

CORONAVIRUS (COVID-19) IN THE WORKPLACE: U.S. LEGAL AND REGULATORY CONSIDERATIONS

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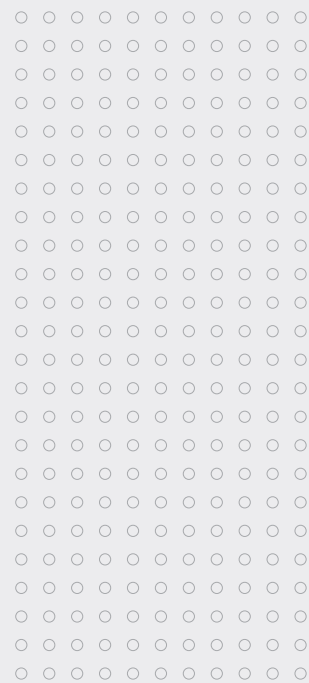
HUB International



Coronavirus and Employee Relations

Dealing with workplace illnesses is not a new challenge to employers. Every day, employers manage various issues associated with employee (and family) member illnesses, unplanned absences, and workforce productivity challenges. Likewise, managing contagious conditions in the workplace is not a new challenge to employers.

While the manifestation of the [Coronavirus](#) presents many of these familiar challenges, there are some new, unique concerns facing employers—most especially the uncertainty, media coverage, and lack of a vaccine. Amidst this, [HUB](#) provides important information that employers should know and understand regarding various employment laws and employee relations issues associated with illness in the workplace (including but certainly not limited to the Coronavirus).



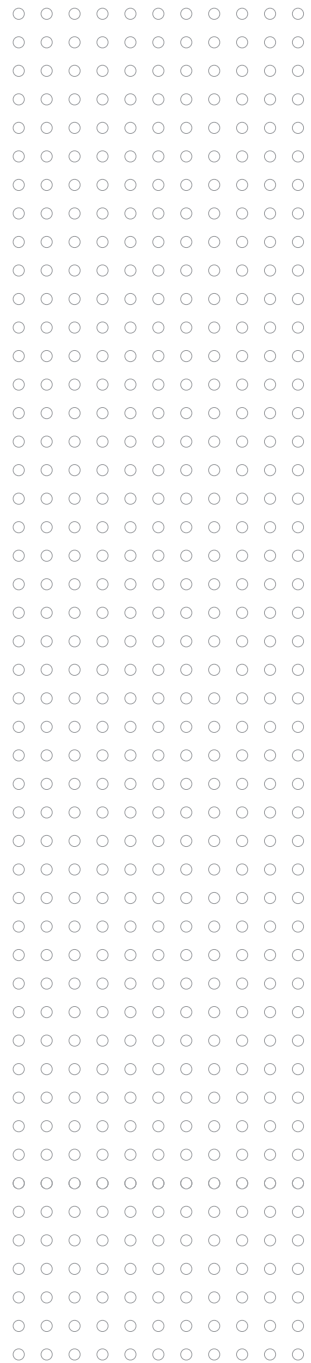
Legal and Regulatory Considerations

Occupational Health and Safety Act (OSHA)

Many times when employers think about OSHA, they think of high-risk working environments. Many white-collar employers, for example, do not connect OSHA obligations with their working environment. In March 2020 OSHA [published guidance](#) regarding COVID-19. This guidance is a resource document for important workplace safety duty and obligations required from employers, regardless of industry. It does not, however, impose new legal obligations. More specifically,

- [29 U.S.C. § 654, 5\(a\)1](#) - **OSHA General Duty Clause** Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
- [29 CFR 1910 Subpart 1](#) - **OSHA's Personal Protective Equipment (PPE)** standards which require using gloves, eye and face protection, and respiratory protection. When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1920.134).
- [29 CFR 1920.1030](#) - **OSHA's Bloodborne Pathogens** standard applies to occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions that may transmit COVID-19. However, the provisions of the standard offer a framework that may help control some sources of the virus, including exposures to body fluids (e.g., respiratory secretions) not covered by the standard.

