

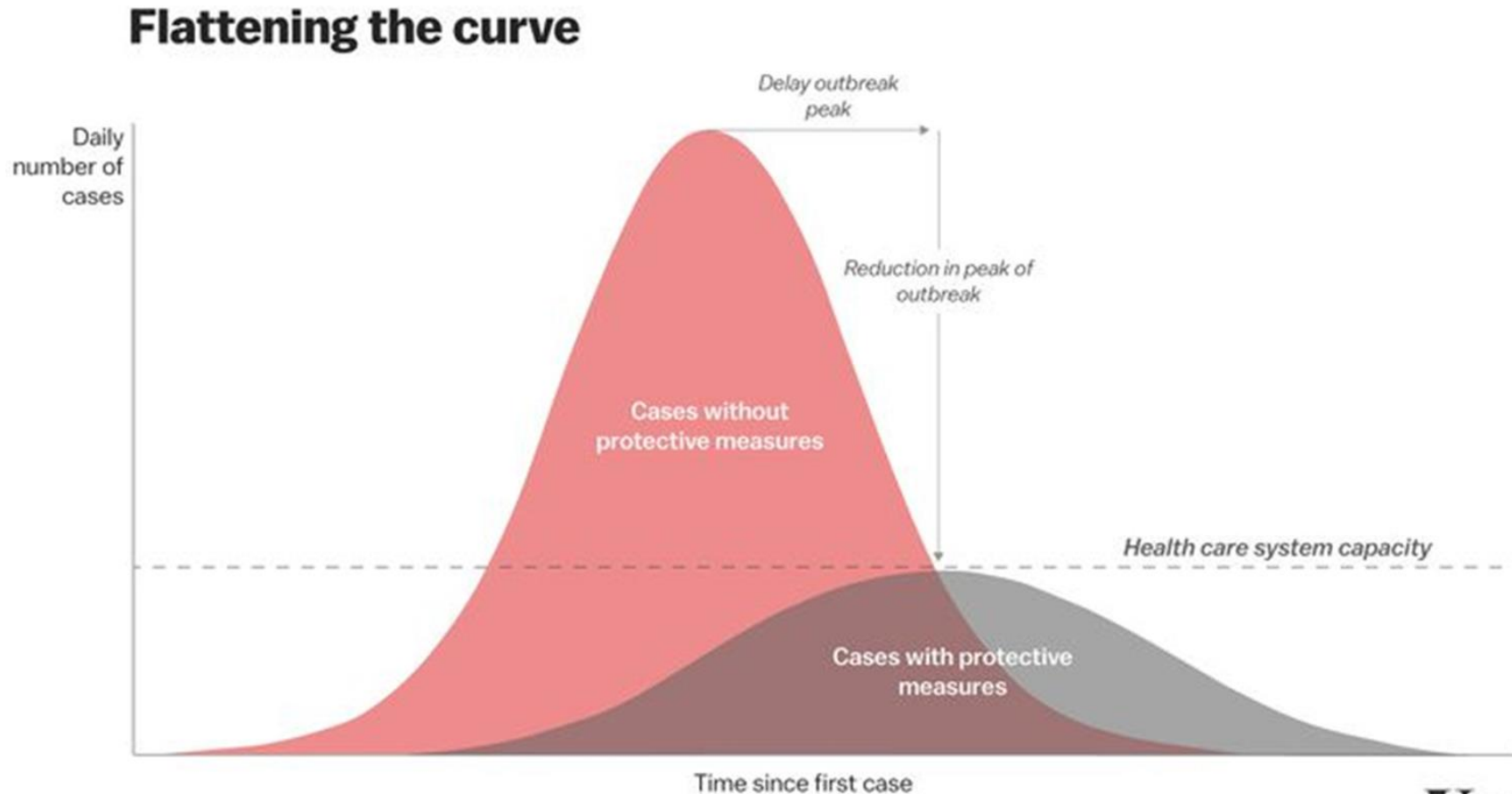
COVID-19 AND THE LAW: It's Here – Now What?

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As of Monday, March 23, 2020, the virus, which only became known 13 weeks ago, has already killed more than 13,000 people worldwide and infected more than 300,000.

