



# COVID-19 FAQ FOR EMPLOYERS

LONG TERM CARE, POST-ACUTE CARE,  
AND SENIOR LIVING FACILITIES

**Jennifer L. Curry**

Shareholder

410.862.1183

[jcurry@bakerdonelson.com](mailto:jcurry@bakerdonelson.com)

**Adam H. Gates**

Shareholder

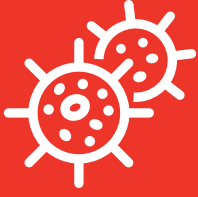
601.969.4661

[agates@bakerdonelson.com](mailto:agates@bakerdonelson.com)

---

**BAKER DONELSON**

[www.bakerdonelson.com/coronavirus](http://www.bakerdonelson.com/coronavirus)



# CORONAVIRUS (COVID-19)

CORONAVIRUS (COVID-19) HAS SPREAD ACROSS THE COUNTRY AND MAY BE IN OUR COMMUNITIES FOR MONTHS TO COME. THE VIRUS CAN MAKE HEALTHY INDIVIDUALS SERIOUSLY ILL AND BE FATAL FOR THE ELDERLY OR INDIVIDUALS WITH CHRONIC MEDICAL CONDITIONS. LONG TERM CARE (LTC), POST-ACUTE CARE, AND SENIOR LIVING FACILITIES CARE FOR THE MOST VULNERABLE AMONG US, AND MUST THEREFORE BE PREPARED TO PROTECT THEIR RESIDENTS, PATIENTS, AND EMPLOYEES FROM THIS THREAT.

Managing workforces through this challenging time will be difficult for a number of reasons. First, without a healthy workforce, residents and patients will suffer. Facilities must therefore take every available precaution, many of which are listed below, to prevent employees from contracting the virus. Second, if a facility's workforce experiences an outbreak, management must be prepared for a dramatic drop in available staffing. They should take steps now to identify other sources of staffing, including agencies and PRN medical personnel. Third, facilities must be prepared to address the myriad sick leave, overtime, and disability-related inquiries that will come with such an outbreak. This list could go on, but the point is clear: **Preparation is key.**

## WE OFFER THE FOLLOWING TOOLKIT AND ANSWERS TO FREQUENTLY ASKED QUESTIONS TO HELP FACILITIES PREPARE TO ADDRESS THESE CHALLENGES.



### **STEP ONE: IDENTIFY INDIVIDUALS WHO HAVE BEEN EXPOSED TO THE VIRUS**

Because staff members interact with others in the community and then come to the facility, they carry a significant potential to introduce infections into vulnerable populations.

Facilities should survey staff to determine if they have traveled in the previous 30 days to countries with heightened warnings from the U.S. Department of State and the [CDC](#). Facilities should also ask staff if they have been exposed to any person or place where COVID-19 is known to have been present in the past 30 days.

Any staff who respond positively to these inquiries should be encouraged to work remotely, if possible. If they cannot work remotely, they should stay home at least 14 days before returning to work or until any symptoms resolve.

Once exposed individuals have been identified, employers have a general duty under the Occupational Safety and Health Act (OSHA) to provide employees with a workplace free from hazards that are likely to cause injury or illness. This obligation is even more extensive among employers in the health care industry, including post-acute, LTC, and senior living facilities. It should be noted that OSHA prohibits employers from terminating an employee who refuses, in good faith, to expose themselves to a dangerous job condition and who has no reasonable alternative but to avoid the workplace. The condition causing the employee's fear, of course, must be objectively reasonable, and not simply the potential of unsafe working conditions.

Facilities should also work to limit visitation by volunteers, vendors, suppliers, and transportation providers. Unless necessary to the care of residents, all volunteer programs should be cancelled or restricted. While suppliers or vendors may still need to deliver goods and equipment to the facility, such deliveries should be made outside the facility. If a volunteer, vendor, supplier, or transportation provider must enter the facility for a necessary purpose, the facility should provide such individuals with personal protective equipment (PPE) for their safety and the safety of residents and staff.