In fact, employers can be cited for violating the General Duty Clause if there is a recognized hazard and they do not take reasonable steps to prevent or abate the hazard. Employers are required to take protective measures such as providing employees with personal protective equipment. In the case of the a contagious virus, this may include issuing the appropriate masks or providing alternative working arrangements that limits employees' exposure to others (more on that below).



Family and Medical Leave Act (FMLA)

Employers that employ 50 or more employees within a 75-mile radius may be subject to the [FMLA](#). The FMLA provides employees (with at least twelve-months of employment and worked at least 1,250 hours) with twelve-weeks of job and health insurance protected leave for specific qualifying reasons.

The two most relevant qualifying events are: (1) employee's own serious health condition; and (2) to provide care for a family member with a serious health condition. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves **inpatient care or incapacity and continuing treatment** by a health care provider. This means that the FMLA will not apply to an employee who is simply afraid to come to work. To qualify as a serious health condition, the employee is unable to work, perform any one of the essential functions of his or her position, attend school, or perform other regular daily activities because of the serious health condition. A serious health condition also requires a regime of treatment or recovery from the serious health condition.

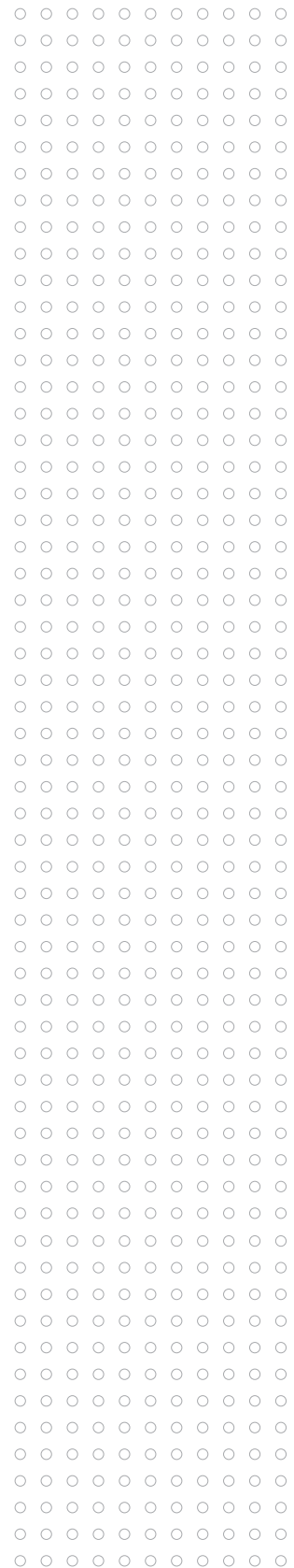
What this means in light of the Coronavirus

So long as FMLA eligibility requirements are satisfied, employees who are diagnosed with the Coronavirus or are medically quarantined for suspicion of having Coronavirus may be eligible for FMLA since Coronavirus satisfies both the **inpatient care** and the **continuing treatment** prongs of the FMLA.

As noted above, FMLA may also apply if an employee must provide care to a qualified family member (child, parent, or spouse) diagnosed with the Coronavirus. In this case, the employee may be needed to provide care to the family member because the family member is unable to care for his or her own medical, safety or other needs; the family member needs help in being transported to the doctor; or to provide psychological comfort and reassurance to the family member due to a serious health condition.

What this means in light of the Coronavirus

If an employee's family member is diagnosed with Coronavirus, then the family member will be quarantined. As a result, the employee likely will not be required to provide care; provide any additional transportation to the family member; or be able to provide psychological comfort and reassurance (by virtue of being separated). However, it is possible that the employee becomes quarantined if he or she had direct contact or exposure to the family member. Therefore, the employee may be eligible for FMLA for his or her own serious health condition.



