



Lawyers Alliance is grateful to the law firm of Orrick Herrington & Sutcliffe LLP for its assistance in preparing the following piece to help guide nonprofit employers responding to COVID-19. Please visit Lawyers Alliance's [Coronavirus Information](#) webpage for additional resources for New York nonprofits.

COVID-19: Guidance on Frequently Asked Employment Questions for Non-Profit Organizations (Federal and New York State)

Last Updated on March 24, 2020

Please note this is an emerging, rapidly evolving area, and recommendations and guidance are subject to change and may not always apply to particular situations or organizations. Answers may vary based on jurisdiction, applicable laws and the specific factual situation. With the exception of certain New York State laws, local laws are generally not addressed by this publication.

This publication is intended as general guidance and does not constitute legal advice.

*For current information on COVID-19, please refer to the CDC's website:
<https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.*

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TRAVEL

1. Can and should the Organization ban, limit or restrict work travel?

Yes, the Organization can ban, limit and restrict work travel. During the outbreak, the Organization should cancel all non-essential business travel. See

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

2. Can the Organization ban, limit or restrict personal travel?

The Organization should generally not ban, limit or restrict personal travel, but may instead generally discourage personal travel and inform the employee that he/she may be quarantined upon return.

The Organization should also consider taking the following steps:

- Advise employees to check the [CDC's Traveler's Health Notices](#) for the latest guidance and recommendations for each country to which the employee will travel and global precautions for high-risk travelers. Specific travel information including warnings against nonessential travel to numerous countries can be found on the [CDC website](#).
- Advise employees to check themselves for symptoms of [acute respiratory illness](#) before starting travel and notify their supervisor and stay home if they are sick.
- Ensure employees who become sick while traveling or on temporary assignment understand that they should notify their supervisor and should promptly call a healthcare provider for advice if needed.
- If outside the United States, sick employees should follow the Organization's policy for obtaining medical care or contact a healthcare provider or overseas medical assistance company to assist them with finding an appropriate healthcare provider in that country. A U.S. consular officer can help locate healthcare services. However, U.S. embassies, consulates, and military facilities do not have the legal authority, capability, and resources to evacuate or give medicines, vaccines, or medical care to private U.S. citizens overseas.

See <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

3. What should the Organization do if an employee refuses to travel for work to an area not covered by the CDC's travel restrictions?

The Organization should not force the employee to travel unless, after conferring with counsel, it is deemed advisable in a particular situation.

4. What should the Organization do if an employee engaged in work-related travel ends up quarantined in that area?

If the employee travels because of work and ends up quarantined in that area and cannot get home, the Organization should consider paying for the employee's hotel and other travel-related expenses during the quarantine period.

5. What if an employee has a vacation and chooses to go to an affected region? Can the employee be quarantined without pay upon return?

The Organization should inform the employee that he/she will be quarantined upon return and it is the employee's choice whether he or she would still like to go on the vacation. The Organization does not have to reimburse him/her for the trip if the employee decides not to go.

If an employee decides to go on the vacation and returns, the employee should be quarantined for 14 days and the employee should work from home during the quarantine period.

If the employee is non-exempt, and cannot work from home, the employee should be required to stay home during the quarantine period. See FAQs 10 through 17 for leave laws that might apply and/or require pay in certain circumstances. If non-exempt employees are working from home, ensure that all working time is recorded and reported accurately, including time spent on meal and rest breaks. Electronic applications (some are even free) are available to assist non-exempt employees in recording their time.

If an employee is exempt, and cannot work from home, the Organization should require the employee to take leave during the quarantine period if the employee performs no work during the quarantined workweek(s). Generally, if an exempt employee performs at least some work in the Organization-defined seven-day workweek, the salary basis rule requires that the employee be paid the entire salary for that workweek. However, if the exempt employee does not perform any work at all during a seven-day workweek, then he/she does not have to be paid their regular salary. However, for all employees, leave laws might apply that require them to be paid in certain circumstances. See FAQs 10 through 17 for leave laws that might apply.

Organizations should contact counsel for specific guidance on how any leave laws related to quarantine apply in their particular circumstances.

