



Dear Friends,

COVID-19 has created an unprecedented event for everyone. As this event unfolds and continues to impact all facets of our lives, we wanted to provide this e-mail answering a number of common questions we have received from companies.

These questions touch on issues such as:

- working remotely,
- adjusting wages, and
- providing for leave.

Please do not hesitate to reach out to us by telephone (954-527-1115) or e-mail ([blerner@kvllaw.com](mailto:blerner@kvllaw.com)). We are here to help, and wish for everyone to stay safe and be well.

Sincerely,

Brian Lerner  
Chair, Labor & Employment

**Can a company choose to have employees stay home and require them to use available paid time off (e.g., vacation, PTO)?**

Yes. The federal wage law (the FLSA) does not require companies to provide paid time off such as vacation. As such, there is no prohibition on a company requiring that such paid time off be taken on a specific day.

**Can a company choose to have employees stay home and not pay them when employees do not have any available paid time off to use?**

In regard to nonexempt employees (employees paid hourly who are entitled to overtime), the FLSA only requires paying these employees for the hours they actually work. If a company requires a nonexempt employee to stay home, the nonexempt employee has no available paid time off, and the nonexempt employee performs no work, then the company does not have to pay the employee. In regard to exempt employees (employees paid a salary and meeting other requirements so as to not be entitled to overtime), the issue is more complicated. Exempt employees almost always must be paid when they work any portion of a workweek, no matter how small. There is a very limited exception, which applies only if the company closes for an entire workweek and the exempt employee performs absolutely no work during that week.

**In the event a company chooses to prevent employees from working from the company's office and requires them to work at home, does the company have to pay its employees who are unable to work from home?**

In regard to nonexempt employees, the FLSA only requires paying these employees for the hours they actually work, whether at home or at the company's office. If the employee is not working while at home, then the company does not have to pay the employee. Exempt employees almost always must be paid when they work any portion of a workweek, not matter how small. There is a very limited exception, which applies only if the company closes for an entire workweek and the exempt employee performs absolutely no work during that week. In this scenario, however, the company is not closed and thus companies should err on the side of caution in paying exempt employees.

**Can a company encourage or require employees to work remotely as an infection control strategy?**

Yes. An employer may encourage or require employees to work remotely 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.

**Does a company have to pay its employees their same hourly rate or salary if they work remotely?**

If remote access is being provided as a reasonable accommodation for a qualified individual with a disability, then the company must pay the same hourly rate or salary. If this is not the case and assuming there is no written contract, then the FLSA applies. In that regard, a company generally has to pay nonexempt employees only for the hours they actually work, whether at home or at the employer's office, at the established minimum wage. So in theory, a company could pay a lesser hourly rate. For exempt employees, they must receive their full guaranteed salary. The FLSA does not permit to make a deduction or reduction of salary solely because the exempt employee is working remotely.

**Given the current impact on business, can a company reduce the wages or number of hours worked?**

The FLSA does not preclude a company from lowering a nonexempt employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work. The FLSA only requires that nonexempt employees receive at least the applicable minimum wage for all hours worked and the appropriate overtime rate for all overtime hours worked. In regard to exempt employees, a company is not prohibited from prospectively reducing the salary paid to an exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the FLSA. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long term business needs, rather than a short-term, day-to-day or week-to-week, deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations. In making any reduction, the employee still must receive a salary that is at least \$684 per week. Moreover, there cannot be any retroactive application of the salary reduction; it must be prospective only.

**Can an employee stay home under FMLA leave to avoid getting pandemic influenza?**

Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA.

**Can a company send an employee home if he/she is showing symptoms of COVID-19?**

A company can send an employee home, but the decision must comply with the laws prohibiting discrimination in the workplace on the basis of race, national origin, sex, age, religion, disability, etc.

**Can a company 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 to work?**

Yes. However, employers should consider that during a pandemic, healthcare 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. Note that during a pandemic health crisis, under the Americans with Disabilities Act (ADA), a company would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work where the company has a reasonable belief—based on objective evidence—that the employee's present medical condition would (a) impair her/his ability to perform the essential job functions with or without reasonable accommodation or (b) pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

The answers provided above attempt to address the questions under federal law. Please be sure to check state and local laws, which may provide additional protections or restrictions. To stay up-to-date on COVID-19, including best practices, please visit <https://www.cdc.gov/>.

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