



Frequently Asked Questions Regarding Policies for Health and Safety Leave (PHSL) and New 2020 Federal Leave Laws

This technical assistance document contains the opinions of MCADSV staff and should not take the place of consultations or communications with your attorney, accountant, or other topic-specific expert.

Q: What is a Public Health and Safety Leave policy and what should it include?

A:

PHSL policies also may be called administrative leave policies. MCADSV did not use this title in its policy as that may be easily confused with disciplinary types of administrative leave policies.

PHSL is a policy that specifically supports employees during an extraordinary circumstance that would not allow them to work from the agency's building, for example, due to tornados, floods, or a public health crisis like the COVID-19 pandemic.

Things you could include in your PHSL are:

- What employees are covered, such as full-time, part-time, and/or seasonal employees.
- Whether employees are expected to work from home and how (the "how" should be included in a separate telework policy).
- How long employees will be paid.
- Limits to liability for the employee while working from home.
- If the policy can be rescinded or changed at any point in time, with or without notice.

Remember your policy and practice must be applicable to all staff regardless of their funding source. However, you can exclude certain positions from the policy. For example, in your policy direct service and administrative employees are

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The Missouri Coalition Against Domestic and Sexual Violence (MCADSV) unites Missourians with a shared value that rape and abuse must end, and advances this through education, alliance, research and public policy.

eligible for Public Health and Safety Leave, including all full-time exempt, non-exempt and part-time but non-direct service staff are not eligible. In practice if you exclude one person from the Leave you will need to exclude all like positions, you cannot pick and choose who is eligible.

The same consistent application for other staffing decisions apply, for example if you determine you have to lay off staff. If you lay off one and there are other like positions you will need a very strong justification as to why others kept their jobs.

Q: Does the new federal Families First Coronavirus Response Act and the Emergency Family and Medical Leave Expansion Act, that start on April 1, 2020, apply to my organization?

A:

Yes. Before the passage of the Families First Coronavirus Response Act, the federal Family Medical Leave Act (FMLA) did not apply to employers with fewer than 50 employees. The Families First Act changes that. ***Employers with fewer than 500 employees now are required to comply with the FMLA from April 1 to December 31, 2020.*** This means employers are required to provide up to two weeks of fully paid sick leave for full and part time employees, and up to 10 weeks of partially paid expanded leave.

The attached PDF of a poster from the U.S. Department of Labor does a good job of describing these new requirements for employers. <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

You are required to post this poster with your other required employment posters.

https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

The Mintz law firm is a trusted source and has provided updates via blogs on their webpages.

- “Families First Coronavirus Response Act Becomes Law” memo dated 3/19/2020: <https://www.mintz.com/insights-center/viewpoints/2226/2020-03-19-covid-19-update-families-first-coronavirus-response-act>
- Information regarding guidance from the Department of Labor: <https://www.mintz.com/insights-center/viewpoints/2226/2020-03-24-updated-department-labor-issues-guidance-families-first>
- “Lingering questions” memo updated on 3/25/2020: <https://www.mintz.com/insights-center/viewpoints/2226/2020-03-25-answers-lingering-faqs-regarding-families-first>

Q: Why do I have to develop a PHSL policy if the Families First Coronavirus Response Act and the Emergency Family and Medical Leave Expansion Act now mandate that I provide paid family and medical leave?

A:

Because a Public Health and Safety Leave policy covers a broader range of administrative leave situations than the sick leave requirements from the expanded FMLA and funders have indicated that you will need a policy if you are going to request grant reimbursements.

Q: I have an employee who has terrible internet connection that makes remote work impossible. What do I do with this situation?

A:

Your PHSL policy should include this circumstance. In this example, the employee is unable to work, they have not chosen to not work. Because of this, you are able to pay their wages.

Q: I have an employee who has nothing they can do while working from home, what do I do?

A:

You may need to be creative in finding work for the employee to do that would normally be outside the scope of their normal job activities. Could they review or write operating procedures for direct service activities they do so your organization has guiding documents in their absence? Can they organize your organization's electronic files, records, materials? Also, continuing education for staff is an allowable activity, so you can provide them with the list of MCADSV's online trainings.

If you are unable to identify work for the employee to do remotely, or if they can't work from home because school closures require them to care for their children, you can still pay them and your leave policy should include this provision if you are going to request grant reimbursement. If the reasons they can't work are related to the public health and safety crisis, then you may pay them their wages in accordance with your PHSL policy.