Officials are aware of more than 15,219 cases and 201 deaths in the U.S., including at least 56 patients who are infected in Hawaii.

The more slowly this happens, the more time health officials will have to treat the sick and develop a vaccine.



The Laws

- OSHA
- The ADA
- Title VII
- Pregnancy Discrimination Act
- FMLA/HFL
- NLRA
- FLSA
- WARN



How to Protect Yourself in the Workplace during a Pandemic



The best strategy to reduce the risk of becoming ill with pandemic influenza is to avoid crowded settings and other situations that increase the risk of exposure to someone who may be infected. If you must be in a crowded setting, minimize your time there. Some basic hygiene and social distancing precautions that can be used in every workplace include the following:

- Stay home if you are sick.
- Wash your hands frequently with soap and water for 20 seconds or with a hand sanitizer if soap and water are not available.
- Avoid touching your nose, mouth and eyes.
- Cover your coughs and sneezes with a tissue, or cough and sneeze into your upper sleeve. Dispose of tissues in no-touch trash receptacles.
- Wash your hands or use a hand sanitizer after coughing, sneezing, or blowing your nose.
- Avoid close contact (within 6 feet) with coworkers and customers.
- Avoid shaking hands and always wash your hands after physical contact with others.
- If wearing gloves, always wash your hands after removing them.
- Keep frequently touched common surfaces (for example, telephones, computer equipment, etc.) clean.
- Try not to use other workers' phones, desks, offices, or other work tools and equipment.
- Minimize group meetings; use e-mails, phones and text messaging. If meetings are unavoidable, avoid close contact (within 6 feet) with others and ensure that the meeting room is properly ventilated.
- Limit unnecessary visitors to the workplace.
- Maintain a healthy lifestyle; attention to rest, diet, exercise and relaxation helps maintain physical and emotional health.



<https://www.osha.gov/Publications/protect-yourself-pandemic.html>

What Employers Can Do to Protect Workers from Pandemic Influenza

- **Engineering controls** are those that involve making changes to the work environment to reduce work-related hazards. These types of controls are preferred over all others because they make permanent changes that reduce exposure to hazards and do not rely on worker or customer behavior. By reducing a hazard in the workplace, engineering controls can be the most cost-effective solutions for employers to implement.
- Examples include:
 - Installing physical barriers, such as clear plastic sneeze guards.
 - Installing a drive-through window for customer service.
 - Using specialized negative-pressure ventilation for aerosol-generating procedures in healthcare settings.

Administrative controls are those that modify workers' work schedules and tasks in ways that minimize their exposure to workplace hazards.

Examples include:

- Developing policies that encourage ill workers to stay at home without fear of any reprisals.
- Discontinuing nonessential travel to locations having high prevalence of illness.
- Developing practices to minimize face-to-face contact between workers such as extended use of e-mail, websites and teleconferences. Where possible, encourage flexible work arrangements such as telecommuting or flexible work hours to reduce the number of workers who must be at the work site at one time or in one specific location.
- Relying on home delivery of goods and services to reduce the number of clients or customers who must visit your workplace.
- Developing emergency communications plans. Maintain a forum for answering workers' concerns. Develop Internet-based communications, if feasible.

Work practices are procedures for safe and proper work that are used to reduce the duration, frequency or intensity of exposure to a hazard

When defining safe work practice controls, it is a good idea to ask your workers for their suggestions, since they have firsthand experience with the tasks. These controls need to be understood and followed by managers, supervisors and workers.

Examples include:

- Providing resources and a work environment that promotes personal hygiene. For example, provide tissues, no-touch trash cans, hand soap, hand sanitizer, disinfectants and disposable towels for workers to clean their work surfaces.
- Encouraging workers to obtain a seasonal influenza vaccine (this helps to prevent illness from seasonal influenza strains that may continue to circulate).
- Providing workers with up-to-date education and training on influenza risk factors, protective behaviors, and instruction on proper behaviors (for example, cough etiquette; avoiding touching eyes, nose and mouth; and proper care of PPE).
- Providing education and training materials in an easy to understand format and in the appropriate language and literacy level for all employees.
- Developing procedures to minimize contacts between workers and between workers and clients or customers.

