



# COVID-19 Employer FAQs

## Understand the Facts Surrounding COVID-19 Laws & Workplace Protocol

As employers have started the daunting task of preparing to return to the workplace in a way that is both methodical and thoughtful, ThinkHR has been fielding many of their questions and concerns surrounding employee safety, pay, screening employees for symptoms and more. It's critical to understand what you can and can't do as an employer when returning your dedicated staff to the physical work environment. Below are frequently asked questions from employers related to COVID-19 and workforce re-entry answered by ThinkHR.

### **Q: Is it safe for our employees to keep working? How do we decide whether to keep employees working or not?**

A: Ultimately each company will need to determine how it will fulfill its duty to provide a safe workplace to its employees. It's very important to pay attention to federal, state, and local authorities to see if they are rolling out specific guidance or prohibitions that you need to be aware of. The vast majority of states have stay at home orders and guidance about which businesses may remain open at this time. In locations without state specific guidance, there may be local orders about which businesses can remain open as essential businesses.

Guidance has been changing from day to day and region to region. We recommend keeping up with the latest information on the Centers for Disease Control (CDC) Coronavirus [home page](#), related pages on that site, and your local health department for the most up to date guidance for your region and operations.

### **Q: We are reopening after business closure due to COVID-19. Can we bring some employees back, but not others?**

A: Yes. If you are recalling some positions, but not others, you should document the business reasons why only those positions were recalled. If you are recalling some employees in a certain position, but not everyone in that position, you should document the objective, job-related criteria you used to decide which employees to bring back. Seniority or previous job performance, for example, would be acceptable criteria and relatively easy to defend if you are ever challenged.

### **Q: Are we required to restore employees returning to work after a furlough to their original positions?**

A: Unless an employee was out on job-protected leave, such as Family and Medical Leave Act (FMLA) or expanded Family and Medical Leave Act (EFMLA), you are not required to return them to their original position or to an equivalent one (or bring them back at all). Given the impact of COVID-19 on business operations across the country, it's not surprising that organizations may need to restructure their teams to stay afloat or remain competitive. That said, if employees who were furloughed or laid off are asked to come back to a job that feels to them like a demotion, they may be less inclined to accept the offer or may be less engaged in the new role than they were in their previous job.



If you need to restructure their position, it will be helpful to explain why that was necessary. People are generally much more accepting of change if they understand it, and less likely to claim discrimination if you've given them your business-related reason for the decision.

**Q: Can we require or allow certain groups of employees, but not others, to work from home?**

A: Yes. Employers may offer different benefits or terms of employment to different groups of employees as long as the distinction is based on nondiscriminatory criteria. For instance, a telecommuting option or requirement can be based on the type of work performed, employee classification (exempt v. nonexempt), or location of the office or the employee. Employers should be able to support the business justification for allowing or requiring certain groups to telecommute.

**Q: Can we reduce pay because of an economic slowdown due to COVID-19?**

A: You can reduce an employee's rate of pay based on business or economic slowdown, provided that this is not done retroactively. For instance, if you give employees notice that their pay will change on the 10th, and your payroll period runs from the 1st through the 15th, make sure that their next check still reflects the higher rate of pay for the first 9 days of the payroll period.

**Nonexempt employees (those entitled to overtime)**

A nonexempt employee's new rate of pay must still meet the applicable federal, state, or local minimum wage. Employees must be given notice of the change to their rate of pay, and some states require advance notice.

**Exempt employees (those not entitled to overtime)**

An exempt employee's new salary must still be at or above the federal or state minimum for exempt employees. The federal minimum salary is \$684 per week. Several states have weekly minimums that are higher than that (California and New York, for instance, are in the \$1,000 per week range). The minimum may not be prorated based on hours worked.

**Exempt employee reclassification**

If an exempt employee has so little work to do that it does not make sense to pay them the federal or state minimum (or you simply cannot afford to), they can be reclassified as nonexempt and be paid by the hour instead. This must not be done on a very short-term basis. Although there are no hard and fast rules about how long you can reclassify someone, it is recommended that you don't change their classification unless you expect the slowdown to last for more than three weeks. Changing them back and forth frequently could cause you to lose their exemption retroactively and potentially owe years of overtime.