An employer facing the possibility of an employee or family member being diagnosed with the Coronavirus may be inclined to bypass the regular and ordinary FMLA steps. The FMLA rules regarding notices and documentation have not been lifted. Therefore, employers must continue to follow their regular and ordinary FMLA process including the Notice of Eligibility and Rights & Responsibilities, certifications, Designation Notice, and most importantly, the fitness for duty. [See the Department of Labor Employer's FMLA Guide HERE.](#)

Employer Workplace Policies

Employers should remember that their published and normal policies continue to be enforceable, including but not limited to:

- Time and attendance and call-in procedures
- Sick leave policies and reporting procedures
- FMLA processes and obligations, including the payment of health insurance premiums
- Wage replacement rules and programs

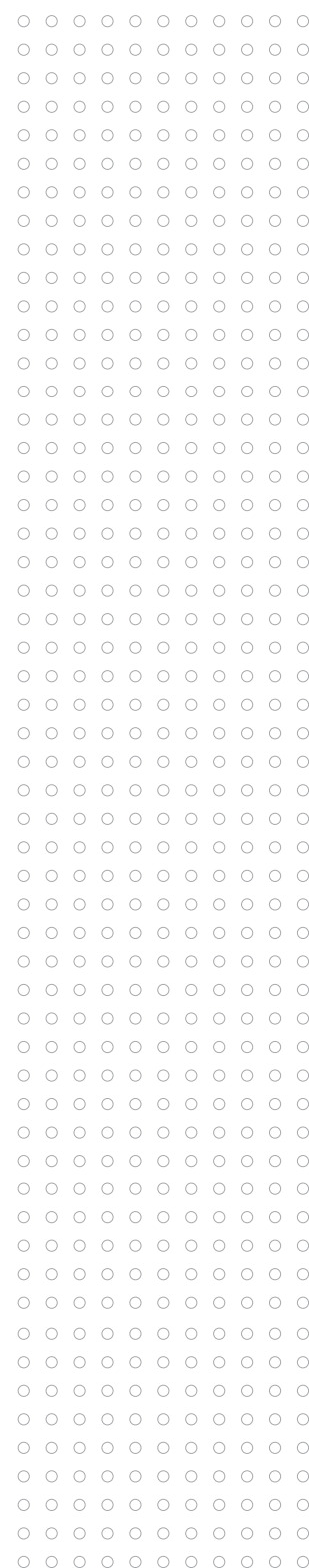
Americans with Disabilities Act (ADA)

The ADA prohibits employers with 15 or more employees from discriminating against qualified individuals with disabilities. Employees may qualify for the rights and protections of the ADA if they experience any one of the following:

1. Physical or mental impairment that substantially limits one or more major life activities
2. Record of such an impairment
3. Regarded as having such an impairment

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. This means that the employer and employee must work together to identify an accommodation that allows the employee to perform the essential functions of his or her job.

The uncertainty associated with the Coronavirus may motivate employers to ask employees about their medical conditions. We caution employers to remember that inquiries about an employee's disability status are [limited](#). Employers may make disability-related inquiries and require medical examinations only if inquiries and examinations are "job related and consistent with business necessity."



