



HENDRICK PHILLIPS
SALZMAN & SIEGEL^{PC}
ATTORNEYS AT LAW

TO: HPSS Clients

FROM: Stephen M. Phillips, Philip J. Siegel, and Benjamin S. Lowenthal

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RE: Coronavirus Labor and Employment Q&As

The impact of the COVID-19 coronavirus pandemic on the construction industry, your jobs, and your employees is unknown. We know that you are facing labor and employment related issues and have many questions. We are here to answer your questions. With that in mind, we have put together answers for many of the most pressing labor and employment related questions that we have been receiving. The Q&As are below. Please note that if you have a company handbook, we suggest you first consult and follow your company's policies as outlined in your company handbook.

Please do not hesitate to call or email us with any additional questions you may have. We will be here for you throughout this pandemic. Stay safe.

Can we restrict business travel and require employees to work from home?

Yes. Whether your company chooses to restrict travel is up to you. Restricting travel may have the effect of leaving some of your employees without any work. Whether you are legally required to pay those employees while they are not working is a question we answer below. Of course, those employees who continue to work from home will be due their wages.

We have employees who are fearful of the virus and don't want to come to work. Do we have to pay them for the time they are away from work?

Absent an employment contract with the employee or an applicable collective bargaining agreement, the answer for your non-exempt, hourly paid employees is likely no. Under the Fair Labor Standards Act ("FLSA"), minimum wage and overtime pay for your non-exempt, hourly paid employees are dependent on hours actually worked in a workweek. Non-exempt, hourly paid employees who are not working are not entitled to wages.

But what about exempt, salaried employees? If an employee is a salaried exempt employee, the employee must be paid if the employee performs any work during the work week. But the law does allow you to make certain deductions from an exempt employee's salary without jeopardizing the exempt status of the employee. If the employee is not sick but chooses to stay home from work for a full day, you are permitted to make a deduction from the employee's salary for the one day

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absence. The law does allow you to make a deduction for a full day absence for personal reasons, other than sickness or disability.

If an exempt, salaried employee chooses to stay home for an entire week and performs no work during the week, you may withhold the employee's salary for the week.

If an employee decides to stay home to avoid getting sick, can we count these absences against any paid leave they may be entitled to? Can we count it as an unexcused absence? Or are they protected absences?

First, consult your company handbook. Any action concerning use of paid leave should be consistent with the company's policy included in any company handbook. If you have a policy which applies in this instance, follow it. If the policy permits you to require use of paid leave time, then you can follow the policy, although we do caution you to consider the employee morale component of any such decision.

Legally, the FLSA does not require employer-provided vacation time and does not entitle an employee to stay at home to avoid getting sick. In the event that the employee does decide to stay home, the absences will generally not be protected, and you can consider the absence an unexcused absence, although consideration should be given to the effect such a policy may have on employee morale.

You will not be permitted to take adverse action against an employee who refuses to work because they believe an imminent danger exists in the workplace. This is an OSHA issue. OSHA defines an "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 [OSHA] enforcement procedures." Unless you have a confirmed or suspected case of COVID-19 coronavirus *in the workplace*, it is unlikely that such an imminent danger exists that would allow for the employee to legally refuse to work.

Do we have to pay employees if we close the office and the employees are unable to work from home or otherwise not working?

For your non-exempt, hourly paid employees, you do not have to pay them if they are not working, even if they are not working because you closed the office. If these employees are not working, you do not have to pay them.

As it concerns your exempt, salaried employees, if the office is closed for the entire week and the exempt, salaried employees perform no work during the week, you may withhold paying the employees' salaries that week. But if an exempt employee performs any work during the week that you close your business, they are entitled to their full salary for the week.

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Please note that the U.S. House of Representatives introduced and passed H.R. 6201, the Families First Coronavirus Response Act, which would amend the FLSA and other employment related Acts. As of March 18, 2020, the bill has yet to become law (has not been passed by the Senate nor signed by the President). If passed in its current form, the bill would immediately require, among other things, for employers with fewer than 500 employees to provide two weeks of paid sick leave, paid at the employee's regular rate, if the employee must quarantine or seek a diagnosis or preventative care for COVID-19 coronavirus, comply with a public recommendation or order, or care for or assist a family member due to the COVID-19 coronavirus.. The bill would also require paid sick leave at two thirds the employee's regular rate to care for a family member or care for a child out of school due to the COVID-19 coronavirus.

