

## Employer/Employee Issues During the Pandemic: Q&A

- 1.) What are employees entitled to under the new sick leave requirements passed by Congress?
- 2.) My business is not closing. What precautions should I be taking?
- 3.) Can I ask my employees to take their temperature prior to working each day?
- 4.) What if an employee who is already working from home claims to be ill or tests positive for COVID-19?
- 5.) Can I send employees home who exhibit potential symptoms of contagious illnesses at work?
- 6.) What are best practices if you find an employee either tests positive for COVID-19 or exhibits symptoms?
- 7.) How should I address employees who have may have been exposed to COVID-19?
- 8.) What If my employee had COVID and wants to return to work?
- 9.) Should employers require written proof of COVID-19 illness for employees or their family members before taking time off?
- 10.) What if I am open but my employees do not want to come to work?
- 11.) Can employees sue employers if they contract COVID-19 at work?
- 12.) Am I required to pay employees who are not working?
- 13.) What are some options if I need to layoff or furlough employees?
- 14.) How can workers obtain unemployment benefits due to COVID-19?
- 15.) I have under 50 employees, how do I gain an exemption from employee paid sick leave or expanded family and medical leave?
- 16.) What documentation should I be keeping in order to take advantage of tax credits for paid sick leave and expanded family and medical leave?

### **1.) What are employees entitled to under the new sick leave requirements passed by Congress?**

Click here for an explanation of the law and how it applies to your business: [Department of Labor, Families First Coronavirus Response Act: Employer Paid Leave Requirements](#).

[Here is a link to the accompanying Q&A document](#) that addresses questions such as how small businesses can obtain an exemption, how to count hours for part-time employees and how to calculate the wages employees are entitled to under this law. [Families First Coronavirus Response Act: Questions and Answers](#).

### **2. My business is not closing. What precautions should I be taking?**

Businesses that remain open during this time should review the Centers for Disease Control and Prevention (CDC) [Interim Guidance for Businesses and Employers](#) to help companies respond to COVID-19. Employers also should review [OSHA's COVID-19 Guidance](#) for U.S. workers and employers. The [AVMA also has compiled a list of resources](#) that can assist you in keeping your staff and public safe.

### **3. Can I ask my employees to take their temperature prior to working each day?**

According to the [Equal Opportunity Employment Commission \(EEOC\)](#), it is not a violation of the Americans with Disabilities Act (ADA) to inquire about flu-like symptoms or to take an employee's temperature during a pandemic. However, a pandemic does not change the employer's obligation to keep medical information confidential, and the fact that an employee has a fever or symptoms is subject to the ADA's confidentiality requirements.

### **4.) What if an employee who is already working from home claims to be ill or tests positive for COVID-19?**

The employee should be treated as any other on-site employee who is similarly situated and be directed to stay home.

### **5.) Can I send employees home who exhibit potential symptoms of contagious illnesses at work?**

Yes, sending an employee home who displays symptoms of contagious illnesses would not violate the ADA. Moreover, failing to send sick employees home may potentially raise issues under OSHA. Employees sent home in this manner do not qualify for unemployment if they are receiving paid leave benefits. However, once the paid leave runs out, they could file an unemployment claim.

In order to file for unemployment benefits, the claimant must be medically able to work. However, the usual eligibility requirement to search for work has been waived by the Texas Workforce Commission (TWC) for the immediate future as part of the pandemic relief effort.

### **6.) What are best practices if you find an employee either tests positive for COVID-19 or exhibits symptoms?**

Always follow CDC guidelines. Employees who test positive or exhibit symptoms should be sent home and asked to self-quarantine for at least 14 days. Employers should work with them to monitor their progress and determine when returning to work would be sensible.

Employers should not require any documentation or test confirmation before sending employees home. That sort of proof can be provided at a later date, if needed. Given the existence of the pandemic, the first priority must be health, safety and containing the spread of the virus.

