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EMPLOYER RESPONSE TO HEALTH OUTBREAKS

This FAQ was developed to assist employers in preparation and response to the spread of illnesses such as the novel flu, measles, or other related illnesses and the risk presented to the workplace.

As with any emergency situation, employers must be prepared to respond to absenteeism and implement plans to continue the essential business functions. Employers are encouraged to seek guidance from the [CDC](#), [World Health Organization \(WHO\)](#), or state or local health departments for up-to-date information related to the virus and recommended quarantine or travel restrictions.

Congress recently passed the Families First Coronavirus Response Act, which will provide relief for employees forced to miss work because of the COVID-19 outbreak, effective April 1, 2020, for employers with fewer than 500 employees. The new law includes an emergency expansion of the Family Medical Leave Act (FMLA) and a new federal paid sick leave law, for leave taken between April 1, 2020 and December 31, 2020. Reference Archbright's KeyNote *Families First Coronavirus Response Act*, available on the Archbright website, as well as the Department of Labor's [Employer Paid Leave Requirements](#) and [Q&A](#). Employers are required to post the [Families First Coronavirus Response Act Poster](#).

Additionally, many state and local officials have issued state and local orders. See state specific sections below. *Note changes to Seattle's Paid Sick and Safe Time (PSST) law, amended March 18, 2020 to address COVID-19.*

The CDC has released guidance for employers that instructs employers to conduct "regular health checks on arrival each day (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings." It is not clear what methods an employer should use – and presumably an employer can consider many options. One option is a screening survey that asks employees and visitors to confirm they have not been exposed to the virus within the last 14 days, are not running a fever, etc., in order to enter the worksite. Eligible Archbright members may visit the HR Toolkit or mobile app for a sample screening survey.

Eligible members are encouraged to call the Archbright HR Advice and Legal team with specific questions, or to seek clarification when necessary.

FREQUENTLY ASKED QUESTIONS

WHAT SHOULD AN EMPLOYER DO UPON LEARNING THAT SOMEONE IN THE WORKPLACE HAS CONTRACTED CORONAVIRUS, MEASLES, OR OTHER RELATED VIRUS OR ILLNESS?

Contact the CDC or state and local health department immediately. Clean and disinfect the workplace (you may wish to contact a professional cleaning service) and inform your employees of potential signs and symptoms, offering employees the option to expense their medical test for the virus.

WHAT INFORMATION MUST AN EMPLOYER SHARE WITH ITS WORKFORCE IF AN EMPLOYEE HAS CONTRACTED A VIRUS OR ILLNESS SUCH AS CORONAVIRUS?

Employers must tread lightly here. Do not disclose the name of the employee. The employer must be cautious not to directly or indirectly disclose the confidential medical information of the infected employee, or expose that individual to potential harassment or other adverse action in the workplace, e.g., name-calling, shunning, etc. Even if not a disability, confidentiality provisions of the Americans with Disabilities Act (ADA) may apply or there may be situations that would be covered by the Health Insurance Portability and Accountability Act (HIPAA).

An example of communication to the workforce may include: "On _____, 2020 it came to management's attention that one of our employees has been infected with [virus or illness]; we are following recommended medical guidelines. We urge all employees to take precautions as outlined on the CDC website at <https://www.cdc.gov/>. If you show symptoms of the illness, you are not to come into work and must call in and report this to [Employer Representative]. If you have any questions, please contact [Employer Representative]."

CAN THE EMPLOYER DIRECT EMPLOYEES TO STAY AT HOME AND AWAY FROM THE WORKPLACE IF THEY ARE EXPERIENCING REPORTED SYMPTOMS OR ARE CARING FOR SOMEONE WITH THE VIRUS OR ILLNESS?

Yes. People are contagious at the onset of these symptoms. It is critical that an employee experiencing symptoms or known to be directly exposed to the disease, stay home for a medically recommended period and only can return to work upon release from a medical provider.

Of course, the employer must enforce this consistently among the workforce to avoid claims of discrimination and inconsistency. For example, if a particular illness is believed to have more cases in a particular country, then the employer may not apply its policies only to people who are or appear to be from that country.

