



Milwaukee Area Compensation Association

## Virtual Roundtable

Covid-19 from a Benefits / Compensation Perspective

# During a pandemic, employers may

- Ask employees whether they are experiencing influenza-like symptoms and send employees home if they are. Employees may be told to stay home and not come to work until at least 24 hours without symptoms.
- Take employees' temperature to determine whether they have a fever.
- Ask whether employees are returning from locations where the coronavirus is present, even if the travel was personal.
- Make a disability-related inquiry or require a medical examination if the employer reasonably and objectively believes that the employee's medical condition either impairs the employee's ability to perform essential job functions or poses a direct threat to the health or safety of the employee or others.

Source: <https://www.arnoldporter.com/en/perspectives/publications/2020/03/pandemic-coronavirus-practical-and-legal>

# Non-Exempt Employees

- Non-exempt employees need only be paid for time that they are working. Employers can generally reduce scheduled hours or hourly pay without violating wage and hour laws; however, certain laws and local ordinances may require "reporting time" pay if non-exempt employees are called off their shift either after reporting or without sufficient advance notice.
- If non-exempt employees are permitted to work from home, employers must make sure that those employees accurately track all time worked, are paid overtime according to state and federal law, and are provided meal and rest periods in accordance with state and federal law.

Source: <https://www.arnoldporter.com/en/perspectives/publications/2020/03/pandemic-coronavirus-practical-and-legal>

# Exempt Employees

- Exempt employees must generally be paid the same minimum weekly salary regardless of how many hours they work. Employers who fail to pay exempt employees' full weekly salary risk altering their exempt status and making them eligible for overtime pay. Employers can avoid this risk in one of three ways:
- **Unpaid furlough.** Employers may impose unpaid furloughs. However, exempt employees cannot perform any work while on furlough. Employers must make sure that furloughed employees do not respond to email, take calls or otherwise perform work duties. If an exempt employee works during furlough, they must be paid for the full week.
- **Mandated Vacation.** Employers may require employees to use vacation time or PTO rather than treating a furlough as unpaid.
- **Fixed Salary and Base Hours Reduction.** Employers may implement a fixed reduction in future salaries and base hours due to a bona fide reduction in the amount of work an employee can do during a pandemic. Employers taking this route should be careful, as the Department of Labor and federal courts have concluded that this practice is only acceptable so long as it is occasional and due to long-term business needs or economic slowdown.

Source: <https://www.arnoldporter.com/en/perspectives/publications/2020/03/pandemic-coronavirus-practical-and-legal>

# Workers' Compensation

- For an illness to be compensable under a workers' compensation system, it must generally be contracted in the course and scope of an employee's employment and be specific to the work performed by that employee. So, for example, an attorney who catches coronavirus from a coworker is not likely to have a cognizable workers' compensation claim. But a health care worker who contracts the virus while treating infected patients at work probably does.
- Employers whose employees are likely to encounter novel coronavirus in the scope of their employment should evaluate whether they have adequate workers' compensation insurance coverage and coverage limits that include occupational diseases.
- If an employee contracts coronavirus and it is not occupationally related, the employee may be entitled to disability benefits if the employer provides such benefits.

Source: <https://www.arnoldporter.com/en/perspectives/publications/2020/03/pandemic-coronavirus-practical-and-legal>

# Family and Medical Leave Act (FMLA)

- Employers who are covered by the federal FMLA must provide job-protected leave and other benefits to an eligible employee who misses work due to his or her own serious health condition, or to care for a close family member who has a serious health condition. While the common flu is typically not a serious health condition, pandemic coronavirus may be if it causes hospitalization or incapacitation. Many states (including California) have similar state leave laws.
- The following absences do not qualify as protected leave under the FMLA:
  - Missing work to care for a healthy child whose school is closed.
  - Staying home to avoid exposure to the coronavirus.
  - There may be state laws (such as California's Labor Code Section 233) that protect caring for a sick family member that would protect an employee who stays home to care for a family member with COVID-19.