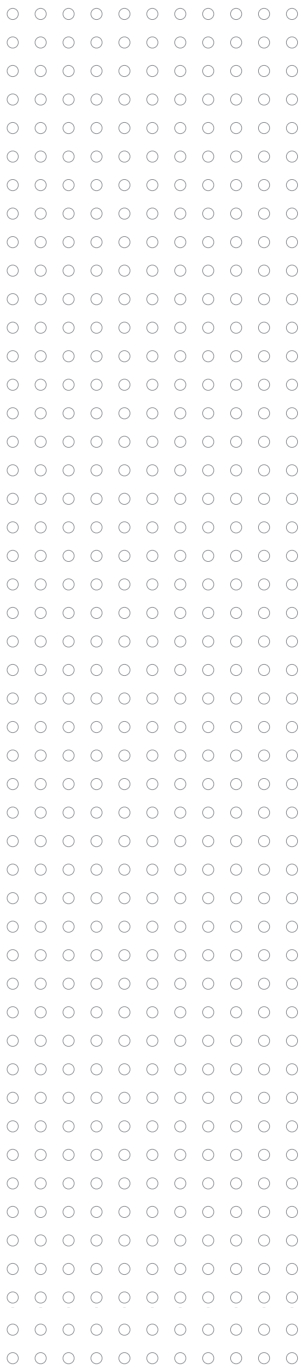
It should be noted that if the “...CDC or state or local health authorities determine that pandemic influenza is significantly more severe [than a seasonal influenza or the 2009 spring/summer H1N1 influenza], it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.”

What this means in light of the Coronavirus

Employees who are exposed to the Coronavirus and, as a consequence, are quarantined, may not be necessarily disabled as defined by the ADA. Employees who are actually diagnosed with the Coronavirus will likely qualify for the rights and protections of the ADA. The EEOC has stated that, in some circumstances, a leave of absence may be a reasonable accommodation under the ADA. Regardless of the approach taken, the employer should contemplate prior practices for consistency and compliance with ADA.

ADA, FMLA, and Telecommuting

Under certain circumstance, allowing an employee to telecommute may be a reasonable accommodation to individuals with a disability (unless doing so would cause an undue hardship) under the Americans with Disabilities Act (ADA). For example, an employee may be quarantined because of “exposure” (instead of actual diagnosis) may and may ask to work remotely from the quarantine site. The employer will first have to determine whether the employee can perform the essential functions of his or her job on a remote basis. If so, and the employee can continue to work on a full-time basis then the time out of the office may not qualify for the FMLA. However, if the employee has a condition that qualifies under the ADA, then the remote arrangement may be an appropriate accommodation allowing the employee to perform the essential functions of the job (*see the Telecommuting section below for more information*).



Title VII of the Civil Rights Act of 1964 (Title VII)

Title VII generally applies to employers with 15 or more employees, including federal, state and local governments and prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion. While travel warnings and travel bans to various countries are on the rise, employers must be careful not to react to these warnings in a manner that may run afoul of Title VII.

What this means in light of the Coronavirus

Employers should not assume that because an employee is a particular race or of a particular national origin, that he or she should be treated differently. For example, employers should be sure that Chinese employees or Americans of Chinese origin are not discriminated against in the fervor to prevent the spread or contraction of this disease. However, it may be reasonable to ask a worker who has recently traveled to China, Italy, or other countries that have been impacted by the virus, to refrain from coming into the office for 14 days — the incubation period for Coronavirus.

Fair Labor Standards Act (FLSA)

One of the most important questions asked by employers is, “If my business is shut down in response to the Coronavirus (or any sort of medical outbreak) do I still have to pay my employees?” The answer depends on the status of the employee as exempt or nonexempt under the Fair Labor Standards Act (FLSA), which in turn depends largely on the work he or she performs.

The general answer is that employees that are exempt under the FLSA must be paid an entire week’s salary if they perform any work during the workweek. Conversely, nonexempt employees must be paid only for the hours actually worked. Because this is a generalization and because there are many exceptions and wrinkles that could apply to any particular situation, make sure to contact your legal counsel for help.

Nonexempt (usually hourly) employees

An hourly employee must only be paid for work he or she actually performs. Therefore, if your business is shut down (or your non-exempt employee does not perform any work) as a result of an outbreak, you generally do not have to pay nonexempt employees for any hours not worked (with a few exceptions). However, if your employee handbook contains any language or policies to the contrary, then you may be obligated to follow those policies. Likewise, be sure to review your policies and handbooks to ensure they do not contain anything that could give rise to a contract or quasi-contractual claim. Finally, make sure that you do not have an actual employment contract with the employee that could govern the terms of his or her wage payments.