Q: I have an employee that chooses not to work. Can I still pay them? Am I required to pay them?

A:

Paying an employee who chooses not to work would depend on your agency's policy and if you have the unrestricted funds to pay them. You cannot pay them with grant funds. You may only pay them with grant funds if they are working remotely or if they are unable to work. We suggest you document the reason(s) why an employee can't work.

Under the newly enacted Families First Coronavirus Response Act and the Emergency Family and Medical Leave Expansion Act you may be required to provide them with full or partial pay if they meet certain criteria. Refer to the attached memos from the Mintz law firm and the DOL poster for more about the list of criteria.

Q: How do I pay an employee's wages if they are unable to work remotely or telework?

A:

All federal grant programs have determined that you can continue to invoice salaries for all eligible employees if you have a PHSL that includes this type of situation. Your policy determines who is eligible. If you have employees who are not grant funded you will need to determine if you will continue to pay them out of your unrestricted funds.

Q: What if I have employees who are not on grant funds and/or do not provide direct services?

A:

You will need to look at paying them from your unrestricted revenue sources. If this is not an option, you might be forced to look at layoffs. For information regarding layoffs you can contact SESCO Management Consultants at 423-764-4127.



Q: Can I send an employee home if they are show symptoms of the illness that forced PHSL to become enacted?

A:

Yes, according to the federal Occupational Health and Safety Administration (OSHA), you are required to maintain a safe workplace.

Additional federal guidance from the Centers for Disease Control and Prevention (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 if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA [Americans with Disabilities Act] if the illness were serious enough to pose a direct threat. Applying this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.”

https://www.eeoc.gov/facts/pandemic_flu.html section B.5.

Q: Can I ask to check an employee’s temperature?

A:

As a matter of everyday practice, no. That would be a violation of the ADA. During a pandemic, the answer is yes, with certain limitations and under specific conditions.

The Equal Employment Opportunities Commission (EEOC) in March, 2020, issued a notice stating:, “Generally, measuring an employee’s body temperature is a medical examination. If pandemic influenza symptoms become... widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.

The CDC and state/local health authorities did acknowledge community spread of COVID-19 in March, 2020. As a result, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

https://www.eeoc.gov/facts/pandemic_flu.html section III.B.7

Importantly, employers should be aware that some people with influenza, including the 2009 H1N1 virus or **COVID-19**, do not have a fever.

Q: As an employer what can I do to prevent the spread of the disease?

A:

The text in this answer is guidance issued 03.21.2020 from EEOC, in conjunction with the ADA.

https://www.eeoc.gov/facts/pandemic_flu.html section III.A.1-2

- I. The following Questions and Answers are designed to help employers plan how to manage their workforce in an ADA-compliant manner before and during a pandemic.
 - A. BEFORE A PANDEMIC

HHS advises employers to begin their pandemic planning by identifying a "pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning."⁽²⁷⁾ This team should include staff with expertise in all equal employment opportunity laws.⁽²⁸⁾ Employees with

disabilities should be included in planning discussions, and employer communications concerning pandemic preparedness should be accessible to employees with disabilities.

When employers begin their pandemic planning, a common ADA-related question is whether they may survey the workforce to identify employees who may be more susceptible to complications from pandemic influenza than most people.

1. Before an influenza pandemic occurs, may an ADA-covered employer ask an employee to disclose if he or she has a compromised immune system or chronic health condition that the CDC says could make him or her more susceptible to complications of influenza?

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.⁽²⁹⁾ 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.

2. Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

Yes. Employers may make inquiries that are not disability-related. An inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications). The inquiry should be structured so that the employee gives one answer of "yes" or "no" to the whole question without specifying the factor(s) that apply to him. The answer need not be given anonymously.

Below is a sample ADA-compliant survey that can be given to employees to anticipate absenteeism.

ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of



organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES _____ NO _____

Q: During a pandemic, may an ADA-covered employer ask employees *who do not have influenza symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?

A:

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees *without* symptoms is prohibited by the ADA. However, under these conditions, employers should allow employees who experience flu-like 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 has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. 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).

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

https://www.eeoc.gov/facts/pandemic_flu.html section III.B.9