometer that does not require human-to-human contact, this may lessen the risk associated with contamination. As well, the employer may wish to consider having employees take their own temperatures or have a trained healthcare worker do so when and where feasible, as an alternative. We also recommend contacting your insurance carrier directly for further information before undertaking this type of process in your workplace.

COVID-19 Resources

The COVID-19 pandemic is a fluid situation for all employers. We recently published guidance around [Emergency Preparedness in the Workplace](#), and also encourage you to review the additional resources for more information (and refer back to these websites as many are frequently updated).

Additional Resources:

- CDC Employer Guidance: <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>
- EEOC COVID Alert: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- DLSE Guidance: <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>
- Pandemic Flu guidance (much of which is applicable to the current virus): https://www.eeoc.gov/facts/pandemic_flu.html
- DOL Pandemic Guidance: <https://www.dol.gov/agencies/whd/fmla/pandemic>