



Business Disruption Planning Due to COVID-19: Effective 18 March, 2020

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The following memorandum was prepared as a joint exercise by Red Clover and OlenderFeldman based on business community concerns received by our firms concerning the COVID-19 outbreak, which culminated in a business call of the New Jersey Chapter of the Entrepreneurs' Organization we conducted on March 17, 2020.

Given the informal nature of the call, our firms provided general information of an informational nature that does not constitute legal advice. Any decisions made by the reader based upon the information provided should be made in direct consultation with a human resources professional and/or employment law counsel and should be guided by sound business judgment reflective of the actual factual and legal circumstances confronting your business.

Thank you for joining us on our call. If you have questions on anything discussed on the call or notes in this document, please contact us. We will also post updates in our LinkedIn Group, [Red Clover Community](#). If you are not already a member, please [contact us](#) for an invitation.



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Preparing for Remote Work

Red Clover covered some key elements for moving to a remote work environment in this recent blog post. <https://redcloverhr.com/remote-work-practices/>

Remote work options are business and job dependent

Jen briefly discussed the fact that the decision to allow work from home is both business and job dependent. There may be business that can go 100% remote for all jobs and some that can work remotely for some jobs but not all.

You should refer to your job descriptions to determine whether a job is suitable for remote work or not. Also, and importantly in your employee communications, there may be some jobs that are eligible for remote work in some organizations, but not in your company because of your industry and the daily tasks performed.

You may find that you have employees who say that they don't understand why they cannot work remotely if they have contacts working in similar job roles who can. It really comes down to the **nature of business and the essential functions of the job** to determine if remote work is an option.

We do recommend, given the unique circumstances at the moment, that employers try to be as flexible as possible with their employees. If you need help determining which roles can be done remotely as well as how to organize and track virtual work, please [reach out](#).

- Make sure you have regular meeting rhythms - it's critical to keep teams performing.
- Be prepared for "Asynchronous collaboration".
- Use Webex, ZOOM, other web conference tools - there are many free or low-cost options out there.
- Communication and flexibility are both key as you transition to new ways of working.



Insurance Coverage

There is a lot of uncertainty and currently very few insurance claims filed at this time. This means that there is nothing to gauge exactly how a policy might pay or not pay your claim. When making a claim provide the information possible, ie. receipts, invoices, and any documentation you have and allow your company to determine if there is coverage. Business interruption coverage is not a backstop or something you should rely on at this time. Please reach out to your insurance broker with specific questions about your coverage, exclusions, and policy specifics.

Four key coverage areas for your business insurance

Event Cancellation: Keep all receipts and document any cancelled events. This is lost business revenue and documentation is important.

Workers Compensation: This may apply if someone has become exposed/infected at your place of business. Initial point of exposure is tough to track unless you are a first responder.

General Liability Insurance: There is a likely exclusion for viruses.

Business Interruption: There are two options here, the first as a business owner, and the second with a loss from a supplier. This requires a direct physical loss to property.

Employment Practice Liability Insurance

This provides coverage to employers to protect against wrongful termination, discrimination, harassment and some other employee related issues that action may be brought against them for. As COVID-19 progresses you may need to reduce your workforce and this will provide coverage as you begin layoffs. If you are currently not anticipating layoffs you may still have the opportunity to purchase a policy if you do not already have one.



Obligations to Workforce During Business Disruption

Worker Illness

Paid Sick Leave under the New Jersey and New York City statutes is protected. The employer cannot retaliate or interfere.

If employees are exhibiting symptoms, caring for a qualifying sick family member, or self-quarantining, we recommend having them use Paid Sick Leave first. PTO is an option after that.

If it is financially viable, we are currently recommending that you keep only essential employees onsite and allow non-essential employees to use PTO or implement a wage continuation plan, where employees continue to be paid according to their regular schedule. Please note that continuation plans are a short term option for most businesses.

Nonessential employees, who are not exhibiting symptoms, can use PTO for a time. Consider keeping only essential employees onsite.

You may want to consider incentivizing not coming into the office when an employee is feeling ill by 'front loading' paid sick leave and other PTO if this is normally accrued under your policies and financially viable for your Company.

Workforce Restructuring Guidance

Step 1: Assess Business Impact

COVID-19 is making a serious impact on businesses, which we think we lead to a good amount of restructuring in 2020. There are many business aspects to consider, and understanding how this may impact your business is key in the decision making process as you proceed.