Exempt (usually salaried) employees:

The general rule for salaried/exempt employees is that they are required to be paid if they perform work at some point during the workweek. Unless your business is shut down (or an employee does not perform any work) for more than an entire workweek, your exempt employees are generally entitled to be paid for the entire week in which they worked.

- One approach employers have considered is to require salaried employees to apply vacation or leave balances for the days not worked. However, the [DOL](#) has disapproved of this practice, so employers will do so at their own risk.
- Another approach could be to lower your exempt employees' salaries on a go-forward basis if you reasonably anticipate those employees will be working reduced weeks for an extended period of time. This, of course, could create morale issues, so this option should only be implemented after careful consideration. Additionally, if you have a contract with a salaried employee where the salary term is definite, you will not be able to adjust the salary downward without the employee's consent.

What this means in light of the Coronavirus

Exempt Status

Employees who are not infected and are able to work may find that they must "fill-in" for absent, infected co-workers. Therefore, job descriptions may be significantly altered and may potentially compromise an employee's exempt status. Additionally, employees who are able to remain working may be faced with increased overtime hours and the employer may find itself grappling with possible overtime abuse. Employers should be sure that their "time and attendance" and overtime policies are up-to-date and distributed through the workforce.

Intermittent FMLA

In some cases, employees may take intermittent FMLA, as an example, to care for an infected family member. Under both the FMLA and FLSA, employers may pay exempt employees on an hourly basis during the intermittent FMLA leave. More specifically, "this means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee."

Medical Information and Privacy (FMLA, ADA, WC, HIPAA)

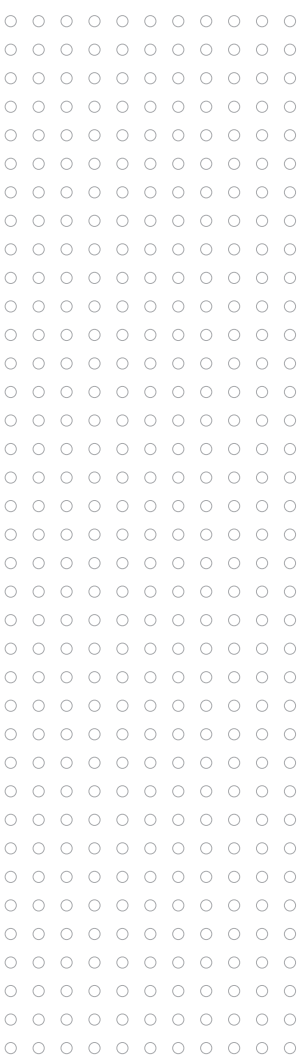
Confidentiality Requirements

As employers begin to learn about employee’s individual medical concerns and conditions, it’s important to remember that several laws have very specific confidentiality requirements. FMLA, ADA, and Workers’ Compensation statutes all contain provisions that protect the confidentiality of an employee’s medical information. Employers have the obligation to ensure that all medical information obtained about an employee is private and confidential. Medical information gathered through the FMLA, ADA, disability insurance, workers compensation, or other sick-leave documentation is generally not protected under HIPAA but is confidential.

Health Insurance Portability Accountability Act (HIPAA) Requirements

Depending on the source of the medical information, employers may also face HIPAA privacy obligations. While HIPAA can be a complex law, in a nutshell, if the employer learns of the employee’s medical information, condition, diagnosis etc. through the health plan, then that information is likely protected under HIPAA.

Generally, HIPAA obligations manifest themselves most frequently in employers with a self-funded health program that have access to claims information. Self-funded programs include health flexible spending arrangements and health reimbursement arrangements. However, employers that receive employee’s Explanation of Benefits (even if fully insured) may unintentionally subject themselves to HIPAA. HIPAA also generally prohibits an employer from discriminating against an employee who has a particular medical condition.