### **STEP TWO: RESPOND TO THE PRESENCE OF CARRIERS ON THE PREMISE**

Facilities should already have an active surveillance program in place capable of identifying cases, clusters, and outbreaks. Facilities should actively monitor staff for COVID-19 symptoms, such as fever, coughing, sore throat, and new shortness of breath, to increase the chances of early detection and recognition of potential outbreaks. Facilities should consider expanding these screening procedures beyond staff to include contractors, vendors, health care professionals, and government officials. If anyone shows symptoms, they should be prohibited from the premises for at least 14 days or until the symptoms resolve.

Though an outbreak could lead to staff shortages, facilities should consider temporarily suspending any programs that increase the number of people that visit the facility, including volunteer programs.

All confirmed cases of COVID-19 among staff and volunteers should be reported to applicable licensing agencies as soon as practicable. It may also be prudent to post signs in areas where (1) infected residents have been placed in isolation, (2) infected staff or volunteers were operating, and (3) infected visitors or vendors were present.



### STEP THREE: EDUCATE AND TRAIN STAFF, VISITORS, AND VOLUNTEERS ON SPREAD AND PREVENTION

Where possible, staff and volunteers should be trained on at least a weekly basis on (1) the sources of exposure, (2) prevention, (3) recognition of symptoms, (4) the appropriate response when an outbreak in the facility has been identified, and (5) communication protocols. The training should also include a thorough explanation and reminder of specific best practices for preventing the introduction and spread of COVID-19 in your facility, including:

- Promote hand hygiene by requiring washing before and after contact with residents and after contact with potentially contaminated surfaces or equipment; supplying every resident room with alcohol-based sanitizer; and keeping every sink well-stocked with soap and paper towels
- Respiratory hygiene and cough and sneeze etiquette (use of disposable tissues, use of elbow when tissues are unavailable, use of facemasks)
- Environmental cleaning (wiping down surfaces with antibacterial or virucide cleaners), particularly frequently touched areas such as doorknobs, counters, and handles
- The proper use of personal protective equipment (PPE), if applicable, by posting signs on the door or wall outside a resident or patient room that clearly describes the type of precautions needed and required for PPE; making PPE (facemasks, eye protection, gowns, gloves) available immediately outside the resident or patient room; and positioning a trash can near the exit inside any resident or patient room to make it easy for employees to discard PPE
- Observing waste disposal best practices (e.g., touchless, lined wastebaskets)
- Social distancing (suspending group activities such as dining and other social events) and avoiding all unnecessary contact, including hugging and shaking hands
- Identifying dedicated employees to care for patients and residents testing positive for COVID-19 and provide rigorous infection control training (see [The Nursing Home Infection Preventionist Training](#) by the CDC)

In addition to training, your facility should post instructions and guidance to staff, visitors, residents, and volunteers throughout the facility about these best practices, explaining why those practices are necessary, and providing guidance for reporting any experienced or observed infection or respiratory symptoms to management.



### STEP FOUR: FOLLOW THESE PRACTICAL STEPS FOR PREPARING STAFF

In addition to educating and training your staff and volunteers, your facility should discuss the practical impact of COVID-19 with your staff and volunteers and your expectations as an employer. This discussion should include:

- Acknowledging your facility's current situation and expectations for the potential spread of COVID-19
- Discussion and publication of the CDC's COVID-19 resources in meetings and in common areas (see [What To Do If You Are Sick](#); [Stop the Spread of Germs](#))
- Allowing flexibility in policies allowing staff to stay home when sick or when needed to care for a sick family member
- Reminding sick staff members to stay home
- Implementing protocols for staff travel (leisure or work-related), and restrictions prohibiting employees from returning to work after non-essential, personal travel
- Limiting staff assignment from rotation to different parts of a building or campus (this may require cross training staff to perform duties that are essential in the case of an outbreak)
- Assigning staff as primary contact to families for updates to family members regarding visitation and to take inbound and make outbound calls for virtual family visitation
- Developing a plan for your facility to accommodate staff shortages
- Limiting close contact with residents and visitors who are in high-risk categories, and requiring the use of face masks, gloves, and protective clothing for staff interacting with infected residents
- Discussing solutions for if/when schools and other public institutions close, or if the facility must go on lock down
- Refreshing emergency contact lists, including contacts for family, caregivers, and health care providers
- Identifying points of contact with state and local health departments for receiving and sharing information, and to report staff and volunteers showing symptoms
- Managing anxiety through preparedness and an Employee Assistance Program



