

Labor and Human Rights FAQ

To be used for specific questions relating to Labor and Human Rights, and what might be most pertinent to our agency that we can answer in light of the questions we have or may receive relating to COVID-19 and Employers, Employees, and Human Rights.

Labor:

- **Q:** Can I make an employee use Paid Time Off (PTO), or as an employee, must PTO be provided, if business operations are closed?
A: No state or federal laws require an employer to provide its employees with PTO. Therefore, an employer can set all of the terms and conditions for the use of and/or awarding of PTO.
- **Q:** If I have to close my business and lay off employees, do I have to pay out their PTO?
A: In North Dakota, generally, PTO which is earned and available for an employee's use must be paid out upon "separation" from employment. If an employer lays off employees for an indefinite period of time, or with no expectation of bringing some or all of its employees back at a certain date, PTO should be paid out to the employee.
- **Q:** What are the differences between non-exempt and exempt status for employees?
A: A non-exempt employee is paid based on the work performed, on an hourly, salary, daily, and/or piece rate. A non-exempt employee is entitled to an overtime rate, for any hours worked over 40 in a single workweek. An exempt employee is paid on a salary basis, for the job performed, not the number of hours of work performed. An exempt employee is not entitled to overtime wages.
- **Q:** Do I have to pay an employee, or as an employee, do I have to be paid, if operations are closed?
A: A non-exempt employee does not have to be paid, if no work was performed. Under the Fair Labor Standards Act (FLSA), an exempt employee is entitled to receive their regular salary, if they are "ready, willing, and able to work," but no work was available <https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs>
- **Q:** Can my employer assign other duties, such as cleaning, even if cleaning is not specifically listed in my job description?
A: Yes. An employer can set the terms and conditions of employment, including adding job duties.
- **Q:** What is the guidance for employees who are asked to work remotely?
A: The employer can set all of the terms and conditions of employment. For example, some employers may ask employees to keep their regular schedules, including breaks, even if they are working remotely. In other cases, an employer and employee can work out alternative schedules, keeping in mind reasonable accommodations are made for employees who may need them.
- **Q:** What if I am a school teacher, a union employee, or other employee working under a contract?
A: Review the terms of your contract. Generally, the contract will govern how an employee will be paid, under these types of circumstances.

General Guidance:

- COVID-19 and the Fair Labor Standards Act (FLSA)
<https://www.dol.gov/agencies/whd/flsa/pandemic>
 - *Note: There are differences between Federal and State labor laws. In those cases, the law which applies is the one that is most beneficial to the employee.
- COVID-19 and the Family Medical Leave Act (FMLA)
<https://www.dol.gov/agencies/whd/fmla/pandemic>
- North Dakota Wage and Hour Statutes <https://www.nd.gov/labor/labor-and-employment-north-dakota-century-code-title-34>
- North Dakota Wage and Hour Regulations <https://www.nd.gov/labor/labor-commissioner-north-dakota-administrative-code>

Human Rights:

- **Q:** Is an employer required to provide a reasonable accommodation to an employee, as a result of COVID-19?

A: The North Dakota Human Rights Act (NDHRA) and the Americans with Disabilities Act of 1990 (ADA), both require an employer to make reasonable accommodations to applicants or employees with disabilities. However, COVID-19 has raised some additional issues, related to reasonable accommodations and medical examinations and inquiries.

The World Health Organization (WHO) and Center for Disease Control (CDC) have declared COVID-19 to be a pandemic in the United States. Therefore, below are some additional FAQs:

- **Q:** Can an employer send an employee home if the employee is displaying COVID-19 symptoms?
A: Yes. Advising employees to leave the workplace is not a disability-related inquiry if the illness is related to COVID-19. In addition, the NDHRA/ADA would also allow such an action if the illness were serious enough to pose a direct threat.
- **Q:** If an employee becomes ill at work or calls in sick, how much information can an employer ask?
A: An employer can ask an employee why the employee did not report for work. An employer can also ask the employee if the employee is experiencing COVID-19-like symptoms. An employer must maintain this information as confidential medical information.
- **Q:** Can an employer take an employee's temperature to check for a fever?
A: No, not unless COVID-19 has become widespread in the community, as assessed by the CDC or state or local health officials.

- **Q:** If an employee has traveled during the COVID-19 pandemic, can an employer ask the employee about the employee's trip or require the employee to stay home and "self-quarantine"?
A: Yes. An employer can set the terms and conditions of employment, including asking an employee about a personal trip and establishing a policy requiring an employee to stay home, with or without pay or the use of paid time off, and "self-quarantine," even if the employee is not exhibiting symptoms.
- **Q:** Can an employer require an employee to regularly wash the employee hands or wear personal protective equipment?
A: Yes. An employer can adopt infection-control policies and practices, designed to limit the spread of COVID-19, without violating the NDHRA or the ADA.
- **Q:** Must an employer, after an employee returns to work after travel during a pandemic, wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?
A: No. This is not considered a disability-related inquiry. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.
- **Q:** Can an employer require an employee who has been away from work during the COVID-19 pandemic to provide a doctor's note, clearing the employee for duty, prior to allowing the employee to return to work?
A: Yes.
- **Q:** Can an employer encourage employees to work remotely/telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?
A: Yes. Remote/telework is an effective infection-control strategy that is also familiar to employers as a reasonable accommodation. In addition, employees with disabilities that put them at high risk for complications of a pandemic may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.
- **Q:** Can an employer compel all of its employees to take any vaccine regardless of their medical conditions or their religious beliefs during a pandemic?
A: No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on a disability that prevents the employee from taking the vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense).
Further, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from taking a vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Generally, employers should consider simply encouraging employees to get a vaccine rather than requiring them to take it.
- **Q:** Must an employer, during a pandemic, continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?
A: Yes. An employer's responsibilities to individuals with disabilities continue during a pandemic. Only when an employer can demonstrate that a person with a disability poses

a direct threat, even after reasonable accommodation, can it lawfully exclude the employee from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a remote/telework site that the employee had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and the employee should cooperate to identify an alternative reasonable accommodation.

All employees with disabilities whose responsibilities include management during a pandemic must receive reasonable accommodations necessitated by pandemic conditions, unless undue hardship is established.

General Guidance:

Guidance from the Equal Employment Opportunity Commission (EEOC)

[https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

[laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

- North Dakota Human Rights Act <https://www.nd.gov/labor/human-rights-act>
- North Dakota Housing Discrimination Act <https://www.nd.gov/labor/housing-discrimination-act>