What this means in light of the Coronavirus

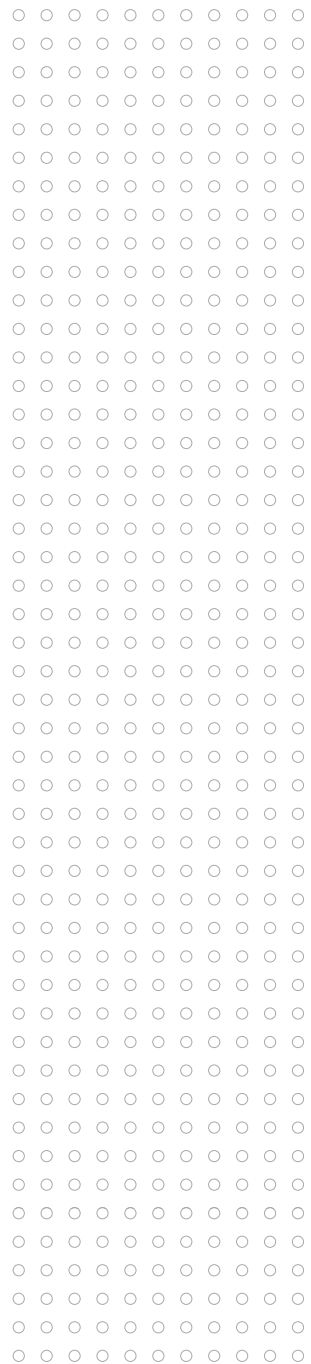
If an employer learns of an employee's medical condition such as a diagnosis of the Coronavirus, the employer may not share this information. Under the **confidentiality provisions** of ADA, FMLA, and WC, only those who "need to know" may know about the diagnosis. It may be very difficult to demonstrate that, for example, a line manager "needed to know" the employee's specific diagnosis. Instead, the line-manager likely only needs to know that the employee will be on a leave of absence and not able to work.

However, under HIPAA the standard is more stringent and the employer absolutely cannot share the medical diagnosis or other medical information unless it is facing a true medical emergency where the employee's diagnosis becomes imperative for health and safety reasons.

Therefore, employers should simply keep an employee's medical condition and diagnosis confidential and private unless facing true health and safety circumstances. Likewise, employers must resist the urge to setup the "gofundme" page or engage in any well-meaning efforts to provide aid and care to an employee that is facing medical condition challenges. However, it is always the employee's right to release and share their OWN medical condition information.

Anti-retaliation and Non-discrimination

It's very important to remember that each of these regulations includes very specific prohibitions against retaliation and discrimination. Employers may not discriminate against any employee on the basis of their medical condition, FMLA status, disability, or any other protected class. Likewise, an employer may not retaliate against an employee because he or she seeks the rights and protections of any of these federal employment laws.



Affordable Care Act Considerations

The ACA requires employers with 50 or more full time equivalent employees to offer a compliant ACA health plan. Along with the mandate to offer a compliant plan, employers must be sure to maintain the plan under two different sets of rules depending on the employee's status. More specifically, the ACA places employees in essentially two categories:

Full-Time. These are employees who, at the time they are hired into their position, are reasonably expected to work an average of 30 hours each week or 130 hours each month.

