

# COVID-19 Testing, Quarantine and Leave Issues

## What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

**Jef Fagan, NECA General Counsel**

As the country and our NECA contractors get back to work in stops and starts (or continue along as essential), there are a number of novel issues that need to be addressed by employers. A few areas of concern are the sick leave and testing issues associated with the pandemic. There will undoubtedly be employees that attempt to come to work sick or get sick while employed. There will also be employees that do not practice proper social distances or precautions, or insist on traveling to higher risk jurisdictions. This Legal Alert addresses some of the concerns associated with these issues. As always, NECA contractors are encouraged to seek competent local legal counsel for specific questions and concerns.

### CDC Testing Guidance and State Testing Requirements

All NECA employers should develop COVID-19 policies and procedures. One component of that health and safety framework should be provisions related to temperature checks and other health screening. There are best practices and government mandates that must be consulted during this process. An employer may also need to comply with owner or general contractor requirements that could vary from jobsite to jobsite.

The CDC has offered comprehensive guidance on testing protocols for COVID-19. Much of this guidance focuses on health and safety best practices; however, there are no federal mandates applicable to the workplace with regard to temperature checks or health screening. A good start for information on CDC best practices is here:

<https://www.cdc.gov/media/releases/2020/s0613-covid19-testing-recommendations.html>

More specific guidance is found at the local and state level. States (and some localities) have issued recommendations and mandates on testing and health screens that are applicable only in their jurisdictions. A running list of temperature and health screening requirements across the country may be found here:

<https://www.littler.com/publication-press/publication/wont-hurt-bit-employee-temperature-and-health-screenings-list>

### CDC Quarantine Guidance and State Quarantine Requirements

Similar to the testing and health screening best practice protocols, the CDC has set out recommendations on quarantine and travel. As NECA employers continue operations during this pandemic, they will no doubt face questions related to how to handle employees that present with symptoms, actual COVID-19 diagnoses, or perhaps those that travel to or desire to travel to higher risk jurisdictions and then want to come right back to work. A good start on these issues is the CDC page found here:

<https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html>

The next step for a NECA employer facing these concerns would be to consult local and state travel and quarantine recommendations and mandates. Several states have instituted mandatory quarantine requirements for certain COVID-19 related health issues and positive tests as well as travel to designated high risk states and areas. These requirements are typically found in the statewide return-to-work directives and recommendations. The following link provides updates to such provisions in all 50 states:

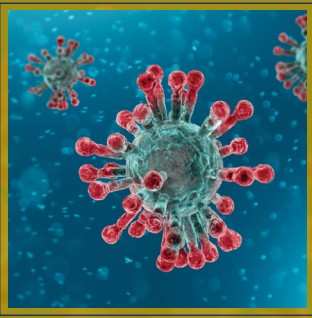


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published 7/9/2020



<https://www.littler.com/publication-press/publication/bouncing-back-list-statewide-return-work-protocols>

See also state directives on facemasks and coverings:

<https://www.littler.com/publication-press/publication/facing-your-face-mask-duties-list-statewide-orders>

These materials should go a long way in providing NECA employers with appropriate guidance in crafting COVID-19 policies on health and safety, particularly as they relate to the treatment of individual employee health, leave and travel. These decisions should be made in consultation with local competent legal counsel.

### **Associated Leave and Compensation Issues**

A significant component of COVID-19 related travel and leave is the compensation associated with related employment determinations. As always, any analysis of leave and compensation must start with each NECA employer's CBA. The next stop should be local and state leave rules and regulations. Many state and localities have required safe and sick leave laws that may be impacted by cases of COVID-19, and there are also states and localities that have expanded these provisions during the pandemic. For example, New York State has recently expanded its leave requirements for employers during the pandemic:

<https://paidfamilyleave.ny.gov/COVID19>

If leave requests are associated with Family Medical Leave Act (FMLA) requirements for job restoration provisions or Americans with Disabilities Act (ADA) accommodation requirements, these laws should also be consulted.

Lastly, the Families First Coronavirus Relief Act (FFCRA) provides for benefits for certain sick and family leave and discussed in depth in other NECA resources. Employees diagnosed with COVID-19, those who are symptomatic and seeking diagnoses, or those required by the government or health care providers to quarantine should be paid FFCRA benefits. The Department of Labor recently released a handy tool for FFCRA benefit eligibility. This tool should be used in conjunction with the NECA guidance and the existing DOL Q&A material when faced with FFCRA benefits questions:

<https://www.dol.gov/agencies/whd/ffcra/benefits-eligibility-webtool>

### **Question and Answers**

The issues raised below should be discussed with the local union in an attempt to work out how they fit within the language of your existing CBA and the expectations of both parties. You should also consult with your local NECA Chapter and competent local legal counsel to determine if any policy changes or additions are mandatory subjects of bargaining as opposed to compliance with law, government mandates or exigent circumstances.