Employers also should provide notice to all employees who worked in proximity to the individual in question without identifying the individual's name or other personal information. That notice should be provided as soon as possible in writing, preferably by email to leave a paper trail.

**7.) How should I address employees who have may have been exposed to COVID-19?**

There is no Texas or federal law that would prohibit a company from telling employees to stay home if they have had a higher than normal degree of exposure to individuals actually infected with the disease as long as the decision is not based on race or national origin. Risk of any employee who has been exposed to COVID-19 should be addressed on a case-by-case basis, but employers should absolutely follow the CDC guidance and relax requirements that employees provide a doctor's note to exercise sick leave, given the possibility of busy and overwhelmed medical facilities. An employer could choose to advance leave or provide additional time off.

Any preexisting paid leave policy should be followed in this situation. Failure to pay for leave owed under a written policy is a violation of the Texas Payday Law. Additionally, Congress passed some new paid sick leave policies that take effect on April 1: [Department of Labor, Families First Coronavirus Response Act: Employer Paid Leave Requirements](#).

**8.) What If my employee had COVID-19 and wants to return to work?**

A best practice is to ask for medical certification to return to work. A conservative approach in this environment is best. It is incumbent on companies to proceed with caution for returning employees because much is still unknown about the characteristics of the virus.

**9.) Should employers require written proof of COVID-19 illness for employees or their family members before taking time off?**

No, given that COVID-19 is a pandemic and direct threat, employers should allow for leave and then have employees provide documentation as soon as they can.

**10.) What if I am open but my employees do not want to come to work?**

Under federal law, employers are not required to pay non-exempt employees for work they do not perform and are not required to pay exempt employees for full-week absences in which they perform no work.

Under state law, policies related to paid sick leave are between employers and employees, and the TWC does not have jurisdiction. However, if the employee has been affected by the coronavirus and is not receiving payment while away from work, they may apply for unemployment benefits. Whether or not they actually receive benefits depends on the circumstances.

The law does not require an employer to retain an employee who doesn't report to work. However, depending on the employer, the employee may be able to use vacation, sick or

comp time for the time missed. It is important to note that the [Occupational Safety and Health Act](#) (OSHA) is also relevant in a pandemic situation. Employers may be responsible for workplace safety violations when they have a duty to protect workers exposed to COVID-19. Contagious diseases that are contracted at work (with the exception of the common cold or flu) are subject to recording and recordkeeping requirements. An employee's refusal to come to work for fear of contracting COVID-19 may be protected activity, triggering OSHA's anti-discrimination provisions.

There is a provision in OSHA regulations [[29 C.F.R. § 1977.12\(b\)\(2\)](#)] that provides the following:

*“(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.”*

## **11. Can employees sue employers if they contract COVID-19 at work?**

Probably not as long as the employer has acted reasonably. The Texas workers' compensation acts likely will bar tort claims except for intentional acts or gross negligence. The steps an employer takes to prevent the transmission and spread of the virus (such as following CDC and OSHA guidance/social distancing) will help negate any showing of intent.

**What about workers compensation?** Employers who have elected to participate under the Texas Workers Compensation Act receive statutory protection for common law claims by injured employees. Generally, an illness is compensable under a workers' compensation system if it arises out of, or is obtained in the course and scope of, an employee's work. Further, the illness must generally be caused by conditions specific to the work performed, more generally, something the employer required of the employee made the employee particularly susceptible. During a pandemic, the burden to show that the illness is work-related falls on the employee, who may have an extremely difficult time proving where they caught the disease, especially as a pandemic virus becomes more prevalent. Veterinarians are not human health care workers, so the required connections may be difficult to make.

## **12. Am I required to pay employees who are not working?**

Fair Labor Standards Act (FLSA) minimum-wage and overtime requirements attach to hours worked in a workweek; therefore, employees who are not working are typically not generally entitled to the wages the FLSA requires. However, if an employee on salary performs at least some work during the workweek, the salary basis rules require that they be paid the entire salary for that particular workweek.

An employer may have to keep paying the worker if they are under an employment contract.

