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## ANALYSIS

# Changes and Guidance in the National Employment Sphere

As the number of confirmed COVID-19 cases continues to increase, national employers across the country are moving to remote-work models or suspending work altogether. In the wake of these changes, national employers face many questions. Can employers mandate that their employees receive testing before they return to work? Can they implement furloughs until the crisis ends? Can time at home be counted towards employees' paid time off?

This alert identifies a few key aspects of what's changing and what's staying the same. In that regard, it goes through the highlights of some recent legislation and announcements in the national employment sphere, followed by the standard rules that are still in place. Finally, this alert addresses a number of FAQs national employers need answered to safely navigate this pandemic.

### What Has Changed

#### *Medical Leave*

The Families First Coronavirus Response Act has introduced paid sick leave and expanded family and medical leave for those with coronavirus-related emergencies. The Act goes into effect on April 1, 2020, and expires on December 31, 2020.

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The Act only applies to employers with fewer than 500 employees. For all such employers, any employee with 30 days' tenure is entitled to 12 weeks of leave for coronavirus-related absences such as government-mandated quarantines, the personal treatment of symptoms or caregiving for a relative's symptoms.

The first 10 days of this leave are unpaid, although an employee may elect to use accrued paid sick leave or vacation leave during this time. After that, employees are entitled to two-thirds of their full compensation, with caps of \$200 per day and \$10,000 in total.

Some details are pending from the Secretary of Labor, so employers should seek up-to-the-minute advice on the particulars for paying under this new legislation.

### *ADA-Approved Testing*

Typically, the Americans with Disabilities Act prevents employers from testing, excluding or refusing to accommodate employees based on certain health characteristics. In the face of the spreading pandemic, the Equal Employment Opportunity Commission (EEOC) released [updated guidelines](#) on March 19, 2020, that relaxed restrictions on employee testing and exclusion from the workplace.

These guidelines make a few things clear. First, EEOC has stated that an employee who has either tested positive for COVID-19 or is experiencing symptoms of COVID-19 poses a "direct threat" to the safety of others. An employer may exclude an employee who poses a "direct threat" from the workplace or take other reasonable actions to assuage that threat. Second, an employer may (i) ask if an employee is experiencing flu-like symptoms and (ii) take an employee's temperature. Although, as EEOC notes, not all carriers of COVID-19 have a fever. Finally, EEOC has said that employers may require a doctor's note to return to work after the pandemic.

### **What Has Stayed the Same**

#### *Title VII and ADA Discrimination*

Even though EEOC has relaxed certain requirements for employers, the mandates of Title VII and the Americans with Disabilities Act (ADA), as they apply to discrimination, remain firmly in place. If companies face layoffs, employers may not make personnel decisions based on protected classes such as race, sex or age. If employers want to furlough workers or take any other precautionary actions that may have a negative impact on an employee, they should proceed with standard caution and seek the advice of counsel before doing so.

related to the global COVID-19 pandemic.

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The Occupational Safety and Health Administration (OSHA) has also developed [guidelines](#) for addressing the spreading COVID-19 pandemic. These guidelines echo longstanding OSHA policy: send sick employees home, place signs in restrooms reminding employees and patrons to wash their hands and implement sick leave policies. OSHA has suggested a few minor precautions in light of COVID-19, such as providing hand sanitizer for employees and installing clear plastic guards for employees with frequent human contact. In addition, OSHA has released guidelines on reporting requirements, discussed below.

### *Federal WARN Act*

The federal WARN Act regulates an employer's ability to implement mass layoffs. As of now, requirements at the federal level have not changed, although some have suggested they may be amended. California has issued an executive order temporarily suspending these restrictions. For a full discussion, please see Issue 5 of this primer, "[Key Points for Employers Planning Layoffs](#)."

## Frequently Asked Questions

### **Can employers tell employees with symptoms to stay home?**

Yes, absolutely. EEOC has determined that symptomatic employees pose a "direct threat" to the safety of other employees, and employers may insist they stay home.

### **Can employers take an employee's temperature at work to determine whether they might be infected?**

Yes. Given the severity of the situation, employers may take their employees' temperatures, but that information remains confidential.

### **Do employers have to report COVID-19 cases for OSHA purposes?**

It depends. OSHA has released [reporting guidelines](#) stating that employers are only responsible for recording cases of COVID-19 if all of the following are met:

1. The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
2. The case is work-related, as defined by 29 CFR 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment

beyond first-aid, days away from work).