ESSENTIAL/NON-ESSENTIAL BUSINESSS

6. What is considered an essential versus non-essential business for purposes of New York COVID-19 Orders?

Effective March 22, 2020 all business and not-for-profit entities in New York must reduce their in-person workforce at any work location by 100%, unless the business qualifies as an "essential business" under the order. The list of essential businesses, as defined by the state, is lengthy, but potentially relevant health and human services categories are listed below:

Essential health care operations including:

- research and laboratory services
- hospitals
- walk-in-care health facilities
- veterinary and animal health services
- elder care
- medical wholesale and distribution
- home health care workers or aides

- doctor and dentist offices
- nursing homes, or residential health care facilities or congregate care facilities
- medical supplies and equipment providers

Essential services including:

- trash and recycling collection, processing and disposal
- mail and shipping services
- laundromats/dry cleaning
- building cleaning and maintenance
- child care services
- auto repair
- warehouse/distribution and fulfillment
- funeral homes, crematoriums and cemeteries
- storage for essential businesses
- animal shelters or animal care or management

News media

Providers of basic necessities to economically disadvantaged populations including:

- homeless shelters and congregate care facilities
- food banks
- human services providers whose function includes the direct care of patients in state-licensed or funded voluntary programs; the care, protection, custody and oversight of individuals both in the community and in state-licensed residential facilities; those operating community shelters and other critical human services agencies providing direct care or support

Vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public including:

- logistics
- technology support
- child care programs and services
- government owned or leased buildings
- essential government services

For businesses operating or providing both essential and non-essential services, supplies or support, only those lines and/or business operations that are necessary to support the essential services, supplies, or support are exempt from the restrictions.

If the Organization's business is not in the business listed above, it may request designation as an essential business by completing an [application form](#). Counsel can assist Organizations in applying for an essential business exemption.

As of the now, the Governor's order is in effect until April 19, 2020.

New York State has issued a helpful FAQ on essential businesses [here](#). For more information, see <https://coronavirus.health.ny.gov/home>.

CLOSURES

7. Assuming non-exempt employees are not working from home, should the Organization pay non-exempt employees if there is a temporary office or facility closure due to COVID-19?

Under federal law, it is not legally required, but may be done voluntarily. See <https://www.dol.gov/agencies/whd/flsa/pandemic>.

Under New York Law, employers are generally only required to pay non-exempt employees for time worked. However, in New York, if an employer sends home a non-exempt employee for lack of work after they have already arrived, the employee is generally entitled to a minimum amount of “call-in” pay for the day. For that day the employee must be paid the minimum wage for the lesser of four hours or the number of hours in the employee’s regular shift. Moreover, note that in certain cases, leave laws might apply. See FAQs 10-17.

8. Does the Organization have to provide WARN Act notice (60 days of pay and benefits) if its worksite closes indefinitely?

Yes, if the Organization meets the employee count and other threshold requirements. However, the Organization might be exempt from the requirement to provide 60 (or New York’s WARN Act, 90 days) notice.

The Federal WARN Act applies to (1) employers with 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours per week, and (2) employers with 100 or more employees, including part-time employees, who collectively work at least 4,000 hours each week, excluding overtime. If the federal WARN Act applies, it imposes a notice obligation on covered employers who implement employment loss as the result of a “plant closing” or “mass layoff” in certain situations.¹

Generally speaking, employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff. Note, however, that if employees are laid off for less than six months, then they do not suffer an employment loss and, depending on the circumstances, notice may not be required.

The federal WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances. This exception applies when an unforeseeable business circumstance was caused by a sudden, dramatic, and unexpected action or condition outside of the employer’s control. This exception may come into play where an employee has been exposed to COVID-19 and an employer is considering suspending or shutting down operations to mitigate exposure to other employees or where the employer is forced to shut down operations due to an order from the government related to COVID-19. This may qualify as sudden and dramatic circumstance outside of an employer’s control. If this exception applies,

¹ Under federal law, a “plant closing” is generally defined as shutdown resulting in employment loss for 50 or more employees during any 30-day period. Separately, a covered employer must give notice of a “mass layoff” which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer’s active workforce.

the employer *must still provide a WARN Act compliant notice* as soon as practicable, but the employer will be relieved of the 60-day time period requirement. At the time notice is given, the employer must provide a brief statement of the reason for reducing the notice period in addition to meeting the standard WARN notice requirements.

New York's WARN Act (covering employers with 50 or more employees), applies to employment loss as the result of plant closings affecting 25 or more workers, mass layoffs,² reductions in work hours (by more than 50% each month for a 6-month period), and relocation of substantially all facility operations. New York also has an unforeseeable business circumstances exception to the WARN Act requirements. Similar to federal law, if this exception is satisfied, it merely reduces New York's 90-day notice period, but an employer must still give as much advance notice as possible and include the reason for the reduced notice period and a factual explanation for the reduction as part of the notice. New York's Department of Labor has indicated this exception might be available for closures due to coronavirus, [stating](#) that if an organization is forced to close due to the coronavirus, it should provide as much information as possible about the circumstance of closure in its filing with the DOL so that the DOL can determine if an exception applies. Thus, New York employers who are faced with the potential of any of the triggering events listed above should prepare to satisfy New York WARN Act notice requirements (with a potentially reduced notice period).