SHOULD AN EMPLOYER REQUIRE AN EMPLOYEE TO STAY HOME FROM WORK IF EXPOSED TO THE VIRUS OR ILLNESS, BUT NOT SHOWING SYMPTOMS?

Employers should carefully review guidance from the CDC, WHO, and/or local health departments. Simply being "exposed" to the illness may or may not *require* an employee to quarantine. If the employee, out of caution, requests to self-quarantine, employers should consider the request. However, if the employee does not necessarily want to self-quarantine *and has no symptoms*, employers should consider many factors, including the amount of exposure (for example, if an employee's spouse tests positive and they are caring for them). If they were simply at an event with someone that was exposed, quarantine may not be a necessary solution. Employers should review this on a case by case basis and ensure any employee with symptoms is not permitted to work.

WHAT STEPS SHOULD AN EMPLOYER BE TAKING TO ENCOURAGE "SOCIAL DISTANCING" AT WORK?

The [CDC](#), [WHO](#), and local health departments have published guidance for employers. Guidance suggests employers – and individuals in general – practice "social distancing" as much as possible to prevent or slow the spread of illness. Examples include spacing workers at the worksite, staggering work schedules, limiting in-person meetings, or eliminating large work-related gatherings (e.g., staff meetings, after-work functions).

CAN WE INSIST ANYONE EXPOSED TO A PANDEMIC ILLNESS (I.E., EMPLOYEE IS CARING FOR A FAMILY MEMBER WITH THE VIRUS OR ILLNESS) GET A MEDICAL EXAM BEFORE RETURNING TO WORK?

Not in most situations. Under the ADA, employers can make disability-related inquiries or require medical exams only if they are job-related and consistent with business necessity. Generally, if the employee poses a direct threat due to the medical condition, a medical exam would be permitted. However, whether an outbreak rises to the level of a direct threat is up to the CDC or public health authority to determine. The EEOC advises, "During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information."

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. However, [EEOC guidance in 2009](#) states that "...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." [CDC guidance for Seattle-King, Pierce, and Snohomish Counties](#) states that every workplace should conduct "Regular health checks on arrival each day (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings."

However, if an employer takes workers' temperatures, it should be clear that the fact that an individual does not have a fever does not mean they do not have the virus; similarly, temperature testing does not necessarily ensure that the workplace is free of the virus. Further, employers should be aware that although the EEOC has provided guidance on ADA requirements during pandemics, it is not clear that a court would follow the EEOC's guidance.

IF AN EMPLOYER REQUIRES EMPLOYEES STAY HOME DUE TO A VIRUS OR ILLNESS SUCH AS CORONAVIRUS, MUST THE EMPLOYEE BE PAID?

The actual issuance of pay will vary from employer to employer, and depends upon the full circumstances of the employer's particular workplace, i.e., the availability of job benefits like sick leave, PTO, vacation, whether the employee is exempt or non-exempt, short-term disability plans, etc.

Wage and hour laws only require payment to non-exempt employees for actual services and time worked; this applies even when the employer unilaterally keeps the employee from coming into work. If the employee has paid leave available, such as sick leave or PTO, the employer may be obligated to allow the employee to use and apply such compensation to the absence. State and local law and ordinances may also be implicated and may entitle the employee to paid time off. Further, the employer should review any collective bargaining agreements that may impose differing payment obligations for unionized employees. An employer may be obligated to pay an exempt employee for time missed if the employer unilaterally and affirmatively requires the individual to stay at home.

WHAT IF AN EMPLOYEE MUST STAY HOME TO CARE FOR A CHILD DUE TO CLOSURE OF THE CHILD'S SCHOOL?

Employers may be required to allow employees to take paid sick leave (or PTO) to care for a child due to a school closed by a public official. Washington and Oregon paid sick leave laws state that an authorized sick leave reason includes when the employee's place of business has been closed by order of a public official for any health-related reason, or when an employee's child's school or place of care has been closed for such a reason.

WHAT LEAVE LAW PROTECTIONS MAY APPLY?

