

# WHEN BUSINESS THREATS ARE CONTAGIOUS: 10 ANSWERS FOR EMPLOYERS NAVIGATING THE CORONAVIRUS

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Employers are facing an unprecedented challenge navigating COVID-19. As the virus spreads, it is generating fear and uncertainty. Employers need clear answers they can trust. They want to know how they can protect their employees, what their obligations are under the law, and what steps they may need to take if the situation gets worse.

Under these extraordinary circumstances, the team at ThinkHR believes it's our duty to help all employers, whether or not they are ThinkHR clients. That's why we've put together this FAQ based on the questions our clients have been asking us. We hope that it helps business owners everywhere manage this challenge and adapt to the circumstances ahead.

## 1. Can employees refuse to travel to areas considered safe?

You can require employees to travel as long as you meet your general duty under OSHA to provide a workplace (including any travel location) that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.

To ensure that you are not subjecting an employee to excessive risk, check the CDC's Traveler's Health Notices for the latest guidance and recommendations for each country where the employee is traveling.

Perhaps more important than whether you can force an employee to travel is whether you should. Requiring a fearful employee to travel will erode trust and confidence and likely cause them significant anxiety. Consider video calls or videoconferencing as an (inexpensive!) alternative to traveling for the next few weeks or months.

Also keep in mind that employees who are immunocompromised or have other relevant disabilities may be entitled to an accommodation (such as not traveling, given current conditions) under the ADA.

## 2. Can we send employees home if they are symptomatic?

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: Non-exempt 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.

### 3. What if my employee discloses that their family member or roommate has COVID-19?

Our recommendation is to follow guidance from the Centers for Disease Control and Prevention (CDC). Employers should ask employees who live with someone confirmed to have COVID-19 to notify a designated HR representative or their supervisor as soon as possible. The employer and employee should then refer to CDC guidance to assess risk and determine next steps—see Tables 1 and 2 in the CDC's Interim US Guidance for Risk Assessment and Public Health Management.

### 4. Do any leaves apply?

Whether FMLA or a state family and medical leave or insurance program will apply to a particular case of COVID-19 will be fact-specific. Even if FMLA or state leaves do not apply, though, we would recommend that employers treat leaves related to this illness as job-protected, both for legal reasons and because it's the right thing to do. If you're in a state with a sick leave law, that will apply if the employee is sick, a family member is sick, or (in many states) when an employee is told to stay home by a public health authority.

### 5. If an employee is out of the office due to sickness, can we ask them about their symptoms?

Yes, but there's a right way to do it and a wrong way to do it. In most 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—we recommend asking specifically about the symptoms of COVID-19 and making it clear that this is the extent of the information you're looking for.

Here's 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, and/or shortness of breath?"

Remember that medical information must be kept confidential as required by the ADA. If the employee does reveal that they have symptoms of COVID-19, or has a confirmed case, you should see the CDC's Interim Guidance to determine next steps. Tables 1 and 2 will help you assess risk and determine what steps, if any, should be taken.

### 6. What if I have a fearful employee who refuses to come to work?

Generally, employees do not have a right to refuse to work based only on a generalized fear of becoming ill. If their fear is not based on objective evidence of possible exposure, you can enforce your attendance policies.

You should be prepared for employees who express anxiety about coming to work and evaluate any request on a case-by-case basis. Consider alternative arrangements such as telecommuting if possible. Employees who are immunocompromised or have other relevant disabilities may be entitled to a reasonable accommodation, such as working from home or taking a leave if working from home is not possible.

If the nature of the employee's position does not allow telecommuting, and there is no legitimate threat, reiterate the steps they can take to keep themselves safe from contracting the virus and explain the proactive steps you are taking to keep infection risk low in the workplace.

## 7. Can we require or allow certain groups of employees, but not others, to work from home?

Yes. Employers may offer different benefits or terms of employment to different groups of employees as long as the distinction is based on non-discriminatory criteria. For instance, a telecommuting option or requirement can be based on the type of work performed, employee classification (exempt v. non-exempt), 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.

## 8. How do I make a telecommuting policy?

Although some employers will be comfortable sending everyone home with their laptop and saying, go forth and be productive, most will want to be a little more specific. A good telecommuting policy will generally address productivity standards, hours of work, how and when employees should be in contact with their manager or subordinates, and office expenses.

For instance, your policy might require that employees are available by phone and messaging app during their regular in-office hours, that they meet all deadlines and maintain client contacts per usual, and that they check in with their manager at the close of each workday to report what they have accomplished. Be sure to let employees know whom to contact if they run into technical difficulties at home.

You'll also want to specify how expenses related to working from home will be dealt with. If you don't expect there to be any additional expenses involved, communicate this. You don't want employees thinking this is their chance to purchase a standing desk and fancy ergonomic chair on your dime. That said, you should consider whether employees will incur reasonable and necessary expenses while working from home. Some states mandate reimbursement for these kinds of expenses, but it's a good practice to cover such costs even if it's not required by law.

## 9. If we choose to close temporarily, do we need to pay employees?

It depends on the employee's classification.

Non-exempt employees only need to be paid for actual hours worked. For these employees, you may:

1. Pay the employee for the time, even though they did not work;
2. Require they take the time off unpaid;
3. Require they use any available vacation time or PTO; or
4. Allow employees to choose between taking an unpaid day or using vacation or PTO.

All four options are compliant with state and federal law. We generally recommend option 4—allowing but not requiring employees to use vacation time or PTO. If your office is required to close by health authorities and your state has a sick leave law, employees may be able to use accrued paid sick leave during the closure.

Exempt employees must be paid their regular salary unless the office is closed for an entire workweek and they do no work at all from home. You can, however, require them to use accrued vacation or PTO during a closure if you have a policy that indicates you will do so, or if this has been your past practice. When it comes to accrued vacation or PTO, it is safest to give employees advance notice if there are situations where you will use their accrued hours whether they like it or not.

## 10. If we close temporarily, will employees be able to file for unemployment insurance?

Depending on the length of the closure, employees may be able to file for unemployment insurance. Waiting periods range from 1-3 weeks and are determined by state law. Be prepared to respond to requests for verification or information from the state UI department if you close for longer than the mandatory waiting period.

Used courtesy ThinkHR

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