



Frequently Asked Questions (FAQs)

Prepared February 2021

- 1. Wage and Hour when Working from Home – How can HR obtain and affirm that submitted time records are accurate and reflect all hours worked?**

We recommend that there should be a statement on the timesheet that the employee is certifying that everything put on the timesheet is accurate and reflects all hours worked. By signing or submitting those time sheets with that certification, it gives the employer a defense that the employee in fact certified the accuracy of the records. We also recommend that supervisors never change an employee's timesheet without first getting the employee's approval and sign-off.

- 2. Wage and Hour when Working from Home – If we have non work-related events after work hours are we required to pay our non-exempt/hourly employees if they attend?**

As long as the events are completely voluntary and employees are not "expected" to attend, the time does not have to be paid.

- 3. Wage and Hour when Working from Home – can we require employees working from home to attend Zoom meetings attend department meetings?**

Yes, you can require WFH employees to attend Zoom meetings and these meetings along with all hours worked would be compensable time and should follow all wage and hour laws.

- 4. Workers Comp and Remote Workers – if an employee is traveling to the office to print reports and is in a car accident, are they subject to workers comp since this was done during work hours?**

Yes, this would most likely be covered under Workers Comp if that task had to be performed at the office. The employer can make claims to the contrary but the act of performing a work task during work hours would most likely be enough.

5. Remote Workers and Different States – If an employee decides to move to another state does the employer need to establish business in that state?

Some states do require all employers to register in the state they have employees in. I would recommend checking the employer requirements in each state.

6. Wage and Hour – Outside Sales Exemption – How does the pandemic affect outside sales exemption if there are no real outside sales activity?

We wish there were an easy answer with certainty but everything happening during the pandemic really has no precedent. That being said, there are real concerns here if it continues. The FLSA regs are pretty clear that the sales must occur away from the employer's place of business. If they do not, then the employee can't qualify for the outside sales exemption. The DOL makes it clear that an employee working from home and making sales from there is simply an extension of the employer's workplace and therefore would not qualify for the exemption. Keep in mind that an employee that is performing inside sales instead of outside sales may qualify for the inside sales exemption if they meet very specific criteria. It is not likely but is something that the employer can still look at.

7. Work From Home Policy – Can an employer decide which employees can work from home?

A company can set their own parameters as long as the parameters stay within fair and consistent business reasons that apply to all similarly situated employees equally. Employers can allow employees to WFH based on good attendance or other performance standards as long as it is available as a carrot for all similarly situated employees. That being said, the employer might have to make reasonable accommodations if an employee can't meet the standards for a legitimate medical or religious reason. That being said, if it turns out that a majority of a certain protected class ends up working at the office then there is the possibility that a plaintiff can claim that the policy, even inadvertently, creates a disparity that results in discrimination against a protected class. We would recommend that if you try to install a policy such as this that you keep an eye on the breakdown of who is granted the right to work from home and who is required to work in the office to see if it remains fairly consistent. If it starts to show a disparity, you should reconsider the policy because it will be creating more risk.

8. Employer required postings and Work from Home employees – Can we keep posters in electronic format on our company intranet for employees to access.

As long as the employees know and you can show proof of communication that employees know where and how they can access these notices. It is also important to note that if employees do not have regular work related computer access, you need to have written consent on file that the employees signs saying they know they can access the notices in a specified location or request hard copies with the appropriate contact information.

9. ADA Compliant Websites – Is Title III access apply to customers, employees, or everyone?

Title III access is applicable in the context of anyone who may attempt to obtain access to your website, whether that be employees, customers, or anyone else. The purpose of Title III is to provide access to accommodations that are open to the public so everyone has equal access, which could really include anyone that attempts to obtain your services/product.

10. ADA Compliant Websites - Does the employer's intranet fall under the ADA requirements?

We do not believe that an intranet would likely fall under Title III because it isn't intended to be open to the public and therefore wouldn't be considered a public accommodation. That being said, if a disabled employee would not have access to the company intranet due to his/her disability and the employer did nothing to attempt to reasonably accommodate this deficiency, the employer may be liable under traditional ADA Title I principals rather than Title III.

11. ADA Compliant Websites - Does the ADA website access requirements apply to Business to Business (B2B) company as opposed to a Business to Consumer (B2C) company?

It can but is much less likely. Any business that is considered a place of public accommodation will clearly be covered. If the business is not "open to the public" but only sells to other businesses, then there is certainly an argument that they are not considered a "place of public accommodation". Keep in mind, however, that if you have a mobile app used by the public or use a recruitment portal open to the public for hiring purposes it is possible that either or both of those might be required to meet ADA standards of accessibility.

12. ADA Compliant Websites – What is the official website for Web Accessibility Initiative Website (WCAG)?

Here is the link to the [Web Accessibility Initiative website](#) that includes all of the WCAG guidelines.