Personal Protective Equipment (PPE) is protective gear needed to keep workers safe while performing their jobs.

Examples of PPE include respirators (for example, N95), face shields, goggles and disposable gloves. While engineering and administrative controls and proper work practices are considered to be more effective in minimizing exposure to the influenza virus, the use of PPE may also be indicated during certain exposure situations and during emergencies. The appropriate types of PPE for use during a pandemic will be based on the risk of contracting influenza while working and the availability of PPE. Check the www.pandemicflu.gov website for the latest guidance.

It is important that PPE be:

- Selected based upon the hazard to the worker;
- Properly fitted and some need to be periodically refitted (e.g., respirators);
- Conscientiously and properly worn;
- Regularly maintained and replaced in accordance with manufacturer's specifications;
- Properly removed and disposed of to avoid contamination of self, others or the environment; and
- If reusable, properly removed, cleaned, disinfected and stored.

If used correctly, PPE can help prevent some exposures; however, they should not take the place of other prevention interventions, such as engineering controls, cough etiquette and hand hygiene (see www.cdc.gov/flu/protect/stopgerms.htm).



- Woman who contracted chronic respiratory illness after being exposed to Influenza B while traveling in Asia. The Supreme Court of Minnesota ruled the woman was eligible for workers compensation because she was on work-related business, and the disease was not one she would have contracted in the United States.

- The only opportunity for an employee who contracts coronavirus to seek damages outside of workers' compensation is if their company has behaved recklessly—such as by ordering them to Wuhan, the epicenter of the virus.
- The fact the U.S. State Department has issued a Level 4 advisory for China—a flat-out "do not travel" warning—means firms could face special liability in the event their employees contracted the virus.



ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

Directions: Answer “yes” to the whole question without specifying the factor that applies to you. Simply check “yes” or “no” at the bottom of the page.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES _____ , NO _____

May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

- Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.
- https://www.eeoc.gov/facts/pandemic_flu.html

Can I fire an employee for refusing to come to work because of fear of contracting the coronavirus?

- Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) 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.”
- Requiring travel to China or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work.

During a pandemic, how much information may an employer request from employees who report feeling ill at work or who call in sick?

- ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

During a pandemic, may an employer take its employees' temperatures to determine whether they have a fever?

- Generally, measuring an employee's body temperature is a medical examination. If 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.

When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

- No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Travel Restrictions and Quarantines

- Can you restrict employees from returning to work regardless of where they have travelled?
- Can you require employees to self quarantine if a household member has traveled *anywhere*?
- What if travel was to a CDC Level 3 or 2 country?
- What if travel was to a community in the USA with an active case of Covid-19?

<https://travel.state.gov/content/travel.html>



EEOC v. Massage Envy (11th Cir. 2019)

- A massage therapist who was fired by Massage Envy in South Tampa, FL, due to concerns she might contract the Ebola virus in a planned visit to Ghana in West Africa in 2014.
- “[E]ven construing the statute broadly, the terms of the ADA protect persons who experience discrimination because of a current, past, or perceived disability – not because of a potential future disability that a healthy person may experience later.”

Paid or Unpaid?

- If you require employees not work for 14 days, do they have to be paid?
- Can you allow an employee to use paid sick leave?
- Can you allow an employee to use paid sick leave for self quarantine if they are not sick and your TDI plan incorporates your sick leave plan?
- If an employee exhausts paid leave benefits, can they be on unpaid leave?
- Does it matter if they are salaried exempt or non-exempt? YES!
 - See DOL Opinion Letter FLSA2005-41 (10/24/05)

H.R. 6201 Families First Coronavirus Response Act, The vote was 363-40.



- **PAID SICK/FAMILY LEAVE**
- Establishes a temporary coronavirus-related sick leave benefit paid by employers with fewer than 500 workers.
- Workers will receive 80 hours of sick leave if they have coronavirus related need for leave. The benefit would expire in January 2021.
- Permits 12 weeks of job-protected family or medical leave at two-thirds pay, though the first 14 days of the extended leave would be unpaid.
- In both cases businesses would be reimbursed by the federal government through a refundable tax credit.