Employees may be eligible for leave under federal, state, or local law. The Family and Medical Leave Act may apply for eligible employees. Other protections may include ADA, Washington Family Care Act, Washington's Paid Family Leave Act, Oregon Family and Medical Leave Act (OFLA), and protected sick leave under Washington and/or Oregon law may apply for an employee and family member or if school or daycare closure is mandated by a public official. If the employer is notified that another employee has a medical impairment that compromises their immune system in such a way that exposure to a virus may create a "direct threat" of harm to the employee, it may also be necessary to engage in the interactive process under the ADA to determine the nature of the employee's medical status and need for accommodation.

WHAT IF AN EMPLOYEE REFUSES TO COME TO WORK BASED ON FEAR OF CONTRACTING THE VIRUS OR ILLNESS (OR ELECTS TO SELF-QUARANTINE)?

Under OSHA requirements, employers have a duty to provide a safe workplace for employees. Employees have a right to refuse to report to work if they reasonably fear doing so would present danger to their safety and health. The employer may not retaliate against the employee under these circumstances. However, there is no requirement to pay the employee for the absence unless the employee is working remotely and/or paid time off is available.

CAN AN EMPLOYER REQUIRE AN EMPLOYEE RETURNING FROM A FOREIGN COUNTRY TO SELF-QUARANTINE UPON RETURN?

It depends. In general, employers may require employees to report if they have traveled to a CDC reported restricted area and if the employee has had contact with an infected contagious person to stay home and self-quarantine. Employers should reference the [CDC Travel Health Notices](#) for current health issues that impact travelers' health, like disease outbreaks, special events or gatherings, and natural disasters, in specific international destinations.

SHOULD AN EMPLOYER REQUIRE AN EMPLOYEE UNABLE TO WORK DUE TO THE VIRUS OR ILLNESS USE THEIR PAID SICK LEAVE?

Employers should follow their paid sick leave or PTO policies. Employers in Washington should be mindful that the Department of Labor & Industries (L&I) states that paid sick leave is a worker's right under the State's paid sick leave requirements, which only an employee may authorize the use of. Under this interpretation, an employer may not force or automatically apply an employee's accrued paid sick leave. If the employee requests the use of accrued paid sick leave, then the employer could apply it.

SHOULD AN EMPLOYER DESIGNATE FMLA WHEN AN EMPLOYEE IS UNABLE TO WORK DUE TO THE VIRUS OR ILLNESS?

If you are a covered employer, clearly eligible employees with the virus or illness and those with a child, spouse or parent infected by the virus or illness are entitled to FMLA. However, if an employee has no symptoms, but only was exposed to the virus or illness, an employer should not charge any of work missed against the employee's FMLA entitlement.

WHAT IF AN EMPLOYEE INSISTS ON COMING TO WORK EVEN AFTER THEY'VE BEEN SENT HOME PREVIOUSLY BECAUSE THEY HAVE THE VIRUS OR ILLNESS?

If an employee has been diagnosed with the virus, or shows symptoms of the virus (as identified by the CDC or other health agencies), it is perfectly permissible for an employer to instruct an employee to stay home until their physician releases them. Their presence in the workplace can put many employees at risk, endanger employees who have complicated medical situations, and affect business operations. Make it very clear to all employees that if they show symptoms of the virus, they are not to come into work but should call in and report this. In addition, many healthcare entities are asking people who have symptoms to call first and not expose other patients by going into a practice. Any employee who knowingly ignores this admonition may need to be addressed through disciplinary procedures.

MAY AN EMPLOYEE FILE A WORKER'S COMPENSATION CLAIM IF THEY CONTRACT A VIRUS OR ILLNESS SUCH AS CORONAVIRUS AT WORK?

Determining whether an illness is compensable under workers compensation laws will depend heavily on the facts of each specific case. However, in general, illnesses are not covered by workers compensation laws unless there is a direct connection between the employee's work activities and the exposure to the illness. Also note state-specific guidance below.

CAN THE EMPLOYER MANDATE VACCINATION (IF ONE IS AVAILABLE)?