13. Benefits Compliance – What is the COVID extension for electing COBRA?

The extension lasts 60 days following the end of the public health emergency period. As of now, this emergency period ends April 20, 2021, so individuals will have until June 19, 2021 to elect COBRA.

14. Benefits Compliance – COVID Premium Credits – Can the premium credit be provided as a cash payout vs. a future reduction of cost share?

Yes, the premium credit can be shared as a cash refund. This may be a desirable option if amount of the credit due to each participant is somewhat sizeable. Otherwise, if it is not sizeable, the tax consequences of the refund may outweigh the benefit of providing a cash refund, in which case a decrease to a payroll cycle's deduction may be a better option.

15. ACA and Benefits Compliance – We received a 226j letter from the IRS in January 2019. We disagreed with the assessment but have not received a letter from them either accepting or denying our appeal. Should we follow up with the IRS or does that mean they agree?

IRS will typically send a response to all employer appeals or acceptance of the shared responsibility assessment. I would recommend contacting the IRS for status.

16. ACA and Benefits Compliance – Do 1095s still need to be sent out this year given that the ACA cannot penalize for not having health coverage?

Yes, 1095 forms must still be distributed. All ACA reporting requirements for employers are still in place. Including a few states with additional requirements.

17. ACA and Benefits Compliance – Which ACA information is required for Box 12 on the W2 form?

This reporting is done directly on the Form W-2 in Box 12 using Code DD. It should include the full cost of the medical coverage provided to the employee for the year, which will include employer and employee contributions.

18. Benefit Trends – This presentation has been talking a lot about High Deductible Health Plans, have these gained a lot of popularity?

Yes, depending on your location, HDHPs have gained a lot of traction for many reasons around cost share, alternative funding arrangements and other plan designs. HDHPs have very specific criteria that must be satisfied in order to be considered HDHP, so it's important to pay attention to how other benefit offerings may impact the plan's ability to satisfy this criteria.

19. Benefit Trends – Can an Individual Coverage Health Reimbursement Plan (ICHRA) sit along side a Group Health Plan?

Yes, but no class of employees can receive an offer of both the ICHRA and traditional group medical coverage. Employee classes can receive only an offer of one, not both.

20. COVID Testing Requirements – can an employer require a negative test result prior to returning to work.

According to the CDC, an employer should not require a sick employee to provide a negative COVID-19 test result or healthcare providers note to return to work.

21. COVID-19 Exposure - What are the notification requirements when an employee has been exposed to COVID-19?

Employers have an obligation to manage the potentially exposed workers' return to work in ways that best protect the health of those workers, their co-workers, and the general public. Inform employees of their possible [close contact](#) (within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period) with someone with confirmed or suspected SARS-CoV-2 infection in the workplace, but maintain confidentiality as required by the [Americans with Disabilities Act \(ADA\)](#)[external icon](#). Most workplaces should follow the [Public Health Recommendations for Community-Related Exposure](#). The most protective approach for the workplace is for exposed employees (close contacts) to [quarantine](#) for 14 days, telework if possible, and self-monitor for [symptoms](#). This approach maximally reduces post-quarantine transmission risk and is the strategy with the greatest collective experience at present.

22. COVID-19 Employer Reporting Requirements: What if we were required to report to OSHA and failed to do so, should we still report?

Yes, we recommend complying with all reporting requirements even if you are late in doing so.

23. COVID Sick Time Requirements – If employees already used their 80 hours of emergency paid sick leave, do I need to pay for additional time if there was an exposure at work?

The emergency sick leave under FFCRA expired on 12/31/2020. There are many State and localities that have implemented their own COVID sick time requirements. We recommend you check with your State and local counties for additional requirements. If all time is exhausted, you can require the employee to use other accrued time off.

24. COVID Exposure and Quarantine Requirements – If an employee was exposed, how long should they quarantine for?

Employees who have [symptoms](#) should notify their supervisor and stay home. CDC recommends [testing](#) for people with any signs or [symptoms of COVID-19](#) and for [all close contacts](#) of persons with COVID-19. Employees who are sick with COVID-19 should [isolate](#) and follow [CDC-recommended steps](#). Employees who are asymptomatic (have no symptoms) or pre-symptomatic (not yet showing symptoms) but have tested positive for SARS-CoV-2 infection should also [isolate](#) and follow [CDC-recommended steps](#). Employees should not return to work until the criteria to [discontinue home isolation](#) are met, in consultation with healthcare providers. Employees who are well but who have a sick household member with COVID-19 should notify their supervisor and follow [CDC-recommended precautions](#). Employers are encouraged to implement flexible, non-punitive paid sick leave and supportive policies and practices as part of a comprehensive approach to prevent and reduce transmission among employees.

25. Covid-19 disability and/or workers comp – Can an employer coordinate required sick pay time with any State benefits the employee might be receiving?