9. Can the Organization furlough employees and/or reduce hours or compensation?

Exempt salaried employees

An Organization that furloughs exempt, salaried employees, runs the risk of losing exempt employee status under state and Federal law if the furlough is not implemented in accordance with wage and hour laws. Organizations considering a furlough or reduction should consult counsel regarding what to do in their particular situation. Potential strategies include:

- *Full-week furloughs.* Organizations can use furloughs in full week increments to avoid making improper salary deductions. This option is lawful because Organizations must only pay exempt employees a set salary in any week in which work is performed and conversely do not need to pay employees for any week in which no work is performed. If this option is used, however, it is vital to ensure affected exempt employees do not perform any work during these weeks. Any work performed triggers the obligation to pay employees their full salary for that entire week, even if the work is minimal. For example, an employee who checks email from home for a few minutes on just one of the days can trigger the obligation to pay that employee for the entire week. As a practical matter, however, it may be very difficult to prevent an employee from performing any work. To avoid this problem, an Organization should consider:
 - Formally banning employees from performing any work at all during these weeks and clearly communicating the prohibition; and
 - Considering eliminating employees' access to work communication during applicable non-working weeks, for example, by blocking access to the Organization's email communications and prohibiting nonexempt employees from taking home work laptops, smartphones, or other communication devices.

² Under NY law, a "mass layoff" is defined as involving 25 or more full-time employees (if the 25 or more workers makes up 33% of all the workers at the site) or mass layoffs involving 250 or more full-time workers regardless of the percentage of workforce.

- *Reduced workweek schedule and pay.* The Organization might also consider adopting a reduced workweek schedule and a commensurate adjustment in employee salaries to avoid violating the salary basis test and jeopardizing the exemption, if the salary reduction is a bona fide change reflecting long-term business needs. The DOL and courts generally have approved this practice as consistent with the FLSA, reasoning that a reduction in the employee's pay is not a deduction in this scenario. To reduce the risk of losing employees' exempt status, Organizations should clearly notify employees before implementing the reduced workweek and salary plan. The notification and the accompanying details should be in writing and, preferably, provided at least one week in advance. Some states require more advance notice. The reduced salary plan also must continue to satisfy the salary basis test.
- *Reduced pay without a reduced workweek.* Reducing employees' future pay without shortening their workweek also reduces labor costs and might be feasible in some circumstances. Absent contractual (including collective bargaining agreement) requirements or state laws to the contrary, the Organization can generally set an employee's pay at whatever rate the Organization wants (assuming exempt employees are paid at least the minimum amount required to maintain exempt status under state and federal law). Like a reduced workweek schedule and pay, a prospective reduction in employee salaries generally does not violate the FLSA if it is a bona fide change reflecting long-term business needs. The reduced salary plan also must continue to satisfy the salary basis test for exempt employees.
 - New York does not have a law against reducing future wages for any lawful reason, so long as wages do not fall below minimum wage.
- *Requiring use of vacation time.* While the FLSA allows an employer to require employees to use vacation or paid time off as a cost-saving measure, many state laws prohibit or significantly limit an employer's ability to do so. Employers should be familiar with the limitations on requiring the use of vacation time or paid time off under applicable state law.
 - In New York, there is no prohibition on requiring employees to use vacation or paid time off. But in certain cases, employees might have the right to instead use family leave, sick leave, or other family or school-related leave. See FAQs 11-13, 16.

If the Organization desires to reduce employee hours, in New York, the Organization might also be eligible to participate in New York's Shared Work program. New York's Shared Work program allows employers to keep trained staff and avoid layoffs. Eligible employees can receive partial Unemployment Insurance benefits while working reduced hours. More information on New York's Shared Work program is available [here](#).

Other limitations

Subject to the "employment loss" thresholds described in FAQ #8, federal and NY WARN acts may apply in the event of extended furloughs or reductions in hours of work.

Additionally, Organizations with fewer than 500 employees that seek to furlough or reduce hours or compensation need to be mindful of the new employee protections established by the federal Families First Coronavirus Response Act ("FFCRA"), including the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLA"), which both go into effect on April 2, 2020, and require employers to provide *paid* leave under certain circumstances. See FAQs # 11 and 16.

Further, Organizations need to consider employees' rights to family leave, sick leave, or other family or school-related leave. See FAQs 11-13, 16. Employees may not be penalized for pursuing rights under these leave laws.

USE OF LEAVE OR PTO

10. Can the Organization require that an employee stay home if there is concern about a particular employee (for example, the employee has recently returned from a particular region or if the employee has an “association” with an infected individual)?