H.R. 6201 Families First Coronavirus Response Act (includes technical changes as passed by House 03/16/2020)

Overview Employer Paid Leave Requirements and Tax Credit Provisions

	Covered Employers	Duration of Leave	Qualifying Reasons for Leave	Required Wage Replacement	Applicability of: Division G – Tax Credits for Paid Sick and Paid Family and Medical Leave
<p>Division E – Emergency Paid Sick Leave</p> <p>Effective 15 days after enactment.</p> <p>Expires 12/31/2020</p>	<p><u>Private sector employers with fewer than 500 employees.</u></p> <p>Public sector employers with 1 or more employees.</p> <p>Good cause exemption for employers with fewer than 50 employees. Applies to reason #5 only. (DOL Rule)</p>	<p><u>Employer must provide 2 weeks</u> of paid sick leave for full-time covered employees.</p> <p>Special rule for part-time employees.</p>	<ol style="list-style-type: none"> 1. Employee is subject to a Federal, state or local quarantine related to COVID-19. 2. Employee has been advised by a health care provider to self-quarantine. 3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. 4. Employee is caring for an individual who is subject to quarantine pursuant to 1 and 2. 5. To care for a child or children whose school or care provider is unavailable due to COVID-19. 6. Employee is experiencing a similar condition as specified by HHS, DOL or Treasury. 	<p><u>Reasons #1-3:</u> Employee’s regular rate of pay. Capped at \$511/day and \$5,110 total.</p> <p><u>Reasons #4-6:</u> 2/3 of employee’s regular rate of pay. Capped at \$200/day and \$2,000 total.</p> <p>Special rule for part-time employees.</p>	<p>Private sector employers with fewer than 500 employees may obtain a credit for wage replacement:</p> <p><u>Employers receive 100% payroll tax credit (refundable as needed)</u> for required paid sick leave wages plus certain health care expenses of the employer.</p> <p>Special rule for self-employed.</p>
<p>Division C – Emergency Family and Medical Leave</p> <p>Effective 15 days after enactment.</p> <p>Expires 12/31/2020</p>	<p><u>Private sector employers with fewer than 500 employees.</u></p> <p>Good cause exemption for employers with fewer than 50 employees. (DOL rule)</p>	<p><u>Employer must provide 10 weeks</u> of paid family and medical leave for employees (employed for at least 30 days).</p> <p>Special rule for part-time employees.</p>	<p>Employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.</p>	<p><u>Not less than 2/3 of regular rate of pay</u> based on # of hours scheduled to work. Capped at \$200/day and \$10,000 total.</p> <p>Special rule for part-time employees.</p>	<p>Private sector employers with fewer than 500 employees may obtain a credit for wage replacement:</p> <p><u>Employers receive 100% payroll tax credit (refundable as needed)</u> for required paid family and medical leave wages plus certain health care expenses of the employer.</p> <p>Special rule for self-employed.</p>

SEC. 3105. SPECIAL RULE FOR HEALTH CARE PROVIDERS, 13 AND EMERGENCY RESPONDERS.

- An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions in the amendments made under of section 3102 of this Act (FMLA).
- Health care provider means:
 - (1) The FMLA defines health care provider as:
 - (i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
 - (ii) Any other person determined by the Secretary to be capable of providing health care services.
 - (2) Others “capable of providing health care services” include only:
 - (i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
 - (ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;
 - (iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.
 - (iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; ...

During a pandemic, may an ADA-covered employer ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?

- No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA. Asking employees if they are immunocompromised or have a chronic condition is a disability-related inquiry subject to the ADA's restrictions. When pandemic influenza symptoms only resemble those of seasonal influenza, they do not provide an objective basis for a "reasonable belief" that employees will face a direct threat if they become ill. Therefore, they do not justify disability-related inquiries or medical examinations.
- However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.
- If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g., telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many disabilities do not increase this risk (e.g., vision or mobility disabilities).
- If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?

- Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.
- In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

- **During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?**
- Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.
- **During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?**
- Yes. An employer may 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 employer should provide these, absent undue hardship.