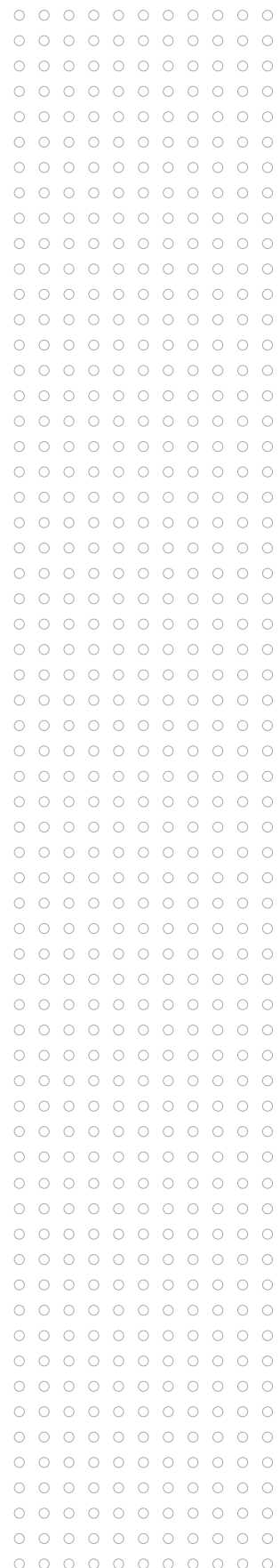
Measured Variable Hour/Part-Time Employees. If you have employees with variable work schedules or who are seasonal, there are special rules that allow you to measure their hours over a measurement period (such as 12 months) to determine if they averaged 130 hours per month (30 hours per week). If you adopt those rules, and an employee averages at least 130 hours per month (30 hours per week) over the measurement period, you have to offer them coverage that will be available for a specified period (often 12 months). The period coverage is available is sometimes called the "stability period."

What this means in light of the Coronavirus

In the event of a prolonged employee absence an employer may be in a quandary with respect to the continuation of the employee's health insurance. If the employee is eligible for FMLA, then his or her health insurance must be continued in accordance with the FMLA rules. However, what should an employer do if the employee is on a leave of absence that is not covered by the FMLA? The answer is found under the ACA and it depends on the employee's status:

Full-time: Beginning the first of the month following the employee's leave, the employer should "downshift" the employee. This means that the employer will measure the employee's hours for 3 consecutive calendar months. At the end of the three calendar months, the employee may retain his or her coverage only if he or she averaged 130 hours of work each month. If the employee did not average 130 hours of work in each calendar month then the employer should offer the employee COBRA for a reduction in hours.

Part-time/Variable-hour: When a part-time/variable hour workers averages enough hours in a measurement period (130 hours in each month of the measurement period) then he or she becomes eligible for the health insurance plan. Subsequent to enrollment in the plan, the employee enters a "stability period". **The rules of the stability period require that the employer maintains the employee's coverage during the entirety of the stability period regardless of hours worked.** This means that during a prolonged non FMLA absence, the employer must continue the employee's health insurance until: (1) the end of the stability period; (2) the termination of employment; or (3) a failure to pay his or her premium contribution – whichever occurs first.



Employers must also be cognizant of affordability issues that may arise in a reduction in hours or a prolonged, unpaid leave of absence. “Affordable” means the employee’s share of self-only coverage under your plan is not more than 9.78% (2020) of the employee’s household income. There are three safe-harbors that an employer may rely on to ensure the plan meets affordability requirements.

The most relevant safe harbor for purposes of this discussion is the W-2 safe harbor. Under the W2 safe-harbor, the premium cannot be more than 9.78% (2020) of an employee’s Box 1 compensation of the W-2 for the calendar year. If selected, the W2 safe harbor must be used for an entire calendar year. The employer cannot change to another safe harbor mid-year.

Affordable Care Act (ACA) and Affordability

Employers who rely on the W2 Safe Harbor for affordability of the health plan under the ACA may need to revisit their calculations. More specifically, the W2 safe harbor method allows employers to use Box 1 of the W2 to determine the contribution structure of the employee-only coverage of the lowest ACA compliant plan. When an employee experiences a reduction in compensation due to, among other things, an unpaid leave of absence, Box1 of the W2 will invariably be reduced. Therefore, the employer’s plan may no longer be affordable. A plan that is not affordable may trigger what’s called the “B” penalty if an employee goes out to the marketplace, gets a plan, and gets a subsidy. [See our Affordable Care Act FAQ HERE](#)