## **STEP FIVE: FOLLOW EEOC AND DOL GUIDANCE FOR EXPOSED EMPLOYEES**

### **The EEOC and The Americans with Disabilities Act**

The U.S. Equal Employment Opportunity Commission (EEOC) enforces anti-discrimination laws such as the Americans with Disabilities Act (ADA), including the requirement for employers to provide reasonable accommodations and rules about medical examinations and inquiries. These laws apply in the case of an outbreak of COVID-19, but they will not prevent employers from following the CDC's COVID-19 guidelines.

The ADA (1) limits an employer's ability to ask employees about disabilities and medical examinations; (2) prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat;" and (3) requires employers to provide employees with reasonable accommodations during a pandemic. Guidance for complying with these limitations follow:

- A "disability-related" inquiry is likely to elicit information about a disability. For example, asking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS. By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability. For example, asking an individual about symptoms of a cold or the seasonal flu.
- A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health. Whether a procedure is a medical examination under the ADA is determined by considering factors such as whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional.
- A "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA. During a pandemic, employers should rely on the latest CDC and state/local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is current and appropriate for their location.

### **The DOL and the Family and Medical Leave Act**

The U.S. Department of Labor (DOL) is the federal agency tasked with overseeing and enforcing the leave opportunities and procedures dictated by the Family and Medical Leave Act (FMLA).

Employees who exhibit symptoms or test positive for COVID-19 may be eligible to take leave under the FMLA. Though the DOL does not consider the ordinary flu with no complications to be a chronic serious health problem under the FMLA, COVID-19 may lead to severe illness and even death. An employee who tests positive for COVID-19 may have a serious health condition that entitles him or her to FMLA leave. It should also be noted that leave taken to avoid exposure to COVID-19 or to care for children who are not sick but whose schools have been closed is not protected by the FMLA.

If an employee takes leave due to COVID-19, an employer may ask the employee to provide a fitness-for-duty examination or for documentation establishing that she has been symptom-free for a reasonable period.

Finally, the DOL requires employers to begin counting paid time off as FMLA leave instead of allowing an employee to use all paid time off and then begin counting FMLA leave. In other words, an employer must begin counting an employee's 12 weeks of FMLA leave when it learns that the absence qualifies for FMLA leave.

### **The DOL and the Fair Labor Standards Act**

The DOL is also tasked with overseeing and enforcing wage and hour laws for American workers, including the Fair Labor Standards Act (FLSA). With the spread of COVID-19 and the high likelihood that your facility may need additional staffing or may need to require employees to work overtime, the DOL has issued new guidance on how to address wage and hour issues during a potential outbreak.

Non-exempt employees must be paid at least minimum wage and are entitled to overtime pay, but an employer generally is required to pay non-exempt employees only for the time they actually work. Thus, an employer is not obligated to pay hourly employees for time spent in quarantine under the FLSA. However, DOL regulations do expect employers to pay nonexempt employees for any return travel home from quarantine imposed during a business trip if such travel occurs during the employees' normal work hours – even if the travel occurs on a weekend or holiday.

Conversely, employees who are properly classified as exempt under the FLSA are not entitled to overtime and are paid on a salary basis regardless of the number of hours worked. With limited exceptions, if an exempt employee performs any work during a week, he or she must generally be paid the full week's salary. An employer's practice of improper deductions from an exempt employee's salary may lead to declassification of the exempt status, in which case the employee will be entitled to overtime.