Organizations should follow CDC and WHO guidelines in assessing whether an employee poses a direct threat based on exposure risk categories when determining whether to require an employee to stay home. As of [3/22/20](#), the risk categories are:

- High Risk
 - Living in the same household as, being an intimate partner of, or providing care in a nonhealthcare setting (such as a home) for a person with symptomatic laboratory-confirmed COVID-19 infection without using recommended precautions for home care and home isolation;
- Medium Risk (assumes no exposures in the High Risk category)
 - Close contact with a person with symptomatic laboratory-confirmed COVID-19;
 - On an aircraft, being seated within 6 feet (two meters) of a traveler with symptomatic laboratory-confirmed COVID-19 infection; this distance correlates approximately with 2 seats in each direction;
 - Living in the same household as, an intimate partner of, or caring for a person in a nonhealthcare setting (such as a home) to a person with symptomatic laboratory-confirmed COVID-19 infection while consistently using recommended precautions for home care and home isolation;
 - Travel from a country with widespread sustained transmission
 - Travel from a country with sustained community transmission
 - Travel on a cruise ship or river boat
- Low Risk (assumes no exposures in the High Risk category)
 - Being in the same indoor environment (e.g., a classroom, a hospital waiting room) as a person with symptomatic laboratory-confirmed COVID-19 for a prolonged period of time but not meeting the definition of close contact.
- No identifiable risk
 - Interactions with a person with symptomatic laboratory-confirmed COVID-19 infection that do not meet any of the high-, medium- or low-risk conditions above, such as walking by the person or being briefly in the same room.

According to the CDC, people with low-risk exposures are not restricted from public places, including workplaces, as long as they remain asymptomatic. Asymptomatic people with low-risk exposures are advised to self-observe until 14 days after their last potential exposure. Employers may choose to

recommend that employees with low-risk exposures check their temperature to ensure they are still asymptomatic before arriving at the workplace.

Going a step beyond the CDC and WHO guidance, many employers have also asked employees who have traveled to certain areas of the world to work from home for 14 days following their return.

11. Is the Organization required to provide paid sick leave to employees who are quarantined at home and not working? Can the Organization require employees to exhaust sick leave in this situation?

Federal

Effective April 2, 2020, Organizations with fewer than 500 employees and public agencies (including any government entity at the federal, state, local or interstate level) will be generally required to provide paid sick leave under the new Emergency Paid Sick Leave Act (“EPSLA”), which was enacted on March 18, 2020 as part of the Families First Coronavirus Response Act (“FFCRA”). The Secretary of Labor has the authority to issue regulations to exempt small employers with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the entity as a going concern. EPSLA requires such organizations to provide up to 80 hours of emergency paid sick leave to full-time employees (and a pro-rated amount for part-time employees based on how many hours they work on average in two weeks) who are:

- o subject to government quarantine or isolation orders related to COVID-19,
- o advised to self-quarantine by health care providers due to concerns related to COVID-19,
- o experiencing symptoms of COVID-19 and seeking medical diagnosis,
- o caring for someone who has been advised or mandated to quarantine or isolate,
- o caring for a son or daughter whose school or child care providers are closed or unavailable due to COVID-19 precautions, or
- o dealing with potentially other substantially similar conditions.

Employees may not be required to use other paid leave prior to using paid sick time under the EPSLA, and may not be discharged, disciplined, or discriminated against for pursuing their rights under the EPSLA. Required pay is capped at \$511 per day and \$5,110 in the aggregate for any of the first three reasons and \$200 per day and \$2,000 in the aggregate for any of the last three reasons. Organizations are required to post notice of this law. *Note: organizations including nonprofits may claim a payroll tax credit for 100% of the wages paid for leave under EPSLA.*

New York

New York’s newly-passed COVID-19 legislation applies where the EPSLA does not or to the extent it provides benefits in excess of the EPSLA. It requires Organizations to provide sick leave to quarantined employees (as well as employees who are under mandatory or precautionary orders of isolation) *without* deducting any of an employee’s accrued sick leave. It also requires most Organizations to provide some amount of paid sick leave and other benefits such as paid family leave as follows:

- o Organizations with 1-10 employees and less than \$1 million in net income must provide unpaid sick leave for the duration of an employee’s quarantine and the employee is eligible for paid family leave and disability benefits during this time.

