

# The Texas Lawbook

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## COVID-19 Update for Employers

March 27, 2020 | **ALANA ACKELS & MARK SHOFFNER**

Employers remain in uncharted territory since the onset of the coronavirus pandemic. Although this unprecedented crisis seems to bring changes by the hour, the following guidance will prepare employers for the near inevitability of a COVID-19 issue arising in your workplace.

### **Can we put employees on unpaid leave of absence?**

#### *For employers with 500 or more employees*

The answer to this question is a prime example of the constantly evolving nature of this crisis. Last week, the answer was an unqualified “yes” in Texas, and that is still the case for employers with more than 500 employees. Those employers can continue to place employees on an unpaid leave of absence to ensure workplace safety and security. Employers should be careful to use reasonable, non-discriminatory measures to determine who to put on a mandatory leave. The Occupational Safety and Health Administration has published guidelines for employers to use to protect their workforce.

During the H1N1 pandemic, the EEOC stated that requiring workers to go home was not disability-related if the symptoms present were akin to the seasonal influenza or the H1N1 virus. Therefore, an employer may require workers to go home if they exhibit symptoms of the COVID-19 coronavirus or the flu. Employers may also consider implementing a mandatory quarantine policy for employees who have come in contact with an infected person or have recently traveled to severely impacted parts of the country or the world, such as Seattle or China. The CDC has issued guidance suggesting the incubation period for the virus can be as long as 14 days, so employers may choose to require a 14-day quarantine for employees returning from severely impacted areas. Employers should be careful not to rely on

stereotypes or target specific groups by race, religion or national origin in determining who should go on leave.

An extended unpaid leave – especially in the case of a 14-day quarantine – could have a tremendous financial impact on some workers. While not required by law, employers may consider some partial pay options in the event an employee is put on leave.

Employers can – and many already have – also consider work from home possibilities to allow employees to continue working without risking the health of the workplace.

#### *For employers with less than 500 employees*

##### **1. Paid sick leave**

Last week, President Donald Trump signed the Families First Coronavirus Response Act. This congressional action is a dramatic response to the pandemic and changes paid sick leave and paid family leave laws for employers with fewer than 500 employees.

The new law provides that eligible employees are entitled to two weeks of paid sick leave to either: (1) self-quarantine or (2) seek a COVID-19 diagnosis or preventive care. Employees will also be eligible for two weeks of paid sick leave if the employee is caring for a family member with a COVID-19 diagnosis or to care for a child whose school or daycare has closed in response to concerns about the virus. Full-time employees are entitled to 80 hours of paid sick leave, and eligible employees can immediately begin taking this leave. Part-time employees are entitled to leave in an amount equal to two weeks of work. In contrast to the large-employer scenario described above, employers subject to this law cannot require employees to exhaust other forms of paid leave before using the paid leave provided by the act.

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For employees taking this leave for self-quarantine, the employer must pay at the regular rate of pay not to exceed \$511 per day or \$5,110 in the aggregate. If an employee takes this leave to care for a family member or child, the employer must pay at two-thirds of the regular rate of pay not to exceed \$200 per day or \$2,000 in the aggregate.

The paid sick leave portion of the act is effective immediately and expires on Dec. 31. An employer's failure to provide the required paid sick leave constitutes a violation of the FLSA.

## 2. Paid family leave

The act also provides for an expansion of the Family and Medical Leave Act when an employee is unable to work in the office or remotely due to the need to care for a child whose school or daycare is closed due to the current pandemic. If that situation arises, an employee is entitled to 12 weeks of FMLA leave, of which the first 10 days can be unpaid but the remainder must be paid at a rate of no less than two-thirds of the employee's regular rate of pay with a maximum benefit of \$200 per day and \$10,000 in the aggregate.

The FMLA portion of the act is effective no later than 15 days after enactment and expires on Dec. 31.

While it might seem odd that these requirements and new entitlements are only imposed on employers of fewer than 500 employees, Congress also provided payroll tax credits to affected employers. An employer who provides statutorily-required leave is entitled to a payroll tax credit for each quarter in the amount of 100% of the qualified paid sick leave wages and 100% of the qualified paid family leave wages not to exceed \$200 per day and \$10,000 aggregate per employee.

The act also provides that the Secretary of Labor can exempt employers with fewer than 50 employees, but that is not automatic. The Secretary of Labor has also published a notice that employers must post in the workplace regarding the new rights under this law.

### Can we ask employees for medical information?

Yes, if an employer has reason to believe the employee has COVID-19 or presents symptoms of the virus.

The Americans With Disabilities Act prohibits employers from requiring medical examinations and making disability-related inquiries unless: (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the

employee poses a "direct threat" to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

The EEOC's position during a pandemic is that employers should rely on the latest CDC guidance and state or local public health assessments to determine whether the pandemic rises to the level of a "direct threat." Given that President Trump declared the new coronavirus a "national emergency" on March 13, it is reasonable for employers to make health-related inquiries and/or take the temperature of a potentially ill employee.

