

Frequently Asked Questions From Employers About COVID-19

By William T. (Tommy) Simmons / *Legal Counsel to Commissioner Aaron S. Demerson*

Q: I am concerned that my small shop might be ordered to close its doors to control the pandemic. Would I have to pay for unemployment benefits for my employees?

A: If a business shuts down due to a closure order from a governmental entity, Section 204.022(a)(1-2) (see <https://statutes.capitol.texas.gov/Docs/LA/htm/LA.204.htm#204.022>) of the Texas Labor Code may allow an employer to ask for chargeback protection. If that were to happen, you should include a copy of the shutdown order with your response to the unemployment claim and argue that the closure was mandated by a local or state order.

Q: Has TWC waived the one-week waiting period for UI Benefits?

A: Yes, Governor Abbott granted the Texas Workforce Commission's request to suspend the one-week waiting period. Workers in Texas will be able to receive benefits immediately after their unemployment benefit applications are approved.

Q: Can TWC assist us if the pandemic forces a mass layoff?

A: Yes – TWC's Rapid Response Unit can help employers and affected employees access unemployment claim and reemployment services in a very streamlined and efficient manner. For information, see the TWC website at <https://twc.texas.gov/businesses/rapid-response>.

Q: What other alternatives exist to avoid mass layoffs?

A: TWC administers the Shared Work Program, which allows partial unemployment benefits for similarly-situated employees whose hours are reduced by a standard amount between 10 and 40 percent – information about that program is at <https://twc.texas.gov/businesses/shared-work>. If the reduction in hours is necessitated by the pandemic, an employer with a shared work plan can request protection from chargeback of benefits paid to affected employees.

Q:

What can an employer ask for if an employee tells us she is ready to return to work?

A:

A question that might come up is whether it is permissible for an employer to require a doctor's release / fitness for duty certificate or something similar if an employee is returning from an absence caused by something that looks or acts like Covid-19. It would be good to keep in mind that many employees may have financial problems relating to inability to pay to see a doctor, so employers should take that into account, and also that at least under current conditions, medical documentation should be requested only if a person is known to have been exposed to a communicable disease (not just coronavirus, but also things that are just as infectious, such as colds, flu, and other viral pests). Moreover, medical offices are almost overwhelmed, so issuing documentation will not be high on their priority lists, and tests for Covid-19 are not yet widely available. Finally, requests for medical documentation should be done consistently and fairly for all similarly-situated employees.

Q:

Is an employer allowed to send an employee home if they are showing signs of illness, such as coughing, sneezing, or report that they have aches or chills?

A:

Yes, in keeping with an employer's general duty under OSHA to maintain a safe and healthy workplace for employees, employees who appear to be sick may be asked to go home, but do so as politely and discreetly as possible. However, the employer should be consistent and treat all employees who exhibit risky symptoms the same.

Q:

What if we know that an employee has been exposed to Covid-19, but they are showing no symptoms?

A:

Generally, there is no Texas or federal law that would prohibit a company from telling employees to stay home if they have had a higher-than-normal degree of exposure to individuals actually infected with the disease. As noted above, be consistent and do not base self-isolation orders on factors such as race or national origin. There have been scattered reports of ethnic discrimination, particularly against people who look like they might have come from Asia. The EEOC is already warning employers that singling employees out based on ethnic or national origin concerns could trigger a discrimination charge.

Q:

Would the employer have to pay sick leave to that employee?

A:

Yes, if the company offers such paid leave. Paid leave policies should be followed - failure to pay for leave owed under a written paid leave policy is a violation of the Texas Payday Law. A federal bill to require up to 80 hours of paid sick leave for full-time employees, H.R. 6201, has passed Congress and has been signed by the President as of March 18, 2020. The text of that bill is online at: <https://www.congress.gov/bill/116th-congress/house-/6201/text/enr>.

Q:

Could they file unemployment claims and draw unemployment benefits if they are told to go home for medical reasons?

A:

No, if they are receiving paid leave benefits. While on paid medical leave, they would not be considered "unemployed" under TWC laws and would not be able to claim unemployment insurance (UI) benefits. Once the paid leave runs out, they could file unemployment claims.

Q: What if they are not getting paid leave?

A: If they are on unpaid leave, they could be considered unemployed if they are out long enough to satisfy the test for either partial or total unemployment (for those definitions, see our book for *Texas Guidebook for Employers* online at https://twc.texas.gov/news/efte/ui_law_eligibility_issues.html#de-fin_of_unemployment).

Q: Does an employee get unemployment benefits even if they are too sick to work?

A: Any claimant who is able to file a claim for UI benefits must meet the eligibility requirements in order to actually draw benefits. Most notably, the claimant must be medically able to work. The usual eligibility requirement to search for work has been waived by TWC for the immediate future as part of the pandemic relief effort.

Q: Is there any way an employer can avoid the cost of unemployment benefits?

A: An employer may be eligible for protection from chargebacks from UI benefits if the evidence shows that the work separation was for medical reasons. However, if the reason for the work separation was merely a cautionary period of time off to minimize potential exposure of others to someone who might be infected, but might not be, chargeback protection would most likely not be extended to the employer. To minimize the chance of unemployment claims being filed, the employer can encourage employees to work from home if the job is such that remote work is possible. Proper recording of work time is necessary, and the employer would need to work with the employees to set up a time-keeping system that functions well and takes all time worked into account.

Q: What other information is on the TWC website about workplace illness issues?

A: The following topics in our book *Texas Guidebook for Employers* may be useful: https://twc.texas.gov/news/efte/medical_leave_laws.html and <https://twc.texas.gov/news/efte/fmla.html>.

Q: Who do I contact if I have other employment law questions, including COVID 19 guidance?

A: You can call our Employer Hotline at: 800-832-9394. This line directly goes to the Office of Employers where you can speak to an employment law attorney.