If an exempt employee misses work during a pandemic, an employer may deduct from the employee's salary for:

- Full-day absences for sickness or disability, pursuant to the employer's sick leave policy, plan, or practice of providing compensation for salary loss caused by illness or disability.
- Full-day absences for personal reasons other than sickness or disability.
- Full-day or partial-day absences taken as unpaid leave under the FMLA.

On the other hand, the employer may not deduct from the employee's salary for:

- Absences due to sickness or disability when the employer does not have a sick leave policy. However, if the employee misses the entire workweek, the employer does not need to pay the employee for the week missed from work.
- Absences occasioned by the employer or by the operating requirement of the business, e.g., when the employer closes the workplace because of the pandemic. However, employers can require the employees to use accrued vacation or PTO for the days they are required to stay home and may require the exempt employees to make up lost work time.

## **EMPLOYMENT QUESTIONS AND ANSWERS IN PANDEMIC SCENARIOS**

**Prior to a pandemic, may an employer survey the workforce to identify employees who may be more susceptible to complications from pandemic influenza than most people?**

No. An inquiry asking an employee to disclose a compromised immune system or a chronic health condition is disability-related because the response is likely to disclose the existence of a disability. The ADA does not permit such an inquiry in the absence of objective evidence that pandemic symptoms will cause a direct threat. Such evidence is completely absent before a pandemic occurs.

**May an employee who becomes ill at work be sent home?**

The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action in a pandemic scenario. The action would also be permitted under the ADA if the illness were serious enough to pose a direct threat.

**How much information may an ADA-covered employer request from employees who report to work feeling ill or who call in sick?**

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

**May an employer take an employee's temperature to determine if they have fever?**

Generally, measuring an employee's body temperature is a medical examination. If COVID-19 becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

**Must an employer wait until the employee develops COVID-19 symptoms to ask questions about exposure to a pandemic during a trip?**

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have COVID-19 symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

**May an employer ask employees who do not have COVID-19 symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?**

No. The ADA prohibits making disability-related inquiries or requiring medical examinations of employees without symptoms. However, under these conditions, employers should allow employees who experience COVID-19 symptoms to stay at home, which will benefit all employees, including those who may be at increased risk of developing complications.

**If an employee voluntarily discloses (without a disability-related inquiry) that he or she has a specific medical condition or disability that puts him or her at increased risk of COVID-19 complications, must the employer keep this information confidential?**

Yes. The employer may ask him to describe the type of assistance he thinks will be needed (e.g., telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many disabilities do not increase this risk (e.g., vision or mobility disabilities).

**May an employer require an employee who is out sick with COVID-19 to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning work?**

Yes, however, employers should consider that during a pandemic, health care resources may be overwhelmed, and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious.

**During a pandemic, may an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?**

Yes. Telework is an effective infection-control strategy that is also available to ADA-covered employers as a reasonable accommodation. In addition, employees with disabilities that put them at high risk for complications of COVID-19 may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

**During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?**

Yes. An employer's ADA responsibilities to individuals with disabilities continue during a pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities. If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation. All employees with disabilities whose responsibilities include management during a pandemic must receive reasonable accommodations necessitated by pandemic conditions, unless undue hardship is established.

**During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?**

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

**After a pandemic, may an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?**

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if COVID-19 is truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

**Must an employer grant leave to an employee who has COVID-19 symptoms, tests positive for COVID-19, or who is caring for a family member that has COVID-19?**

An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which may include the flu where complications arise that create a "serious health condition" as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period. The DOL, however, has not determined whether or not the right to such leave is applicable in the case of COVID-19 or a pandemic.

**May an employee stay home on FMLA to avoid getting COVID-19?**

While the FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition, leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA. Employers should encourage employees who are ill with COVID-19 or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

**What legal responsibility do employers have to allow parents or care givers time off from work to care for the sick or children who have been dismissed from school?**

None. There is currently no federal law covering employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or child care. However, given the potential for significant illness under some pandemic scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families.