- Organizations with 1-10 employees and \$1 million or more in net income must provide 5 days of paid sick leave and then for the duration of the employee's quarantine, the employee is eligible for unpaid leave, and paid family leave and disability benefits
- Organizations with 11-99 employees must provide 5 days of paid sick leave and then for the duration of the employee's quarantine, the employee is eligible for unpaid leave, and paid family leave and disability benefits
- Organizations with 100 or more employees must provide at least 14 days of paid sick leave

There are some limited exceptions, such as if the employee chose to travel abroad to certain high-risk areas for personal non-employment-related reasons, despite having been provided notice that doing so would make them ineligible for the protections of this legislation. In such case, the employee would be eligible only to use any accrued leave after which time the organization would have to provide unpaid sick leave. Additionally, the law does not apply in cases where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under quarantine or isolation.

12. Can employees use FMLA or similar state leave if they are quarantined at home and not working?

Federal

Potentially. The flu and common cold do not typically qualify as serious health conditions under the FMLA, unless complications arise. 29 C.F.R. § 825.113(d). Some people with COVID-19 may only experience mild symptoms that would not qualify as a serious health condition. However, COVID-19 can amount to a serious health condition if complications arise from the illness, leading to, for example, hospitalization or incapacitation.

If COVID-19 does amount to a serious health condition for an employee, then they are entitled to leave under the FMLA. Note, employees are only eligible for FMLA leave if the employer has over 50 employees in a 75-mile radius.

On March 11, the World Health Organization (WHO) declared that COVID-19 is a pandemic. With respect to pandemic *influenza*, the DOL has stated that leave taken by an employee for the purpose of avoiding exposure would not be protected under the FMLA, but that employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for employees in these circumstances. For more information, see the Department of Labor's [FAQs](#) on COVID-19 and FMLA.

New York

In New York, paid family leave might be available to employees for any period where they are quarantined and not eligible for paid sick leave. See FAQ #11.

13. Can employees use disability leave if they are quarantined at home and not working?

It depends. Generally speaking:

For employees diagnosed with COVID-19: Once an employee is diagnosed with COVID-19, some type of leave might apply under state or federal law and might preclude the use of any other type of leave while it applies. See FAQs #11-12. Otherwise, the disability and leave event should be similar to any other illness. Typically, for the first week of absence due to an illness, paid sick leave or vacation would provide income continuation (conditions of a short duration are not considered a disability under the ADA and therefore an employee would not be entitled to disability leave). For illnesses that last longer than a week (or longer than the period of paid emergency sick leave), short-term disability (STD) benefits would likely kick in. The Organization should check with their disability insurers and administrators to confirm they will be covering claimants diagnosed with COVID-19, and to identify any potential exclusions.

In New York, disability benefits may be available to employees affected by COVID-19 who are subject to mandatory or precautionary orders of quarantine or isolation pursuant to the new legislation. See FAQ #11.

For employees who are not diagnosed with COVID-19 but are not able to work (for example, employee is healthy but is quarantined or isolated by local authorities): Most disability policies will not cover absences of this type. If an employee is quarantined due to a suspected exposure, it is unlikely that absence will be covered by disability plans, but employers should check with their vendor to confirm.

New York's new law makes such employees potentially eligible for disability leave in such instances to the extent they are not covered by paid sick leave. See FAQ #11.

For employees who are not diagnosed with COVID-19 but are not willing to work (for example, employee is fearful of commuting):

Where disability or other leave does not apply (see FAQs 11-12, 17), employees may otherwise choose to use general personal leave while quarantined (subject to whatever leave/time off approval requirements are typically in place at the Organization). The Organization should continue to provide whatever leave program is laid out in their employee handbook. The Organization may also voluntarily choose to provide employees with leave beyond the minimum state and federal law requirements.

Finally, note that on March 11, the WHO declared that COVID-19 is a pandemic. The EEOC's [guidance](#) on Pandemic Preparedness in the Workplace and the Americans with Disabilities Act is a helpful resource for other ADA-related questions.

14. Can the Organization require employees to use PTO or vacation time if they are quarantined at home and not working?

New York state generally requires employers to provide emergency sick leave for quarantines and federal law also includes similar requirements for some employers (see FAQ 11), in which case an employer cannot require employees to use PTO or vacation time. However, if an exception applies, such as if the Organization is exempted because of its size, or if the employee engaged in personal travel to a high-risk area despite receiving notice that emergency sick leave would not apply if they did so, then assuming no other leave laws discussed in this section apply, the employee could use PTO or vacation time for their quarantine. The employer should not force the employee to use PTO or vacation time. Note, some employees may not want to use their PTO.

15. Should the Organization require the employee to produce a doctors' note affirming good health before the employee returns to the workplace?

It depends. The CDC recommends that employers not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.

However, the EEOC permits it. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

16. Can an employee use family or school-related leave if his/her child's school closes down due to coronavirus?

Yes, in certain circumstances.

