

# PREPARED FOR WHATEVER COMES NEXT

Employee Benefits and Human Resources Law

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## COVID-19 – Your Company’s Response to Employee Absences

Employers are asking: How do we address employee attendance during the coronavirus outbreak? Do we permit employees to have extended leaves when hour banks are depleted? Do we pay for those leaves? Can we tell employees to return home if they report to work ill?

Haynes Benefits has been talking with our clients and industry contacts about these issues, and we are asking how they are responding to the coronavirus outbreak with respect to company policies regarding leaves of absence (paid/unpaid) and similar issues.

Here is what we have learned:

- Most employers have *not yet implemented* any special leave policies beyond the employer’s regular PTO/STD programs, but employers are considering potential options.
  - Employers are also implementing COVID-19 policies that notify employees as to absences, benefits, workplace hygiene, and other employment policies affected by the virus
- Some employers have implemented an “unlimited” sick time policy during the outbreak. Employees will not be docked for absences, nor will the absences count against PTO, until the outbreak passes. The primary concern with this policy is whether employees will abuse the additional benefit.
- Some employers already utilize the “unlimited PTO” concept. That type of policy should cover the coronavirus situation.

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- Employers with some form of unlimited time all seem to monitor the time being taken and the employee's accompanying performance.
- Some employers are adding up to a week of paid sick leave if the employee is ill.
- A common employer response is that an employee will not be disciplined for excessive absenteeism (or exceeding his/her PTO hour bank) *if* the absence is related to the virus.
- Some employers are allowing an employee who has used all available PTO/sick time to "borrow" PTO time.
  - In other words, run a "negative PTO balance" which can be replenished when the employee returns to work.
- Almost all employers are expanding telecommuting to anyone whose job permits telecommuting and who previously has not been telecommuting.
  - Some organizations who do not need a facility/office presence have closed their offices completely, and all employees are working remotely.
  - Other employers have mandated to their telecommuters, "if you are sick, work from home."
  - Many employers are banning all business travel. Some are banning travel to larger group meetings.
- Hospital systems, long term care, and other medical facilities have stated they will ask an employee to leave work if visibly ill.
  - Directives from CMS and other federal and state health agencies support such action.
  - A non-health care related facility, by contrast, should seek further legal guidance as to whether such action can be taken from an employment-law perspective, but a directive from the U.S. Centers for Disease Control and Prevention ("CDC") supports such action.
  - Confidentiality concerns – employers, however, must insure that an employee's medical condition is kept confidential under ADA and other privacy rules.

- Other suggestions include:
  - Compensating an employee at a reduced rate for missed work (if PTO is exhausted).
  - In areas where school closings have occurred or there is an ill family member, consider alternate shift times and/or the swapping of shifts.
- Congressional proposals for granting paid leave related to the virus are being considered.
  - Congress may not be able to act quickly enough to implement such a mandate given the immediacy of the crisis.
  - Employers should also review state and/or local laws to determine whether mandatory paid leave provisions will apply in this situation.
- Employers should also consider the following:
  - Family Medical Leave Act (“FMLA”) – will the employee’s absence qualify as FMLA and/or be treated as FMLA leave (and counted against available FMLA leave time)?
  - No retaliation/discrimination – OSHA prohibits retaliation against an employee for expressing concerns regarding workplace safety. The ADA and other federal and state employment laws prohibit discrimination based on disability and other protected classes (e.g., national origin, age, etc.). Employers must keep these laws in mind with respect to any employment actions taken during the outbreak.

Here is a link to our earlier article regarding the coronavirus that provides more details about the virus and strategies for dealing with the virus:

<http://www.haynesbenefits.com/Proactive Coronavirus Strategies.pdf>

If you need our help with any of these pressing matters, please let us know!

The content herein is provided for educational and informational purposes only and does not contain legal advice. Please contact our office if you have any questions about compliance requirements applicable to your employee benefit plans or other HR compliance matters.

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