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RE-OPENING FAQ

1. I am thinking about reopening, what types of things should I consider?

- Physical workspace modifications
 - Updated floor plans to increase separation between workstations; closed or modified common areas and “high touch” surfaces; and posted reminders of social distancing, mask, and handwashing expectations;
- Limiting in-person interactions and physical contact;
- Training employees and managers on social distancing policies and protocols;
- Updates to employee scheduling;
- Study the [FFCRA](#) and know about employer obligations and employee rights
- Consider steps to avoid claims of negligence and tort liability
 - Comply with all federal or state guidelines;
 - If the business is a non-essential business don't open prematurely while a stay-at-home order remains in effect.

2. Can I require medical testing before employees return to work?

Employers may take steps to determine whether employees entering the workplace have COVID-19. Under the ADA, an employer can require medical testing as long as it is “job related and consistent with business necessity.” The EEOC has indicated that an individual with coronavirus will pose a direct threat to co-workers and says employers can screen for COVID-19. The EEOC has listed temperature checks as an approved method of screening. You may also ask employees whether they have been exposed or have experienced symptoms associated with the virus, including the following symptoms listed by the CDC: fever, cough, shortness of breath/difficulty breathing, muscle pain, headache, sore throat, or new loss of taste or smell.

3. Do I have to pay employees for their time spent getting tested?

As a best practice, if you require the testing, the time spent getting tested should be compensated.

4. Should I have employees sign a consent before screening them?

Though not required, it is advisable to obtain their prior written consent. If the screening is only for temperature, the consent should indicate that the test is not diagnostic. Employees should consult with their medical providers if they become concerned about any symptoms. Also, employers should remember to comply with all HIPAA recordkeeping and confidentiality requirements.

5. Can I require a doctor's note before returning an employee to work, or if the employee "looks sick"?

Yes; the EEOC says that an employer can require an employee returning to work to provide a doctor's certifying fitness for duty. You should be sure to apply the requirement to all similarly situated employees.

6. What do the CDC and OSHA say related to cleaning?

OSHA made general recommendations related to cleaning and suggests that employers maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment, including confirming that the cleaning products are effective against COVID-19.

The CDC suggests that people wash their hands often with soap and water for 20 seconds after interaction with a sick person, after blowing one's nose, coughing, or sneezing; after using the restroom; before eating or preparing food; and if soap and water are not available and hands are not visibly dirty, an alcohol-based hand sanitizer that contains at least 60% alcohol may be used.

7. How should I clean up if one of my employees is sick?

According to the CDC, employer should do the following:

- Close off areas used by the person who is sick.
- Open outside doors and windows to increase air circulation in the area. Wait 24 hours before you clean or disinfect. If 24 hours is not feasible, wait as long as possible.
- Clean and disinfect areas used by the person who is sick, such as offices, bathrooms, common areas, shared electronic equipment like tablets, touch screens, keyboards, remote controls, and ATM machines.
- If more than 7 days since the person who is sick visited or used the facility, additional cleaning and disinfection is not necessary.
- Continue routine cleaning and disinfection.

8. What leave am I required to provide to employees who are unable to work for reasons related to COVID-19?

Employers may be required to provide leave in accordance with the FMLA and FFCRA.

Eligible employees of employers with 50 or more employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons under the FMLA. An eligible employee with COVID-19, or who is caring for a spouse, parent, or child with COVID-19, would be able to take FMLA leave, provided that the employee had FMLA leave available. The FFCRA expanded FMLA leave for absences related to care of a child whose school or child care facility is closed or unavailable because of COVID-19. Expanded FMLA is available to employees who have worked for the employer for at least 30 calendar days. The FFCRA also created a paid sick leave that is available to all employees, regardless of length of employment, for certain reasons related to COVID-19.

9. What if a business reopens and employees don't want to come back in? Can they still collect unemployment? Would the FFCRA apply?

Arkansas unemployment laws will not typically allow employees to keep collecting if they have turned down work available to them without good cause. In determining whether or not any work is suitable for an individual and in determining the existence of good cause for voluntarily leaving his or her work under §11-10-513, there shall be considered, among other factors and in addition to those enumerated in subsection (d) of this section, the degree of risk involved to his or her health, safety, and morals, his or her physical fitness and prior training, his or her experience and prior earnings, the length of his or her unemployment, his or her prospects for obtaining work in his or her customary occupation, the distance of available work from his or her residence, and prospects for obtaining local work.

The term “good cause” means a justifiable reason for not accepting a particular job; and the question of what constitutes “good cause” is a question of fact for the board. DWS has not issued guidance on whether or not COVID is “good cause” to turn down available work.

As businesses reopen and rehire employees, there could be FFCRA considerations related to paid FMLA/sick leave. If you have any employees that can't come in because the schools/daycares are closed, then they may have the FFCRA FMLA/sick leave eligibility. So as rehires happen, then that means businesses may have to provide paid leave under applicable FFCRA provisions. FFCRA leave is eligible for tax-credits.

10. Can my employees use FFCRA leave intermittently?

While working at the usual worksite (vs teleworking), the Department of Labor says it depends on why an employee is taking paid sick leave and whether the employer agrees. Unless an employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless an employee is teleworking, once an employee begins taking paid sick leave for one or more of these qualifying reasons, an employee must continue to take paid sick leave each day until either (1) the full amount of paid sick leave is used or (2) the employee no longer has a qualifying reason for taking paid sick leave. This limit is imposed because if

an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep from spreading the virus to others. If an employee no longer has a qualifying reason for taking paid sick leave before exhausting paid sick leave, an employee may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if both employer and employee agree, employees may take paid sick leave intermittently if they are taking paid sick leave to care for a child whose school or place of care is closed or unavailable because of COVID-19 related reasons.