**Employees with contracts or CBAs**

If employees have employment contracts or are subject to collective-bargaining agreements (CBAs), you should consult with an attorney before making any changes to pay.

**Q: Some of our employees have said they don't feel safe returning to work. Can we just permanently replace them?**

A: We recommend caution when deciding to replace an employee who refuses to work because of concerns about COVID-19. Here are few things to keep in mind:

- Recalled employees may have a right to job-protected leave under a city ordinance, state law, or the federal Families First Coronavirus Response Act (FFCRA).
- Employees who are in a high-risk category — either because they are immunocompromised or have an underlying condition that makes them more susceptible to the disease — may be entitled to a reasonable accommodation under the



Americans with Disabilities Act (ADA) or state law if their situation doesn't qualify them for leave under the FFCRA (or if they have run out of that leave). It would be a reasonable accommodation under the circumstances to allow the employee to work from home or, if working from home is not possible, to take an unpaid leave.

- Employees who live with someone who is at higher risk are not entitled to a reasonable accommodation under federal law, but we strongly recommend allowing them to work from home if possible or take an unpaid leave if requested. Otherwise, they may decide to quit and file for unemployment insurance. If you want to keep them as an employee, being compassionate and flexible is your best bet.
- Under Occupational Safety and Health Administration (OSHA) rules, an employee's refusal to perform a task will be protected if all of the following conditions are met:
  - Where possible, the employee asked the employer to eliminate the danger, and the employer failed to do so;
  - The employee refused to work in "good faith," which means that the employee must genuinely believe that an imminent danger exists;
  - A reasonable person would agree that there is a real danger of death or serious injury;  
and
  - There isn't enough time, because of the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Check state and local law to see if additional protections may apply.

Instead of replacing employees who express fear about contracting COVID-19, we recommend that you consider methods to encourage employees to come to work and to help put their minds at ease. Consider emphasizing all of the safety methods you have put in place (such as scheduled handwashing, frequent disinfection of surfaces, social distancing rules, reduced customer capacity, staggered shifts, or more extreme measures if warranted by your industry). We recommend relying on the Centers for Disease Control and Prevention (CDC) and local health department guidance for establishing safe working conditions at this time. You might also consider offering premium pay (a.k.a. hazard pay) or additional paid time off for use in the future to employees who must come to work.

#### **Q: Can we screen employees returning to work for COVID-19?**

A: Yes, the Equal Employment Opportunity Commission (EEOC) has stated that screening employees for symptoms of COVID-19 is allowed under the Americans with Disabilities Act (ADA) because it is a direct threat to others in the workplace. Therefore, during the COVID-19 pandemic, you may inquire about symptoms related to the virus, require self-reporting by employees, and take employees' temperatures. Known symptoms of COVID-19 include:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

As the medical community continues to learn more about COVID-19, additional symptoms could be added to this list.



Employers can check [this page](#) for currently recognized symptoms. If you decide to do screenings, make sure you screen all employees; otherwise you may find yourself in the middle of a discrimination claim. And remember that all information about employees' health — including a lack of symptoms or temperature — must be kept confidential.

**Q: How do we handle taking employees' temperatures?**

A: The Equal Employment Opportunity Commission (EEOC) has issued guidance that employers may take employees' temperatures during the COVID-19 pandemic because COVID-19 is spreading nationwide. Note that many people may have COVID-19 without a fever, so other safety precautions should not be scaled back just because employees "checked out" upon arrival to work. Employees' body temperatures are considered medical information and must be kept confidential under the Americans with Disabilities Act (ADA).

The main [CDC COVID-19 page](#) has general community mitigation strategies as well as certain regional specific strategies. We cannot provide guidance on how to implement temperature checking procedures, but significant precautions should be taken so that you do not actually increase risk by reusing a tool that comes into contact with hands, faces, and/or mouths of multiple employees.