HR Considerations and Best Practices

Telecommuting

The CDC recently released an updated [bulletin](#) regarding the Coronavirus in the U.S. and one of its recommendations was implementing a [telework](#) or telecommuting program. Remote work presents both opportunities and challenges for employers. On the positive side, employers may be able to limit the spread of contagious conditions in the workplace. On the negative side, employers may grapple with time and attendance issues, overtime abuse, and/or workplace productivity challenges. Employers that choose to allow telecommuting arrangements should have a comprehensive policy addressing the “rules of the road”. By planning ahead and creating a tailored policy, employers can avoid confusion and headaches down the line, including possible allegations of uneven and discriminatory treatment. [See Sample Telecommuting Policy HERE.](#)

Telecommuting best practices and considerations

- Employees should be made aware that permission to telecommute is not guaranteed, may not be a permanent or regular arrangement, and the employer may approve or deny telework arrangements at its discretion.
- A thorough policy should specify whether requests will be entertained under specific circumstances and for specific positions and/or location.

Time and Attendance

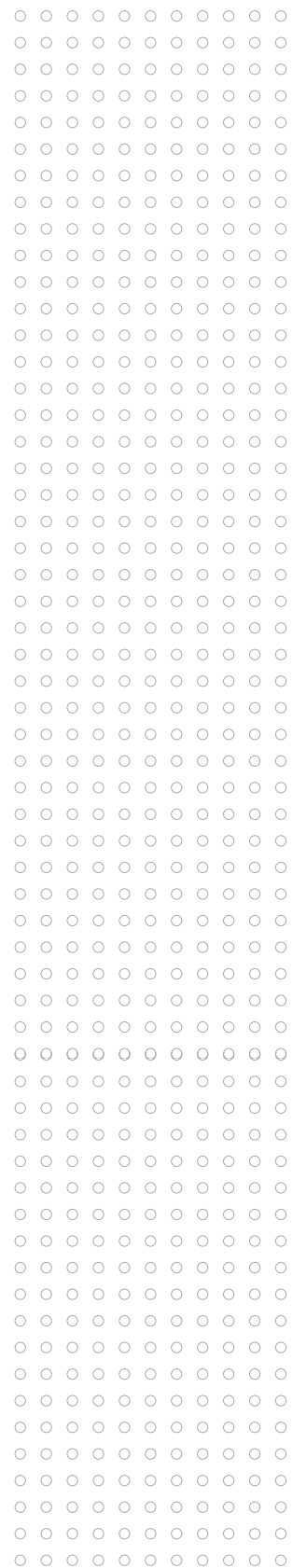
Employers covered by the Fair Labor Standards Act are required to keep records for nonexempt employees, including records of hours worked each day and total hours worked each workweek. Failure to be diligent in timekeeping practices may result in significant wage and hour legal exposure. To minimize the risk that telecommuting nonexempt employees will be lax about timekeeping, employers ensure their telecommuting policy addresses non-exempt employee's rules regarding recording of all working time.

Social Distancing

[Social Distancing](#) is a measure that employers may take to reduce the person-to-person contact or transmission of a viral condition. Social distancing can include measures such as:

- Alternative working arrangements that expand the physical proximity of employees to one another
- Alternative meeting arrangements that limits close or collective, in-person meetings using remote meeting tools such as GoToMeeting, Zoom, Skype, etc.
- Limit employees/customer face-to-face contact using conference calls and remote meeting tools such as GoToMeeting, Zoom, Skype etc.
- Install sneeze shields
- Develop a cross-training program to ensure a continuity of operations
- Develop communication plan
- Invest in hand sanitizer and disinfectant spray and wipes for the workplace
- Develop initiatives that encourage handwashing and regular disinfecting efforts

The general premise of social distancing is – if you don't need to meet in person or have face-to-face contact – don't.



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