Click on the following link for an explanation of the applicability of new paid sick leave provisions that begin on April 1: [Department of Labor, Families First Coronavirus Response Act: Employer Paid Leave Requirements](#). Click here for a link to the Q&A relating to these new laws: [Families First Coronavirus Response Act: Questions and Answers](#).

### **13. What are some options if I need to layoff or furlough employees?**

There is a federal law that mandates notice to employees with certain exceptions, but these provisions only apply to employers with 100 or more full-time employees. Employers can but are not required to pay employees if they temporarily close. These workers can file for unemployment (see below).

Employers who wish to only temporarily furlough workers should attempt to structure the leave of salaried exempt employees so they don't later risk losing the exemption under the FLSA that would require payment of minimum wage and overtime. This means that employers should probably use furloughs in full-week increments to avoid making improper salary deductions. This option is lawful because employers 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, such as checking company email. Concerns about losing exempt status generally do not apply to non-exempt employees, as employers only must pay these employees for hours actually worked

Absent an employment contract, an employer can reduce an employee's future pay without shortening their workweek. However, exempt employees must be paid at a salary rate equal to or greater than the minimum amount set by the Department of Labor (DOL) to remain exempt (\$684 gross per week, or \$35,568/year), and hourly employees are paid minimum wage and overtime pay. Additionally, the employee must be informed in writing of the rate at which they will be working before performing any work. The FLSA does allow an employer to require employees to use vacation or paid time-off as a cost-saving measure.

Employers can temporarily change salaried-exempt employees to hourly non-exempt if they provide advance notice of the change. This requires tracking of hours and payment of overtime for work over 40 hours. Hourly non-exempt employees are not entitled to pay during a business closure or where work is unavailable.

## **TWC Programs for Employers Who Wish To Furlough Employees**

For employers who wish to avoid layoffs by cutting employee hours or furloughing workers, the TWC recommends the use of the following programs.

First, the [Mass Claims program](#) streamlines the unemployment benefit claims process for employers by allowing the submission of basic worker information on behalf of employees to initiate claims for unemployment benefits. During the COVID-19 pandemic, the TWC has waived the requirement to submit a Mass Claims Request at least five days prior to the planned layoff.

Next, the [Shared Work program](#) provides Texas employers with an alternative to layoffs during a business slowdown. If your practice has slowed down due to the COVID-19 pandemic and you need to reduce employee working hours, you may be able to avoid laying off employees by submitting a shared work plan to the TWC. The program allows employers to supplement their employees' wages lost because of reduced work hours with partial unemployment benefits. The reduction in normal weekly work hours for employees in an affected unit by at least 10 percent but not more than 40 percent; the reduction must affect at least 10 percent of the employees in that unit. Shared Work unemployment benefits are payable to employees who qualify for and participate in an approved Shared Work plan. Workers may choose not to participate, but employees who do qualify will receive both wages and Shared Work unemployment benefits.

Shared Work unemployment benefits affect the employer's tax rate in the same way as other benefit chargebacks. Unemployment benefits paid through the shared work program are charged to the employer's account and used to compute the general (experience) tax rate. However, it's very possible that future state or federal legislation may provide relief or change how chargebacks are billed to employers.

### **14. How can workers obtain unemployment benefits due to COVID-19?**

For first-time unemployment applicants, [here is a link to a tutorial](#) from the TWC on applying for benefits online. Please note that the TWC is currently inundated with calls, so it may be difficult to reach a person. The TWC says it expects to provide special COVID-19 information later this week but encourages furloughed workers to [apply for benefits now through this link](#). Unemployment benefits begin as soon as a claimant's application is finalized and not when a TWC representative reaches out since there will be a delay.