That being said, employers should limit the focus of the inquiry to determining whether the employee may have contracted COVID-19 and limit that information to the smallest number of people that "need to know" in the organization. Employers must protect the health information of employees, which would include any documentation related to the virus to be housed in the employee's medical file separate from the standard employment file.

### What if an employee tests positive for the virus?

- Employees who test positive should be required to notify management as soon as possible. Employers should designate one person with management as the recipient of this information.
- The employee should be sent home immediately and instructed to follow up with his or her primary care provider. The employer should not allow the employee to return to work until he or she is symptom-free for at least 14 days.
- The identity of the infected employee must be kept confidential and shared only on a "need to know" basis.
- Employers should ask the employee to retrace his or her steps to identify all office areas and co-workers with which the employee interacted.
- Extra measures should be taken to sanitize any areas of the office that the infected employee trafficked.
- Without disclosing the identity of the infected employee, co-workers who may have had contact with the infected employee should be notified so that they can self-monitor their condition. The employer should also consider having those potentially infected co-workers self-quarantine at home for up to 14 days.

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## Can an employee in Texas refuse to come to work because of fear of infection?

Only if the employee reasonably believes he or she is in imminent danger, which essentially means that he or she reasonably thinks that reporting to work would result in immediate death or serious physical harm.

While asking an employee to travel certain parts of the world (such as China or Italy) may rise to this level, coming to work in the United States is unlikely to rise to this level based on the information available now. However, employers should remain sensitive to employee fear as we progress through the pandemic and try to work cooperatively with employees to keep everyone safe, calm and working. Of course, this is another rapidly-changing circumstance as government directives continue to limit group gatherings. It is important to note, however, that these guidelines so far have only applied to social – not business – gatherings.

## Do short-term disability or business interruption insurance cover this?

Employers should contact their short-term disability carriers to determine whether COVID-19 is a covered illness under their policy. Often there is a one-week waiting requirement before benefits begin, so in some cases, the employee may not qualify if the mandatory leave is less than one week. Similarly, the employee would not qualify if he or she is asymptomatic but simply quarantined.

Unfortunately, most business interruption policies require some type of property damage for coverage to apply. But employers are encouraged to contact their insurance brokers or carriers to evaluate what coverage may be available.

## What if my company is a nonsubscriber to workers' compensation insurance?

For Texas nonsubscribers to workers compensation, employees testing positive for the virus are likely not covered under your work injury benefit plans. The benefit plans are designed to cover only those work injuries suffered in the “course and scope of employment.” For that reason, the benefit plans only cover “occupational diseases” (those encountered exclusively in the workplace), not diseases the general population is exposed to. Even if an employee contends they were infected by a co-worker who was previously diagnosed, it is just as likely that employee was infected outside of work in the multitude manners in which the virus is transmitted in the community.

## What should employers be doing?

- **Plan:** Develop an emergency response plan, which may include increasing employee ability to work from home in the event of a quarantine.
- **Sanitation:** Implement increased sanitation measures, which may include enhanced cleaning of commonly touched surfaces, providing hand sanitizer or gloves and posting signs that require frequent hand washing.
- **Limit travel:** For a limited period, consider restricting, or outright banning, travel by regional managers, salespeople and other employees who travel to other locations as part of their work routine. Instead, instruct them to conduct their work by phone or virtual meeting software.
- **Isolation policy:** Develop a policy on how to reasonably identify and isolate potentially infected employees in a non-discriminatory manner.
- **Legal compliance:** The novel coronavirus implicates many aspects of the law, including a new federal statute providing paid sick leave and paid family leave for employees affected by the outbreak. Employers must quickly implement HR systems and controls to ensure proper administration of new legal requirements.
- **Hotline:** Larger employers may consider setting up a hotline so that employees can report they are experiencing symptoms and receive direction to a company-designated testing facility. Employers can likewise have payment set up with that facility as a benefit for their employees so the testing is free to the employee. As test kits are currently scarce, be advised that facilities are not obligated to test all people desiring a test, only those meeting the CDC testing criteria.

Employers simultaneously face a public-health crisis and the requirements of a sweeping new law. While much uncertainty remains about the duration of this pandemic, Texas employers must be mindful to comply with new and old legal obligations to protect both the welfare of their employees and the livelihood of their businesses.

**Alana K. Ackels** and **Mark A. Shoffner** are partners and **Mason G. Jones** is an associate with Bell Nunnally in Dallas. They can be reached at [aackels@bellnunnally.com](mailto:aackels@bellnunnally.com), [mshoffner@bellnunnally.com](mailto:mshoffner@bellnunnally.com) and [mjones@bellnunnally.com](mailto:mjones@bellnunnally.com).