#### **1. How should an employer handle employee requests to travel to higher risk jurisdictions?**

Best practice would be to develop a travel policy as part of your safety plan and implement it consistently across the workforce. Non-essential work travel may be restricted during the pandemic. Personal travel, while it may not be restricted unless illegal, could subject an employee to quarantine or health clearance obligations. If, upon return from travel, there is a direct threat such as observed symptoms, described symptoms, extraordinary risk or objectively high-risk travel, such an employee who poses a direct threat to the workplace can be quarantined or required to get health clearance before returning to work.

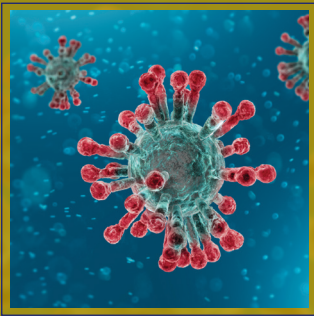


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Such action must be based on objective, factual information, not on subjective perceptions or irrational fears. Therefore, if up to date CDC Travel Advisories, or similar government information, provide the basis for the concern, an employer may rely on that guidance as objective to make reasonable assessments of conditions in their workplace. Employers may have compelling business reasons, such as the safety of its employees or customers, to prefer an employee take time off or work remotely following an employee's travel to an area with a widespread or ongoing community spread or exposure to the virus.

**2. Must an employer quarantine an employee that travels to a higher risk jurisdiction before allowing them to return to work?**

Some states require a mandatory quarantine depending on the jurisdiction. Some states have recommendations related to travel and quarantine. Your policy may become relevant on the issue.

**3. Must an employer pay an employee that travels to a higher risk jurisdiction and is then quarantined?**

This is highly dependent on your CBA, leave policy (if any), your state and local requirements, and whether the employee is quarantined by the government or by a private entity. If the employee is subject to a government quarantine or advised by a healthcare provider, they are entitled to FFCRA benefits. Absent that, you may have no compensation obligations. There is certainly an argument to be made that an employee that violates policy should not be paid for quarantine time. The nature of the travel and your treatment of the same could determine whether required quarantine or testing time is compensable.

**4. Must an employer pay an employee for waiting in line for a temperature check or health screen to enter a workplace?**

The law is not clear here and these cases will be very fact specific. How long is the wait time? Is the testing or health screen mandated by the government or the owner or an employer requirement? The best practice is to consult with your local NECA Chapter to determine if any past practice exists. If none, a mutual agreement between the parties is recommended for how such health and safety measures will be handled.

**5. Must an employer pay an employee for time needed to get a COVID-19 test?**

The law is not clear and there is no specific guidance from the DOL or the EEOC. Best practice would be to schedule the test during working hours in a quick and efficient manner. That eliminates the time it would take to go to a health facility for testing along with the associated compensability questions. If offsite testing is employer mandated, it is likely compensable – much like mandatory drug tests.

**6. Do employers need to pay for the time it takes employees to put on PPE equipment? What about masks?**

First, this issue should be discussed with your local NECA Chapter and the local union. Safety should always be the paramount concern and specific issues like this should be worked out – and indeed they may be mandatory subjects of bargaining.

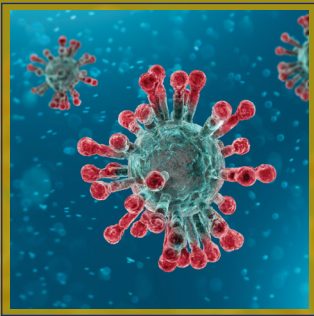
As to the law, this area is also very fact specific. Using the analysis from the Supreme Court in *IBP v. Alvarez*, 126 S.Ct. 514 (2005) <https://caselaw.findlaw.com/us-supreme-court/546/21.html> donning and doffing of clothing or gear must be “integral and indispensable” to the employees’ “principal activities” on a job to be considered compensable time. If the equipment is PPE specific to the job – even if COVID-19 related - the time it



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takes to put it on is likely compensable. However, requiring an employee to wear a cloth facemask is no different than many states now imposing the same requirement to enter public areas. Therefore, the requirement to wear a cloth facemask would likely not be considered “integral and indispensable” to the employees’ “principal activities” and is likely not considered compensable time.

We will continue to monitor the law and legislation and update guidance and alerts as the law develops during this pandemic.

*This material is for informational purposes only. The material is general and is not intended to be legal advice. It should not be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, applicable CBAs, prime contracts, subcontracts, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.*



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