Federal

Effective April 2, 2020, organizations with fewer than 500 employees as well as public agencies (including any government entity at the federal, state, local or interstate level), will be subject to the new Emergency Family and Medical Leave Expansion Act ("EFMLA"). EFMLA generally requires organizations to provide up to 12 weeks of job-protected leave to employees who have been employed for 30 days or more and who are unable to work because their child's school, day care, or child care is unavailable due to a public health emergency.³ The first 10 days of this leave may be unpaid and employees may elect to use other paid benefits to cover the time period, including personal leave or medical or sick leave. However, after the first 10 days, the leave must be paid at no less than two-thirds of the employee's regular rate of pay, with required payments capped at \$200 per day and \$10,000 in total. Employers must post notice of employees' rights under the EFMLA. *Note: organizations including nonprofits may claim a payroll tax credit for 100% of the wages paid for leave under EFMLA. Also, small organizations with less than 50 employees are not subject to civil suit for violating EFMLA leave requirements.*

New York City

New York City's Paid Safe and Sick Leave Law requires all organizations to provide up to 40 hours of sick leave to care for a child whose school or child care provider closed due to a public health emergency. If the organization has five or more employees, such leave must be *paid*.

³ Small employers with fewer than 25 employees might be exempted from restoring an employee to the same position after returning from leave if they meet certain conditions, including facing changes in operating conditions due to a public health emergency during the period of leave, and making reasonable efforts to restore the employee to an equivalent position for up to a year after they start leave or after the public health emergency concludes.

17. What if the company has a flexible PTO policy or unlimited vacation time? Can employees leverage the flexible vacation time and take unlimited time off?

This depends on the Organization's particular policy and state-specific state and local laws. Please contact counsel for more information.

EXPENSE REIMBURSEMENTS

18. If the Organization requires an employee to work from home, does it have to reimburse for business expenses?

New York law does not specifically require employers to pay for or reimburse employees for business related expenses. However, an employer must honor its agreements with employees to provide benefits. N.Y. Lab. Law § 198-c.

DISABILITY / PERCEIVED DISABILITY IMPLICATIONS

19. Is Coronavirus a disability (either actual or “regarded as”)?

It depends. Generally, conditions of a short duration are not considered a disability under the ADA. 29 C.F.R. § 1630.2(j). However, complications that may arise from illness caused by coronavirus may lead to the condition becoming an ADA-covered disability. The ADA defines a disability as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. It also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Arguably, symptoms of coronavirus may result in the impairment of a major life activity.

Note that on March 11, the WHO declared that COVID-19 is a pandemic. The EEOC's [guidance](#) on Pandemic Preparedness in the Workplace and the Americans with Disabilities Act is a helpful resource for other ADA-related questions.

Coronavirus or related quarantine might also qualify an individual for sick and/or disability leave under federal law and/or New York law. See FAQs 11 and 13.

20. What are the ADA implications of taking an employee's temperature in the workplace?

On March 18, 2020, the EEOC issued guidance regarding temperature checks. Because the CDC and state/local health authorities, including New York, have acknowledged community spread of COVID-19 and issued attendant precautions, organizations may measure workers' body temperature. However, organizations should be aware that some people with COVID-19 do not have a fever. Additionally, organizations should ensure that any temperature screenings are conducted in a non-discriminatory manner.

New York does not currently have any authority that would run contrary to the guidance above.

21. Can an employee refuse to come to work because of fear of contracting the virus? Would this raise the question of work-from-home as an ADA accommodation?

Employees Under Shelter-in-Place Orders Issued by Gov/Public Health Officials:

New York: Effective March 22, 2020 all business and not-for-profit entities in New York must reduce their in-person workforce at any work location by 100%, unless the business qualifies as an “essential business” under the order. See FAQ 6 for more information.

Employees Not Under Shelter-in-Place Order Issued by Gov/Public Health Officials:

Employees generally may not refuse to come to work because of potentially unsafe workplace conditions under OSHA or any other federal law, though the Organization should be sympathetic, discuss the situation with the employee and consider ways to address safety concerns like providing protective gear and sanitation efforts. Moreover, Organizations should consult counsel regarding legal implications of any safety concerns and workplace conditions in their particular circumstances.

For essential businesses, employees are generally entitled to refuse to work under OSHA only if they reasonably believe they are in imminent danger in the workplace. Section 13(a) defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

Note that local, state, and federal health authorities have cautioned that certain categories of individuals are especially vulnerable to this virus should carefully follow social distancing guidelines. The Organization may want to provide an accommodation to individuals who fall in the below categories:

- o over the age of 60
- o with an underlying health condition (heart disease, diabetes, etc.)
- o with a compromised immune system
- o who are pregnant.