**Q: As we begin to return to work, if an employee is out of the office due to sickness, can we ask them about their symptoms?**

A: Yes, but there's a right way to do it and a wrong way to do it. In non-pandemic circumstances, employers shouldn't ask about an employee's symptoms, as that could be construed as a disability-related inquiry. Under the circumstances, however — and in line with an employer's responsibility to provide a safe workplace — it is recommended that employers ask specifically about the symptoms of COVID-19.

Here is a suggested communication: "Thank you for staying home while sick. In the interest of keeping all employees as safe as possible, we'd like to know if you are having any of the symptoms of COVID-19. Are you experiencing a fever, cough, shortness of breath, chills, muscle pain, headache, sore throat, or a new loss of taste or smell?"

Remember that medical information must be kept confidential as required by the Americans with Disabilities Act (ADA). If the employee does reveal that they have symptoms of COVID-19, or has a confirmed case, the CDC recommends informing the employee's co-workers of their possible exposure to COVID-19 in the workplace (but not naming the employee who has or might have it) and directing them to self-monitor for symptoms. Employers should also follow CDC guidance for cleaning and disinfecting.

**Q: Can we send employees home if they are symptomatic?**

A: Yes. The Centers for Disease Control and Prevention (CDC) has [advised employers](#) that employees who appear to have symptoms of COVID-19 (e.g., cough, shortness of breath) should be separated from other employees and sent home immediately. If the employee feels well enough to work, consider whether they can effectively telecommute.

Note: Nonexempt employees may be entitled to a few extra hours of pay if you're in a state with reporting time pay, but this cost will be well worth it to maintain the safety of the workplace.

**Q: What should we do if an employee says their symptoms are not related to COVID-19?**

A: This is a tough situation. The CDC advises employers to send employees home when they have COVID-19 symptoms. If an employee claims their symptoms are from another cause (e.g., allergies, asthma, common cold), the most risk-averse response would be to send them home with pay until the symptoms resolve or they can provide evidence of the other source of the symptoms.



**Q: What if an employee discloses that their family member or roommate has COVID-19?**

A: According to the CDC, employees who share a household with someone who is infected should self-quarantine for 14 days after their last exposure (exposure will be ongoing until the person they live with has recovered).

The CDC does not currently recommend special scrutiny or quarantine for those who have been exposed to an asymptomatic person, even if that person has been exposed to someone with COVID-19 (meaning you don't need to send everyone home to quarantine just because they worked with someone who has a sick family or household member).

Because COVID-19 is widespread in many communities, the CDC recommends that everyone practice social distancing, be alert for symptoms, and follow CDC guidance if directly exposed or if symptoms develop. Remember that the confidentiality of medical information, including that of an employee's family member, must be maintained per the Americans with Disabilities Act.

**Q: Can I send an employee home if they are sick or pregnant, regardless of whether it's COVID-19-related, just to be safe?**

A: You have the right to send people home for sickness if it appears that they have something contagious; in this case, you are protecting other employees in the workplace. This includes sending employees home who have the common cold.

You should not send employees home because you believe they are higher risk — this includes pregnant employees. We would encourage you to make working from home or unpaid leaves available for employees who want that option, but not to force that on anyone who doesn't pose a risk to others.

**Q: Can we tell employees who travel to stay home and quarantine, even if they don't have symptoms?**

A: Yes. However, given the widespread community transmission in the United States, an individual who has traveled may pose no more risk than someone who has not. If you feel where they traveled to was higher risk than where your workplace is located and that concerns you, consider options to keep them working during the quarantine period.

**Q: Our business is suffering due to COVID-19. We can't afford to pay people and might have to close. What do we do?**

A: This is understandably a very difficult situation for employers and their employees.

There are three basic options when it comes to keeping employees or letting them go: furlough (temporary reduction in hours of work or weeks of work); temporary layoffs (layoff with the intention of rehire, generally within six months); or permanent layoffs (layoff with no anticipated rehire date). In all situations, it's best to be very clear in written communications about your decision and work with an attorney.

Employees who are furloughed can generally still receive unemployment insurance benefits, so employers shouldn't feel like they have to terminate everyone just so they can receive unemployment insurance.

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