Yes, an employer can coordinate salary continuation with any State required benefits.

26. COVID-19, Temp Agencies and Worker Comp – Who’s responsibility is it to report COVID exposure and which agency covers workers comp if applicable?

It is always the employer’s responsibility to do their own reporting even if that employee is through a temp agency. The temp agency would be the responsible for the coordination of workers comp claims and benefits.

27. COVID Vaccination – can an employer require vaccines, ask for vaccines and require employees to pay for vaccination?

An employer can decide to mandate a COVID-19 vaccine as long as the current EEOC requirements are met. If you require the vaccines for employees, you can ask candidates if they have been vaccinated. The employee would not be responsible for any cost associated with the vaccine if the employer is requiring it.

28. COVID and employees afraid to return to work – What can we do with employees that are afraid to return to work?

If the employee cannot work from home and is not comfortable returning to the workplace, we recommend you seek counsel before deciding to terminate. It is best to try and find an accommodation before terminating someone due to COVID-19 reasons.

29. CA - Rehire Policy: When asked during reference checks, can a previous employer still answer the question "is this employee re-hirable?"

Yes, it is legally permissible to answer the question, but we generally believe that employers have little to gain by disclosing anything more than a former employee’s title and dates of employment in response to a reference check. Many people understand the question “is the employee eligible for re-hire?” to be code for “should we even consider hiring this person?,” so a negative response is almost certain to kill the former employee’s chance at being hired, and can lead to claims for defamation, invasion of privacy, etc. I typically recommend that clients respond to the question by stating that their policy provides only for disclosure of titles and dates of employment.

30. CA - Rehire Policy: Is it okay to include "not giving a notice of 15 days for resignation" you are not eligible for rehire?

If you are asking whether it is legally permissible to decline to rehire a former employee because the employee resigned without giving adequate notice, there would be nothing illegal about refusing to rehire a former employee on that basis. If you are asking whether it would be legal to include a no rehire clause in a severance agreement or settlement agreement because the employee resigned without giving adequate notice, then the answer would differ. You cannot include a no rehire clause in a severance or settlement agreement merely because the employee resigned without notice.

31. CA - Wage and Hour and COVID - We ask employees to do a self check at home for COVID symptoms prior to coming to work. We want to make sure they don't have cough, headache, loss of smell, fever or chills. We don't require that they log it or tell us. Do we have to pay them for that?

Off-the-clock time spent performing tasks required by an employer was the subject of the *Frlekin* case discussed during the presentation. "Hours worked" can include tasks that an employer requires employees to perform at home, but whether the time spent at home performing a "self-check" constitutes hours worked will ultimately depend on the factual circumstances of the individual case, focusing on the employer's level of control. According to at least the California Department of Industrial Relations' Safe Reopening FAQs for Workers and Employers, No. 12, a medical check at home where the "employer simply request[s] that workers take their temperatures and do a brief wellness check before coming to work ... generally would not constitute hours worked because the level of control would be slight. (https://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm) But the FAQs are not legally binding and presents only the opinion of this particular agency. There is presently no clear, binding answer directly on point that I am aware of because this is a relatively novel issue that is not yet settled.

32. CA FEHA - What if an EE waits until after hired to disclose any disability information and they are in fact unable to perform job duties?

The answer depends on a variety of factors, such as, for example, whether the employer is covered by FEHA, whether the employer has sufficiently engaged in the interactive process, and whether the employee is able to perform the essential job functions with or without a reasonable accommodation. Remember, an employer with 5 or more employees is required by FEHA to provide reasonable accommodation to employees with a disability (or medical condition) to perform the essential functions of their job unless it would cause undue hardship. To determine whether or not a disabled employee can perform those essential functions with or without reasonable accommodation, the employer must sufficiently engage in the interactive process with the employee to make that determination. As we learned from *Doe v. Department of Corrections* discussed during the presentation, medical documentation plays a key role in the interactive process. If an employer has already sufficiently engaged in that interactive process and determined that the disabled employee is truly unable to perform those essential job functions with or without reasonable accommodation, theoretically, the employer has satisfied its obligations under FEHA. However, it would be prudent for an employer in those circumstances to confer with counsel before proceeding further because the employer's risk of exposure for any missteps is substantial.

33. CA – Wage and Hour - If a construction worker has a company truck with tools in it, when does their work day start? Home or jobsite?

This was the issue in the Oliver case that we discussed during the presentation. If the employee has the option of taking tools home with him/her at night and chooses to do so, then the employee's work day begins when they arrive at the first job site in the morning. If the employee is required to carry the tools in their vehicle, then there is a chance that the commute time from the employee's home to the first job site, and from the job site back home at the end of the day, could be considered work time if the circumstances were such that the employee could not effectively use the time and vehicle for personal purposes. The ultimate answer would depend on the specific facts and circumstances of an individual case.



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