There are no specific laws that preclude an employer from requiring employees to get a vaccine. However, there are privacy, disability, and religious discrimination considerations regarding vaccinations that must be taken into account. Additionally, if employees are represented by a union, mandating vaccinations needs to be bargained with the union. Before mandating vaccinations, employers are encouraged to seek legal counsel.

To encourage employees to seek vaccination voluntarily, employers can communicate that vaccines are safe and effective, with links to the CDC information. Employers may also offer to arrange onsite vaccinations at the workplace and/or pay for employee vaccinations.

WHAT IF THE HEALTH OUTBREAK EFFECTS BUSINESS AND AN EMPLOYER MUST CONDUCT TEMPORARY LAYOFFS OR FURLOUGH EMPLOYEES?

When confronted with a difficult financial and business climate, employers look for ways to reduce costs. Reductions often include layoffs, reduced workweeks (or furlough), or short-term plant/facility closings. Generally, a furlough refers to a temporary, unpaid layoff or leave implemented as a cost-saving measure. A reduced workweek may be used as a form of furlough or may refer to reduced work hours over a period of time (for example, a reduction of one day a week for a year). Generally, employers may reduce the hours of *non-exempt* employees through a workforce reduction. Furloughs should be done, if possible, in full workweek increments for exempt employees to protect an employee's exempt status. See Archbright KeyNote *Pay Docking for Exempt Employees*. Also note state-specific guidance below.

IF WE HAVE TO SHUTDOWN SUDDENLY AND CANNOT PROVIDE 60 DAYS NOTICE, ARE THERE ANY PENALTIES?

The Worker Adjustment and Retraining Notification Act (WARN Act) is a federal law that requires certain employers to give advance notice of significant layoffs to employees and others. In general, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff.

However, where the 60-day notice cannot be provided, employers must still follow the requirement to provide notice as soon as possible. "Unforeseeable Business Circumstances" applies to both plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required. To fall within this exception, there must exist some sudden, dramatic, and unexpected action or condition outside the employer's control. In determining whether the business circumstances were not reasonably foreseeable, the focus is on the employer's business judgment. Reference Archbright KeyNote, *WARN Act Overview* for additional information.

Employer should also note that several states also have WARN Act layoff notice laws that may be stricter than the federal WARN law and may apply to smaller employers.

WHAT OBLIGATIONS EXIST TO NOTIFY OF NEGOTIATE WITH A UNION REGARDING CORONAVIRUS POLICIES, LEAVE, OR QUARANTINE?

It depends on the terms of the collective bargaining agreement. There may be an obligation to negotiate with a union regarding quarantine policies because they affect the terms and conditions of employment. Depending on the managements rights clause in the contract, an employer may be able to send the employee home but may still have to pay the employee based on the union rights clause.

WASHINGTON

Employers in Washington must also be mindful of [specific guidelines and orders](#) related to certain business and school closures.

Employers in the Seattle area, including King, Pierce, and Snohomish Counties, are encouraged to review [CDC recommendations](#) related to mitigation strategies for Coronavirus, as well as [King County's Public Health news and blog](#) for new state and local Orders issued to protect residents' health from COVID-19, including [specific guidelines for certain industries](#).

Washington paid sick leave laws state that an authorized sick leave reason includes when the employee's place of business has been closed by order of a public official for any health-related reason, or when an employee's child's school or place of care has been closed for such a reason.

Effective March 18, 2020 the City of Seattle's Paid Safe and Sick Time (PSST) Ordinance was amended to address COVID-19. Prior to the March 2020 amendments, employees could use PSST when their **child's** place of care or school was closed due to the order of a public health official for a health-related reason. An employee may now use PSST if any **family member's** place of care or school is closed. These amendments also now require an employer with 250 or more full-time equivalent employees to allow their employees to take PSST when their place of business has been closed for any health or safety reason. Eligible employers are encouraged to review Archbright's KeyNote *Washington State Paid Sick Leave* for additional information.

Washington employers may wish to contact the [Employment Security Department](#) (ESD) for up to date guidance and/or to request "standby" status for an employee to temporarily apply for unemployment benefits. Washington employers may also consider the [Shared Work](#) program. Workers will be able to receive unemployment benefits if an employer needs to temporarily shut down operations because workers become sick or quarantined as a result of the Coronavirus.