Source: <https://www.arnoldporter.com/en/perspectives/publications/2020/03/pandemic-coronavirus-practical-and-legal>



## DOL Question/Answer

## **If an employer directs salaried, exempt employees to take vacation (or leave bank deductions) or leave without pay during office closures due to influenza, pandemic, or other public health emergency, does this impact the employee's exempt status?**

- Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. The FLSA does not require employer-provided vacation time. Where an employer offers a bona fide benefits plan or vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). Further, this will not affect the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary. However, an employee will not be considered paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the office closure during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work.
- Therefore, a private employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee's guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt.

Source: <https://www.dol.gov/agencies/whd/flsa/pandemic>



## **What are an employer's obligations to an employee who is under government-imposed quarantine?**

- WHD encourages employers to be accommodating and flexible with workers impacted by government-imposed quarantines. Employers may offer alternative work arrangements, such as teleworking, and additional paid time off to such employees.

Source: <https://www.dol.gov/agencies/whd/flsa/pandemic>

## **May an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?**


- Yes. An employer may encourage or require employees to telework as an infection-control or prevention strategy, including based on timely information from public health authorities about pandemics, public health emergencies, or other similar conditions. Telework also may be a reasonable accommodation.
- Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws. (See the U.S. Equal Employment Opportunity Commission's publication, [Work at Home/Telework as a Reasonable Accommodation](#), for additional information.)

Source: <https://www.dol.gov/agencies/whd/flsa/pandemic>

## Do employers have to pay employees their same hourly rate or salary if they work at home?

- If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then you must pay the same hourly rate or salary.
- If this is not the case and you do not have a union contract or other employment contracts, under the FLSA employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office. However, the FLSA requires employers to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.
- If the [Service Contract Act](#) (SCA) or state or local laws regulating the payment of wages also apply, nothing in the FLSA or its regulations or interpretations overrides or nullifies any higher standards provided by such other laws or authority. (See the U.S. Department of Labor, [Wage and Hour Division](#) for additional information on the SCA or call 1-866-487-9243.)

Source: <https://www.dol.gov/agencies/whd/flsa/pandemic>



## NCCI: National Council on Compensation Insurance

# Is coronavirus compensable under WC?

- The answer to that question is “maybe.” While WC laws provide compensation for “occupational diseases” that arise out of and in the course of employment, many state statutes exclude “ordinary diseases of life” (e.g., the common cold or flu). There are occupational groups that arguably would have a higher probability for exposure such as healthcare workers. However, even in those cases, there may be uncertainty as to whether the disease is compensable. Would time away from work during recovery be considered “temporary disability” or is it just normal “sick time”? While these questions linger, at least one state has taken steps to address compensability for WC.
- On March 5, the state of Washington’s Department of Labor and Industries announced that it changed its policy related to workers compensation coverage for healthcare workers and first responders. Under the clarified policy, Washington state will provide benefits to these workers during the time that they are quarantined after being exposed to coronavirus on the job. The coverage will pay for medical testing, treatment expenses if a worker becomes ill or injured, and provide indemnity payments for those who cannot work if they are sick or quarantined.
- For general health insurance at least 10 states have issued mandates for coverage of coronavirus.

Source: <https://www.ncci.com/Articles/Pages/Insights-COVID19-WorkersComp.aspx>

NCCI: National Council on Compensation Insurance



## Other Questions

# Other Questions or Concerns

- How will companies afford to pay for this?
  - Long term impacts for housing market and interest rates (concern for relocation services)
  - Hazzard Pay, per diems, on-call and call-in pay
  - Risks to employees
  - Retirement savings fears
  - How will this change Compensation and HR functions holistically going forward
  - Senate bills ~ state of flux
  - Productivity concerns
  - Getting people used to working from home
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- [marya@mra.net](mailto:marya@mra.net) offered to share portions of the MRA Coronavirus toolkit to anyone who emails her to ask. Thanks Mary!

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