Can we make employees who are exhibiting symptoms of a contagious illness or the COVID-19 coronavirus go home from work for the day? Do we have to pay them if we send them home?

Yes, you can make employees who are exhibiting symptoms of the COVID-19 coronavirus or a contagious illness go home. Pursuant to the CDC's Interim Guidance for Businesses and Employers, the CDC recommends that employees who are exhibiting symptoms of a contagious illness or the COVID-19 coronavirus (i.e. cough, shortness of breath) be separated upon arrival to work and sent home immediately. The CDC's Interim Guidance for Businesses and Employers can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>. The CDC's current list of symptoms of the COVID-19 coronavirus can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.htm>.

Whether you have to pay the employee who is sent home during the day is a function of whether the employee is an exempt, salaried employee or a non-exempt, hourly paid employee. For the exempt, salaried employee, you are not permitted to make any deduction from the employee's salary because the situation does not involve a full day absence from work. You are under no obligation to pay the non-exempt, hourly paid employee after they are sent home from work.

If the exempt, salaried employee remains out of work for full day absences due to his or her sickness, the law only permits you to make a deduction from the salaried employee's pay without jeopardizing the exemption if the deduction is made in accordance with a bona fide plan, policy or practice of providing wage replacement benefits for such absences.

Whether your situation involves either a non-exempt, hourly paid employee or an exempt, salaried employee, be sure to consider your obligations under the Americans with Disabilities Act and Family Medical Leave Act, if any, if the employee requires extended time away from work.

Our business is suffering as a result of the COVID-19 coronavirus, and we are unable to keep our employees fully employed. Are we permitted to layoff employees until we recover from the fallout surrounding the virus? For employees that are laid off, can we continue to require them to pay the employee portion of their health insurance premiums?

Certainly, lack of work is a non-discriminatory, legitimate business reason for laying off employees, reducing hours, or terminating employees. Be mindful, however, that while it is well known that terminating an employee's employment will allow the employee to claim unemployment benefits, a layoff or reduction in hour may also entitle your employees to unemployment benefits in your state.

Moreover, in addition to terminating the employment relationship, laying off an employee or reducing an employee's work hours may be a triggering event under COBRA. A reduction in hours will also constitute a qualifying event if the reduction in hours has the effect of excluding the individual from coverage under the terms of the plan. If the reduction in hours has no effect on the employee's coverage, it is not a COBRA event and you can still require the employee to pay the employee portion of the premium.

Can we take an employee's temperature at work to determine whether the employee might be infected?

It depends. The Americans with Disabilities Act ("ADA") considers taking an employee's temperature as a "medical examination," and prohibits employers from requiring medical examinations unless the employer can show (1) that the medical examination is job related and consistent with business necessity, or (2) the employer has reasonable belief that the employee poses a "direct threat" to the health or safety of the employee or others which cannot be eliminated or reduced by a reasonable accommodation. A "direct threat" is defined as there being a significant risk of substantial harm. In the event that the COVID-19 coronavirus is or becomes widespread in your community as assessed by the CDC or state or local health authorities, and you have an employee exhibiting symptoms of the COVID-19 coronavirus consistent with what is being reported, then you may take an employee's temperature.

If an employee has been absent from work, can we ask why the employee has been absent?

Yes. An employer may ask an employee why the employee did not report to work. It is not a disability-related question protected under the ADA.

Example: During the COVID-19 coronavirus 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.

If an employee has been absent from work because the employee has been sick, can we require the employee to provide a doctor's note or release before returning to work?

Yes. Such a request would be permitted under the ADA either because it would not be a disability-related request or because the employee poses a "direct threat" to the health or safety of the

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employee or others. You can ask the doctor to state the employee is not contagious or otherwise have the doctor identify any workplace modification that may be needed to protect the health and safety of others. The note should not provide a diagnosis, however.

Does any of this implicate OSHA?

Yes. You do have a legal obligation under OSHA to keep your workplace safe from known hazards your employees will be exposed to in the performance of their duties. In this instance, OSHA has published a guide that provides steps companies can take to meet their obligations under OSHA and protect their workplace. You can access OSHA's publication on the COVID-19 coronavirus at: <https://www.osha.gov/Publications/OSHA3990.pdf>.