11. Can I let my employee use paid sick time even if the employee is not sick? What about vacation?

If employers offer paid sick or vacation leave, the use of such leave depends on the terms of the employer's policy. Likely, it depends on what the employer's policy says about when sick leave and vacation can be taken.

12. Do I have to accommodate employees with COVID-19?

The ADA applies during the pandemic and could require reasonable accommodations for both employees with COVID-19, and employees who have other medical conditions that qualify as "disabilities" (such as diabetes, asthma, or immune disorders) and make them more vulnerable to COVID-19 exposure.

13. Should I revise job descriptions to address whether physical presence in the workplace is an essential job function?

Just because employers permit employees to work remotely because of COVID-19 does not mean that employers must eliminate workplace presence as an essential function after the COVID-19 pandemic.

14. How does part time work affect an employee's benefits?

It depends on the plan documents. Some plans cover for part-time employees and furloughs and should outline when coverage ends.

15. Is COBRA implicated?

If an employee loses coverage due to termination of employment or a reduction of hours below the number of hours required for eligibility for a COBRA-qualifying event, COBRA will be implicated if employees elect coverage,

16. What impact will any changes to the employees' hours have on any Affordable Care Act or other benefit plan testing that will occur?

The ACA may be implicated when employee is placed on a furlough or leave, but is still considered to be full time employee. That scenario could trigger the employer mandate penalty of \$2,000 per full-time employee if the employer does not provide coverage to at least 95 percent of full-time employees. Special rules and exceptions may apply to each employer's analysis, so employers should consult with their benefits coordinator.

17. What if an employee refuses to return to work?

Fear is likely not a reason to refuse to return to work, and employers are not required to allow employees to work from home. If the refusal is based on a qualifying reason, the employee may be eligible for expanded FMLA or paid sick leave. Some employees may have ADA-protected disabilities, which could require reasonable accommodations. Employers should communicate with employees related to the refusal and keep the records.

18. If I know an employee is at higher risk because of medical conditions or because of their age, can I refuse to let them return to work? Should I delay their return?

No. Treating those employees differently than others that are similarly situated could lead to claims of age or disability discrimination. You should talk to those employees about their preferences.

19. Can my employees file workers' compensation claims if they believe they contracted COVID-19 at the office?

Governor Hutchinson issued [Executive Order 20-35](#) in order to clarify the workers' compensation benefits available for employees during the COVID-19. For the purposes of the exclusivity of rights and remedies under the Workers' Compensation Law in Ark. Code Ann. § 11-9-105, requiring an employee to perform work when the employer has knowledge that, within the normal course and scope of the employee's job performance, exposure to severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) or to coronavirus disease 2019 (COVID-19) or to any other disease, health condition, or threat caused by SARSCoV-2 or by any virus mutating from SARS-CoV-2 is possible or likely is not intentional conduct that would remove the employer from the protections of the Workers' Compensation Law, § 11-9-101 et seq. The Order also designates these conditions as an occupational disease.

20. Can I, as an employer, be liable if an employee contracts COVID-19 while at work?

Governor Hutchinson issued [Executive Order 20-33](#) to protect businesses that open or remain open during the COVID-19 emergency. All persons in the State of Arkansas and the person's employees, agents, and officers shall be immune from civil liability for damages or injuries caused by or resulting from exposure of an individual to COVID-19 on the premises owned or operated by those persons or during any activity managed by those persons. The immunity provided under the Order does not apply to willful, reckless, or intentional misconduct resulting in injury or damages. The immunity provided under this Executive Order does not extend to workers' compensation benefits.

21. My employees have been teleworking productively since mid-March without any issues. Now, several employees claim they need to take paid sick leave and expanded family and medical leave to care for their children, whose school is closed because of COVID-19, even though these employees have been teleworking with their children at home for four weeks. Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements?

You may require that the employee provide the qualifying reason he or she is taking leave, and submit an oral or written statement that the employee is unable to work because of this reason, and provide other documentation outlined in section 826.100 of the Department's

rule applying the FFCRA. While you may ask the employee to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work, you should exercise caution in doing so, lest it increase the likelihood that any decision denying leave based on that information is a prohibited act. The fact that your employee has been teleworking despite having his or her children at home does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-19 related reason. For example, your employee may not have been able to care effectively for the children while teleworking or, perhaps, your employee may have made the decision to take paid sick leave or expanded family and medical leave to care for the children so that the employee's spouse, who is not eligible for any type of paid leave, could work or telework. These (and other) reasons are legitimate and do not afford a basis for denying paid sick leave or expanded family and medical leave to care for a child whose school is closed for a COVID-19 related reason.

This does not prohibit you from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child.

22. My employee's child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?

Yes. If the physical location where your employee's child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your employee's child is still expected or required to complete assignments.

NOTE: The Department of Labor has not yet issued guidance on whether or not the FFCRA would apply to employees whose children's school was open, but the parent had elected to keep the child home for online instruction, but based on this answer, it seems like the physical location of the school or place of care must be closed for the FFCRA to apply.

23. What is a "place of care"?

A "place of care" is a physical location in which care is provided for your employee's child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

24. Who is a "child care provider"?

A "child care provider" is someone who cares for your employee's child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

25. What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:

- The name of your employee requesting leave;
- The date(s) for which leave is requested;
- The reason for leave; and
- A statement from the employee that he or she is unable to work because of the reason.

If your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice.

If your employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you must also document:

- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child.