22. If the Organization is hiring, may it screen applicants for symptoms of COVID-19?

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

New York does not currently have any authority that would run contrary to the guidance above.

23. May the Organization take an applicant’s temperature as part of a post-offer, pre-employment medical exam?

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment.

New York does not currently have any authority that would run contrary to the guidance above.

24. May the Organization delay the start date of an applicant who has COVID-19 or symptoms associated with it?

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

New York does not currently have any authority that would run contrary to the CDC guidance above.

25. May the Organization withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

New York does not currently have any authority that would run contrary to the CDC guidance above.

HYGIENE IN THE WORKPLACE

26. In a non-healthcare setting, can an employee insist that s/he be allowed to wear protective gear, such as a face mask or latex gloves? Is there any difference if the employee is in a direct customer service job, such as a front desk job or distributing food to clients?

Generally, no. OSHA has addressed whether an employee can simply refuse to work in unsafe conditions. Under OSHA, an employee's right to refuse to do a task is protected if all of the following conditions are met: (1) the employee is acting in good faith based on the risk; (2) the risk is such that a reasonable person, under the circumstances, would conclude that there is a real danger of death or serious injury; (3) there is insufficient time to seek intervention by OSHA; and (4) despite the employee's request, the employer has not taken sufficient steps to remove the risk. If the specific facts of an employer's business meet these conditions, an employee has a right to refuse to perform a task. However, given the CDC's guidance that face masks are only necessary in limited circumstances,⁴ masks are likely not necessary to protect the health of most employees.

Nevertheless, if an employee asks to wear protective gear as an accommodation related to a disability, an employer should grant the accommodation absent undue hardship.

The [NYC Department of Health](#) does not recommend the routine use of face masks for those who are not sick. Face masks are not needed for general or routine tasks in the workplace—even those who frequently interact with the public. Some employees may have to use either face masks or N95 respirators per their organization's protocol for reasons unrelated to the current COVID-19 outbreak. If so, such employees should use face masks or N95 respirators as usual.

The CDC has also provided hygiene and prevention guidance for particular organizations as follows:

⁴ The CDC does not recommend that people who are well wear some type of mask to protect themselves from respiratory disease, including COVID-19. The CDC does recommend that surgical masks should be used by people who show symptoms of COVID-19. If an employee shows symptoms or has been diagnosed with COVID-19, however, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask as an accommodation.

- Homeless Shelters: <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/index.html>
- Community and Faith-Based Leaders: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/index.html>
- Workplaces: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

27. Can the Organization mandate that an employee wear protective gear, such as a face mask or latex gloves?

Yes. An Organization may generally require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the Organization should provide these, absent undue hardship.

For most U.S. workers, OSHA has advised that companies should adapt infection control strategies based on a thorough hazard assessment, using appropriate combinations of engineering and administrative controls, safe work practices, and personal protective equipment (PPE) to prevent worker exposures. You can access OSHA's current guidance [here](#).

For workers involved in healthcare, death care, laboratory, airline, border protection, and solid waste and wastewater management operations and international travel to areas with ongoing, person-to-person transmission of COVID-19, OSHA specifically advises companies to “assess the [hazards \(see page\)](#) to which their workers may be exposed; evaluate the risk of exposure; and select, implement, and ensure workers use controls to prevent exposure.” Control measures may include a combination of engineering and administrative controls, safe work practices, personal protective equipment, and respiratory protection. Under these circumstances, companies could mandate that employees wear protective gear. However, as explained above, companies must engage in an interactive process and make reasonable accommodations for employees with disabilities as appropriate (*i.e.*, providing an alternative to latex gloves for an employee who is allergic to latex).

The CDC has also issued [Interim Guidance for Businesses and Employers](#), [Interim Guidance for Homeless Shelters](#), and [Interim Guidance for Community and Faith-Based Organizations](#). Guidance for these organizations varies somewhat. For example, it is recommended that employees working in homeless shelters wear disposable gloves when handling clients' belongings. In general, the CDC recommends that employees who appear to have acute respiratory illness symptoms (*i.e.* cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Notably, the CDC is not recommending that Organizations mandate sick employees wear protective gear at work because it does not recommend that they remain at work. The guidance also includes organization-specific risk-reduction strategies, including best practices on cleaning, disinfection, and social distancing.

The [NYC Department of Health](#) does not recommend the routine use of face masks if you are not sick. Face masks are not needed for general or routine tasks by staff – even those who frequently interact with the public. Some staff may have to use either face masks or N95 respirators per their organization's

protocol for reasons unrelated to the current COVID19 outbreak. If so, such staff should use face masks or N95 respirators as usual.