**Must an employer provide paid sick leave to employees who are out of work because they have COVID-19, have been exposed to a family member with COVID-19, or are caring for a family member with COVID-19?**

No. Federal law does not require employers to provide paid leave to employees who are absent from work because they are sick with COVID-19, have been exposed to someone with COVID-19, or are caring for someone with COVID-19. If an employee's leave does qualify for FMLA protections, the statute allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances.

**May an employer send an employee home if he or she shows symptoms of COVID-19? Can an employee be required to take sick leave or prevented from coming to work?**

Yes. An employer may develop a plan of action in the event of a pandemic or outbreak which would permit the employer to send employees home, provided that the plan complies with laws prohibiting discrimination in the workplace.

**May an employer offer employees a "show-up" bonus for each day worked to encourage attendance during a pandemic?**

Yes. For facilities looking to encourage employees to continue reporting to work, an option may be to offer a "show-up" bonus for every day worked during an outbreak. The DOL, however, requires that pre-arranged bonuses designed to encourage work be included in the regular rate of pay for purposes of calculated overtime. However, if both the determination of whether to award a bonus and the amount of the bonus are determined at the discretion of the employer, the bonus may be excluded from the regular rate. These may include bonuses paid to employees after the fact to thank them for overcoming the stress of difficult situations. Call-out payments for work outside of normally scheduled hours may also be excluded from the regular rate in certain circumstances, although the approach on this issue may be impacted by state law, collective bargaining agreements, or individual employer compensation policies.

**May an employer require salaried, exempt employees to use vacation or leave without pay during facility closures?**

Yes. An employer may require exempt staff to take vacation or paid time off (PTO) in the case of a facility closure due to COVID-19, whether for a full or partial-day absence, so long as the exempt employee receives his or her full guaranteed weekly salary. If the exempt employee does not have sufficient vacation time or PTO available, the employee must still receive the full guaranteed salary for any week in which he or she performs any work in order to maintain the employee's exempt status. The exempt employee does not have to be paid for any week in which no work is performed.

**May an employer mandate telework arrangements?**

Yes, a facility may require employees to telework, where applicable, as an infection-control or prevention strategy. This includes where a facility imposes such arrangements based on current information from the CDC or state or local health authorities. The DOL has issued guidance noting that telework alternatives may also be provided as a reasonable accommodation under the ADA during a pandemic.

**May a facility use volunteers to fill the gaps left by employees who are out of work due to COVID-19?**

It depends. The FLSA has stringent requirements with respect to the use of volunteers. In general, covered, nonexempt workers working for a private, for-profit employer must be paid at least the minimum wage and cannot volunteer their services. On the other hand, individuals who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious, or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA.

**May an employer require an employee to perform services outside his or her job description during the course of an outbreak?**

Yes. The FLSA does not limit the types of work employees may be required to perform.

**What are the legal implications for shutting down a facility during an outbreak?**

Under the federal Worker Adjustment Retraining Notification (WARN) Act, employers with 100 or more employees are required to provide 60 days' advance notice of a temporary shutdown if the shutdown will (1) affect 50 or more employees at a single site or employment, and (2) result in at least a 50 percent reduction in hours of work of individual employees during the month of the shutdown. However, 60 days' notice is not required if the shutdown is a result of a "natural disaster" or "unforeseeable business circumstances." Although the WARN Act does not specifically address whether a pandemic or potential pandemic qualifies as a natural disaster or unforeseeable business circumstance, the key factor for both is that the event was sudden, dramatic, and not foreseeable within the required notice period. Employers should note that, even if these exceptions should apply to the COVID-19 outbreak, the employer is still required to give as much advance notice as is practicable.

[www.bakerdonelson.com/coronavirus](http://www.bakerdonelson.com/coronavirus)