### **What should an employer do if an employee who is not ill and has not been exposed refuses to come to work?**

Typically, an employee cannot refuse to come to work. However, OSHA has carved out an exception for employees who legitimately fear for their safety. An employee *does* have the right to refuse to work if all of the following conditions are met:

- Where possible, the employee asked the employer to eliminate the danger, and the employer failed to do so;
- The employee refused to work in “good faith,” meaning the employee must genuinely believe that an imminent danger exists;
- A reasonable person would agree that there is a real danger of death or serious injury; and
- Due to the urgency of the hazard, the employee does not have time to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

### **Can employers mandate their employees receive testing before they return to work?**

Yes. EEOC has determined that after the pandemic subsides or after an employee has recovered, employers may require that the employee provide a doctor’s note.

### **Can employers screen job applicants and new hires for symptoms of COVID-19?**

Yes. An employer may screen applicants for COVID-19, provided that it does so evenhandedly for all applicants. An employer may also delay an employee’s start date based on symptoms or even withdraw an offer altogether if the position needs to be filled immediately.

### **If an employee is working from home, what expenses must the employer reimburse?**

It depends. Many states require that employers reimburse their employees for *necessary* business expenses. As employers move their workforce to a remote model, employers should be mindful of what expenses they place on their employees. The most common offender is telephone bills. In some jurisdictions, such as California, the employer is required to pay a reasonable percentage of telephone costs, corresponding to the phone’s work usage.

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## **PREVIOUS PRIMERS**

**National Employment Law Series: Employee Paid Leave Rights in the Families First Coronavirus Response Act**

Mark Tatum | Dan Schwaller

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MARCH 23, 2020 | ISSUE 5

**National Employment Law Series: Key Points for Employers Planning Layoffs**

Katherine Sinatra | Charles Rosebrough

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MARCH 20, 2020 | ISSUE 4

**The Effects of COVID-19 on FDA Actions for Medical Products and Food**

Sonali Gunawardhana | John Johnson III

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MARCH 19, 2020 | ISSUE 3

**New Federal Law Extends Existing Tort Protections for Makers of Certain Products Used to Combat COVID-19**

Cary Silverman

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MARCH 18, 2020 | ISSUE 2

**Cybersecurity and Health Information Privacy During the COVID-19 Pandemic**

Al Saikali | Colman McCarthy | Lisichen Reeves

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MARCH 13, 2020 | ISSUE 1

**Is COVID-19 an Excuse for Your Performance?**

Tom Sullivan

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## RESOURCES

### Selected Bench Guides

**Georgia Pandemic Bench Guide**

[Co-Authored by Shook Partner Josh Becker]

**Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State**

### **Court Judges and Administrators**

[National Center for State Courts]

### **Additional State Public Health Bench Books**

[Centers for Disease Control and Prevention]

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## Resources for Employers

### **Equal Employment Opportunity Commission**

[Americans with Disabilities Act; Rehabilitation Act]

### **Department of Labor**

[Unemployment; Workplace safety]

### **Department of Labor Wage & Hour Division**

[Families First Coronavirus Response Act]

### **Occupational Safety and Health Administration**

[Work safety and exposure risk]

### **California Employment Development Department**

### **New York Labor Department**

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## Additional Resources

### **Association of Corporate Counsel COVID-19 Resource Center**

### **Bloomberg Law Coronavirus Outbreak News**

### **Bain & Co. Coronavirus Economic Impact Report**

### **Law360 Court Status and Closures List**

### **National Center for State Courts: Court News Updates**

### **WestLaw Global Coronavirus Toolkit**

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## **FYI HEADLINES**

The coronavirus test that wasn't: How federal health officials misled state scientists and derailed the best chance at containment

[USA Today - March 27, 2020] From its biggest cities to its smallest towns, America's chance to contain the coronavirus crisis came and went in the seven weeks since U.S. health officials botched the testing rollout and then misled scientists in state laboratories about this critical early failure. Federal regulators failed to recognize the spiraling disaster and were slow to relax the rules that prevented labs and major hospitals from advancing a backup... »

## EPA suspends enforcement of environmental laws amid coronavirus

[The Hill - March 26, 2020] The Environmental Protection Agency (EPA) issued a sweeping suspension of its enforcement of environmental laws Thursday, telling companies they would not need to meet environmental standards during the coronavirus outbreak... »

## States, feds try to end scourge of coronavirus price-gouging

[Ars Technica - March 26, 2020] Attorneys general representing 33 US states and territories yesterday signed letters ([PDF](#)) urging online retailers to set and enforce policies banning price gouging on their platforms during this emergency... »

## Blood from people who recover from coronavirus could provide a treatment

[Washington Post - March 27, 2020] An old idea for fighting infections — an approach most physicians know about only from medical lore — is being revived as people wait for drugs and vaccines to thwart the novel coronavirus... »

## The Coronavirus Pandemic May Be Loosening Links In The Supply Chain

[NPR - March 27, 2020] Truckers, warehouse workers and cargo handlers, all in a vast network, find themselves one endless day after the next getting food, medicine and, yes, toilet paper to customers... »

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