Legislation recently passed by Congress provided more money to the states with increased claims for unemployment compensation if they meet certain requirements. Some of the prerequisites for states include taking steps to ease eligibility requirements and improving access to unemployment compensation for claimants, including waiving work search requirements and the waiting week and, importantly, non-charging employers directly impacted by COVID-19 due to

an illness in the workplace or direction from a public health official to isolate or quarantine workers. Congress has also enacted Pandemic Unemployment Insurance to cover individual who are not otherwise covered by traditional unemployment such as business owners, self-employed, 1099 or contract workers (relief veterinarians) and gig workers. The individual must self-certify that they are able to work and available for work except that the individual is unemployed, partially unemployed, or unable or unavailable to work for one of the following reasons:

- They have been diagnosed with COVID-19;
- They have symptoms of COVID-19 and is in the process of seeking a medical diagnosis;
- A household member has COVID-19;
- They are providing care to a household member with COVID-19;
- A child or other person in the household for which the individual is the primary caregiver is unable to attend school or daycare due to COVID-19;
- The individual is unable to reach work due to a quarantine;
- The individual is unable to attend work because a healthcare professional advised him or her to self-quarantine;
- The individual is scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19;
- The individual is the sole wage earner in his or her household due to death of the head of household as a result of COVID-19;
- The individual was required to quit his or her job as a result of COVID-19;
- The individual's place of employment closed due to COVID-19; and
- The individual is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for unemployment benefits under another state unemployment program.

Individuals who can telework or are receiving sick leave or other paid leave benefits are not eligible. All unemployed workers will be entitled to an additional \$600 per week (up to 4 months) if the unemployment is related to COVID-19. Currently, when a worker files for unemployment and names your clinic as their last employer, the TWC will send you a [Notice of Application for Unemployment Benefits](#). When responding to this notice, make sure to include information stating that your business was impacted by COVID-19. If the former employee is eligible for unemployment benefits, the TWC will send former employers a [Notice of Maximum Potential Chargeback](#) and continue billing reimbursing employers for benefits paid. However, due to the declared a disaster relating to the pandemic as well as the recent legislation passed by Congress, employer tax accounts will likely be protected from chargeback.

**15. I have under 50 employees, how do I gain an exemption from employee paid sick leave or expanded family and medical leave?**

You can ONLY gain exemption from the provision of expanded leave to care for the employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, for

COVID-19 related reasons. To justify this denial an authorized officer for your business must DOCUMENT and retain for your records for 4 years the facts and circumstances relating to how they meet one of the following prerequisite criteria for that exemption

- (1) Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
- (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
- (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

**16. What documentation should I be keeping in order to take advantage of tax credits for paid sick leave and expanded family and medical leave?**

Payments from employers to employees for paid leave, as well as allocable costs related to the maintenance of health benefits during the period of the required leave, is to be reimbursed by IRS via tax credits, up to statutory limits. However, it is important to maintain the proper documentation to prove that the leave was paid in order to receive the reimbursement.

An employer is required to retain all documentation, including employee provided oral statements four years, regardless of whether leave was granted or denied. It's a good idea to require a written statement from the employee for your records which contains the following

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for



which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Here is the specific provision of the law that applies

**§826.140 Recordkeeping.**

*(a) An Employer is required to retain all documentation provided pursuant to §826.100 for four years, regardless whether leave was granted or denied. If an Employee provided oral statements to support his or her request for Paid Sick Leave or Expanded Family and Medical Leave, the Employer is required to document and maintain such information in its records for four years.*

*(b) An Employer that denies an Employee's request for Paid Sick Leave or Expanded Family and Medical Leave pursuant to §826.40(b) shall document the determination by its authorized officer that it is eligible for such exemption and retain such documentation for four years.*

*(c) In order to claim tax credits from the Internal Revenue Service (IRS), an Employer is advised to maintain the following records for four years:*

*(1) Documentation to show how the Employer determined the amount of paid sick leave and expanded family and medical leave paid to Employees that are eligible for the credit, including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave;*

*(2) Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages;*

*(3) Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;*

*(4) Copies of the completed IRS Forms 941 that the Employer submitted to the IRS or, for Employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the Employer's entitlement to the credit claimed on IRS Form 941, and*

*(5) Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.*