- **During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?**
- Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.
- Example E: During an influenza pandemic, an employer directs a supervisor to contact an employee who has not reported to work for five business days without explanation. The supervisor asks this employee why he is absent and when he will return to work. The supervisor's inquiry is not a disability-related inquiry under the ADA.
- **May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?**
- Yes. 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.

Discrimination

- Fear of the coronavirus is manifesting as racism against people who are of Chinese or Asian descent after the virus was first identified in China in December.
- Being Chinese or Asian American, Iranian or Italian, does not increase the chance of getting or spreading COVID-19.
- The best deterrent to such bias is education.

NJ Employers Can't Fire Workers Over COVID-19 Symptoms

- NJ AG issued guidance requires employers to take reasonable action to stop related harassment of East Asian employees such as one worker calling the disease the “Chinese Virus” and prohibits terminating employees because they exhibit covid-19 symptoms.

The NLRA

- Employees might refuse to work unless their work environment is sanitized, they get to wear a mask, they ask for protective equipment, particularly if someone at the workplace had been sick. Or employees might protest co-workers not washing their hands.
- These acts are may be protected concerted activity for which the employer may not discipline an employee.

Union Issues

- Employers may face economic pressures that lead to temporary layoffs. Employers should review their collective bargaining agreements (CBAs) to ensure they are aware of what rights they have to institute layoffs and how they would go about carrying out the reduction in force.
- In certain industries it may become necessary for companies to implement cost-cutting measures, such as wage freezes. In those circumstances, a company may have to ask a union to enter into mid-contract negotiations on such issues.

Telecommuting

- Eligibility

- Job is of exempt status
- Work is information based
- Productivity can be monitored/measured easily.
- Position is able to typically work alone on assignments.
- Job duties of the individual do not require frequent supervision, direction or input from company personnel.
- Physical presence at the worksite is not an essential job requirement or necessary to perform essential job functions.



Scheduled Workweek

- The telecommuter and supervisor must agree in advance on the number of days of telecommuting allowed each week, the work schedule the employee will maintain, and the manner and frequency of communication.

Workplace

- Establish and maintain an appropriate work environment within their home for work purposes. The Company will not be responsible for costs associated with initial setup of the telecommuter's home.
- The telecommuter is solely responsible for any tax and other legal implications for the business use of the home.

Safety

- The telecommuter is responsible for designating and maintaining a workplace that is free from recognized hazards and that complies with all occupational safety and health standards, rules, and regulations.

Workers' Comp

- Work-related injuries that are sustained by the telecommuter while at their home work location may be covered by WC.

Equipment

- The telecommuter must agree to use all equipment for its intended purpose, in accordance with the manufacturer's instructions and in a safe manner.
- The telecommuter is responsible for the maintenance of personal equipment not provided by the Company.
- The Company will supply the telecommuter with appropriate office supplies

Information Security

- To ensure proper use of information, communication systems and business equipment, the Company may monitor the use of these systems and equipment from time to time.

More Telecommuting Policies

- Confidentiality
- Anti-Harassment, Discrimination and Retaliation Policy
- Performance Evaluations
 - Not every telecommuting arrangement will be a success.
- Telecommuting Agreement
 - Employees and their supervisors must jointly sign a Telecommuting Contract prior to the commencement of telecommuting.

WARN

- A layoff of more than 50 employees for over 6 months requires the employer to give each employee 60 day advance written notice of the layoff UNLESS the layoffs were due to an “unforeseen business circumstance” or natural disaster.
- WARN Act regulations say that the disaster must be a direct cause of the layoff, and it’s possible that a pandemic would be considered indirect.
- The WARN Act applies to companies with 100 or more employees. It defines a “mass layoff” as the termination of more than 50 workers in a 30-day period at a single site, affecting more than 33% of an employer’s workers, or the discharge of at least 500 employees.
- Violations of the federal Worker Adjustment and Retraining Notification Act, or the WARN Act, could result in stiff fines, including back pay, benefits, and a civil penalty of \$500 per day.

- (b) The “unforeseeable business circumstances” exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.
- (1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.
- (2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

- (c) The “natural disaster” exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.
- (1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.
- (2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.
- (3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in §639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.
- (4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the “unforeseeable business circumstance” exception described in paragraph (b) of this section may be applicable.

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