Washington L&I has clarified that workers' compensation benefits will be provided to these workers during the time they're quarantined after being exposed to COVID-19 on the job. The policy also applies to others who may have accepted claims for exposure to COVID-19; for example, those who are not considered health care workers but are working in facilities with documented exposures or others whose claims may be approved. Effective March 8, 2020, the one week waiting period to receive unemployment insurance is waived.

Employees may also be eligible for Washington's Paid Family and Medical Leave (PFML) if the leave is related to COVID-19. Employees who are ill, or who are caring for a family member who is ill, will generally qualify for paid leave under PFML. Employees who are not ill, but are under a Coronavirus quarantine, do not have a "serious health condition" and will generally not qualify for paid leave. Employees should contact the [Employment Security Department](#) (ESD) [PFML website](#) for updates on leave qualifications and timing of benefit payments. Paid leave may also be available to eligible individuals that are not currently working, but unable to work due to a qualifying event under PFML.

For employers covered by both PFML and the new Families First Coronavirus Response Act, employers should be aware that PFML and the paid FMLA may run *consecutively*.

OREGON

Employers in Oregon must also be mindful of [specific guidelines and orders](#) related to certain business closures.

Oregon paid sick leave laws state that an authorized sick leave reason includes when the employee's place of business has been closed by order of a public official for any health-related reason, or when an employee's child's school or place of care has been closed for such a reason.

Oregon employers should reference the [Oregon Employment Department](#) for COVID-19 related business layoffs, closures, and unemployment insurance benefits. On March 18, 2020, Oregon issued temporary rules to help employees impacted by COVID-19. The Oregon Employment Department's temporary rules expand the availability of unemployment insurance to those impacted by COVID-19, while the Oregon Bureau of Labor and Industries ("BOLI") issued a temporary rule expanding the availability of the [Oregon Family Leave Act](#) ("OFLA") to parents whose children are impacted by school or day-care closures.

For employers covered by both OFLA and the new Families First Coronavirus Response Act, the unpaid OFLA leave and the paid FMLA would run concurrently in most circumstances.

IDAHO

Idaho employees may reference the [Idaho state website](#) for guidance and FAQs regarding . Employers should reference the [Idaho Public Health District](#) websites for up to date guidance related to COVID-19.

DISCLAIMER: The information in this document is provided for guidance purposes only. It should not be construed as legal advice and is not intended to be a substitute for legal counsel. If you are a Silver or Gold member, please contact us to obtain advice from the Archbright legal team.

SAMPLE MEMO TO EMPLOYEES

To: All Employees

Date:

We are very aware of the [health outbreak, i.e., coronavirus] and are watching the [CDC website as well as the state/local Department of Health's website] for information and will provide additional information if and when it is needed.

This is a good reminder to always practice good health and hygiene practices:

- Stay home when sick – and if you arrive at work sick, you will be sent home
- Avoid close contact with people who are sick
- Avoid touching your eyes, nose, and mouth
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash

[Employer Name] provides workplace hygiene products throughout the office and encourages every employee to help prevent the spread of germs by using the products. Kleenex tissues, disinfecting Clorox wipes, and hand sanitizer bottles are provided throughout the work area in common work locations. Please wipe down common areas and meeting rooms after each use. All used tissues or wipes should be thrown in the trash immediately.

Wash your hands often throughout the day with soap and water, especially before eating. Ensure you lather your hands and scrub between the fingers, under the nails as well as the front and back of the palms for at least 20 seconds before rinsing. An alcohol-based hand sanitizer with at least 60% alcohol should only be used when soap and water are not available.

Please work closely with your manager if you need flexibility to care for your own illness, a family member's illness, or school/daycare closure. Regardless of the type of illness, if you are showing any signs or symptoms of a respiratory infection, you should practice social distancing to help prevent getting others sick. Stay home and seek medical care; refer to [Employer Name] PTO and sick leave policy and communicate with your Manager and HR. Do not return to work until you are symptom free and/or released by your doctor.

Please contact [Employer Representative] if you have any questions.