28. Can the Organization require an employee to be tested for COVID-19?

Yes. On March 11, the WHO declared that COVID-19 is a pandemic. While the ADA normally prohibits employee disability-related inquiries or required medical examinations, there is an exception where an employer will impose a “direct threat” due to medical condition. A “direct threat” is a “significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation. Given the WHO pandemic pronouncement and because it is widespread, if an employer now believes that the employee, based on “objective, factual information,” poses a “direct threat” we believe there is no legal prohibition on requiring a test.

New York does not currently have any authority that would run contrary to the CDC guidance above.

PRIVACY

29. How much information can the Organization ask an employee if there is concern that they may have (or have been exposed to) COVID-19?

During a pandemic, ADA-covered companies (employers with 15 or more employees) may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Organizations who are not covered by the ADA are encouraged to follow [CDC Guidelines](#), which state generally that organizations should maintain the confidentiality of all employees and encourage those who are exhibiting the symptoms listed above to stay home.

30. Should the Organization notify employees if a co-worker has been diagnosed with coronavirus?

If an employee is confirmed to have COVID-19, the Organization should obtain a complete list of employees who worked in close proximity (within 6 feet) to that employee during the prior 14 days. The employer should notify the employees with whom s/he worked in close proximity that it is suspected that they have been in close contact with an employee who has, or may have, contracted COVID-19 and request that those individuals work from home to prevent spread of the infection. The Organization should avoid identifying the diagnosed employee by name. The Organization can also refer employees to the CDC’s website or their healthcare provider if they have questions about the transmission of the virus or if they become ill ([see here for the CDC’s website about transmission](#)).

Alternatively, some Organizations are choosing to move to a remote work arrangement for an entire office where there has been either a confirmed diagnosis or even potential exposure. Again, even in this situation, it is important to avoid identifying the diagnosed or exposed employee by name.

The Organization may also want to consider a communication to employees regarding sanitation efforts taken in the impacted workplace.

OSHA REPORTING

31. Is COVID-19 a recordable illness that requires reporting to OSHA?

Yes, if the employee is infected on the job. While 29 CFR 1904.5(b)(2)(viii) exempts recording of the common cold and flu, COVID-19 is a recordable illness when an employee is infected on the job. See [OSHA website, COVID-19 standards](#).

32. If an employee in the US is diagnosed with the virus, and informs the Organization, but there is no reason to believe it was an occupational infection, does the Organization have an obligation to make a report to the government, e.g. OSHA?

No. If the employee did not contract the virus at work, then it does not need to be reported to OSHA.

33. If an employee has been confirmed to have COVID-19, what factors would the Organization look to in determining whether to report? A cluster of infections of employees? Anything else?

The test is whether an employer has reason to believe the employee contracted it at work. So, a cluster of infections might indicate that is the case. The [regulation](#) says:

“You must consider an injury or illness to be work-related 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 injuries and illnesses resulting from events or exposures occurring in the work environment...”

The section goes on to exempt employers from reporting instances of the common cold and flu, but notes that:

“contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work.”

The regulation directly addresses instances where it is not obvious whether the precipitating event or exposure occurred in the work environment. In those instances, employers are directed to:

“...evaluate the employee’s work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.”

Organizations should consult counsel regarding whether any particular incident of COVID-19 triggers OSHA reporting requirements.

34. Where do companies make OSHA reports in the United States if employers have employees both in and outside of New York?

The regulations allow companies with multiple business establishments to keep records for all of the establishments in a central location (such as headquarters), but employers need to make each report to the local OSHA office.

- This [contact page](#) contains local OSHA telephone numbers.
- An employer may also have reporting obligations to the respective state authorities. [Here](#) is a list of state-level contacts.

WORKERS COMPENSATION

35. Is COVID-19 compensable under Workers Compensation in New York?

Likely, yes. New York has made available additional benefits under the workers' compensation law to affected employees. The law amends the New York Workers' Compensation Law to further define "disability" as an inability of the employee to perform their job duties or any other duties offered by their employer due to a mandatory or precautionary order of quarantine or isolation due to COVID-19.

OTHER CONSIDERATIONS

36. Any I-9 relief on getting scans and not seeing the original?

Due to precautions being implemented by employers and employees related to physical proximity associated with COVID-19, the Department of Homeland Security (DHS) announced that it will exercise discretion to defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA). Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2. Employers also should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field once physical inspection takes place after normal operations resume. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate. These provisions may be implemented by employers for a period of 60 days from the date of this notice OR within 3 business days after the termination of the National Emergency, whichever comes first.

See [here](#) for more information.