Key questions

What does this mean for your business? What are your obligations as an employer? Is remote work an option? What amount of your work can still be completed? How will you manage remote work practices? What impact will this have on your workforce? Is your current workforce sustainable? How will you handle a workforce reduction? Getting a good understanding of your business and the projected impact this can have will help you prepare as you navigate the situation.

Identify essential personnel

Identifying the key people your business needs to operate is the first step. Evaluate your employees and identify your top performers. Identify any poor performing employees, evaluate current status and make



decisions accordingly. Always make decisions based on the job function and the performance of the individual in that job. Take an even-handed approach to avoid claims of discrimination.

Exempt v Non-Exempt (from Overtime)

Exempt employees are paid for the work completed, not for the time they work. Their pay is set as an annual salary and then over the pay periods set by your company policy. **If exempt employees perform any work at all, they are entitled to their entire pay for the week. This includes checking email and voicemail.**

Non-exempt employees are paid for time worked. Hourly employees must be non-exempt. Salaried employees may be exempt or non-exempt. This is generally defined in the employee offer letter of employment.

Step 2: Reclassify as needed

To reclassify a salaried exempt employee, you can adjust their terms and conditions. For example, you can employ an across-the-board salary reduction in which salaried employees are paid on a “part-time” or wage reduced basis. You can also reclassify salaried workers as hourly employees.

It is not recommended you handle this transition on your own, there are specific evaluations, communications, and documentation that is necessary to handle this properly, please reach out to a HR professional or employment law attorney for assistance. Most employees will not like these actions, but if handled properly and in a non-discriminatory fashion, it is reasonable. The former option is likely a better one from an optics and practical standpoint.

In order to preserve the employee’s exempt status notwithstanding a part-time schedule, the following requirements ***must be carefully*** observed:

- The employee must meet the minimum salary threshold for exempt employees. This is currently \$684 per week based on the Department of Labor’s revised overtime exemption rules.
- The employee’s pay ***cannot*** vary based on the hours worked in any week. So, for example, if the position is considered “half-time” exempt and the employee nonetheless works 35 hours in a particular week, the employer should ***not*** pay the employee for the additional hours. Similarly, if the half-time exempt employee works only 10 hours in a particular week, the employer should not reduce their pay for the hours not worked;
- The part time exempt employee should ***not*** have a specifically defined number of hours they are expected to work each week. Defining a specific number of hours per week is inconsistent with the concept of being paid on a salary basis;
- Finally, the employee must be paid at least twice the then current minimum wage

Please check with your healthcare provider as to whether a reclassification of this nature would impact the employee’s ability to qualify for medical benefits.

Hourly employees, as the name implies, are paid hourly. They are paid according to the hours that they work and their schedule can be adjusted to meet business needs. There is no need to reclassify.



Step 3. Furlough

A furlough is a temporary reduction in the days or weeks an employee works. It is essentially a temporary layoff and can be implemented for some or all of your employees.

A furloughed employee cannot engage in any work or they are entitled to be paid. This includes emails, calls, listening to voicemail. It is specific to salaried exempt employees.

Employees are not paid during a furlough and are eligible for unemployment benefits. This is not an ideal option for most employees and there is a clear risk that they will look for alternative employment.

When communicating furloughs, it is important to communicate that it is temporary. Set the expectation that you intend to bring them back as soon as possible and communicate a planned end date for the furlough period. Keep them updated regularly (at least weekly).

Be cognizant of the fact that if you reduce an employee's pay significantly and the employee resigns as a result, this could be considered an adverse employment action. Decisions to reduce time should be based on objective data and decision points.

Document everything in case you need it later.

What happens if I ask someone to work during a furlough?

Regardless of whether a furloughed employee is exempt or nonexempt, if they are furloughed and asked to work, they must be paid. Establish a procedure by which they keep track of time worked to be submitted to the Company.

Step 4: Permanent Layoffs

A layoff is a suspension or termination of work with no planned return date. Employees who are laid off may apply for unemployment benefits. Notify your insurance broker to initiate COBRA for their health benefits options, which would require them to pay the full premium for their insurance. Their benefits may end on the date of layoff or may extend to the end of the month. Your broker or agent will know the specifics of your policy.

In the context of layoffs and furloughs, various WARN acts may apply (federal and state). **Please note:** An exception to the Federal Warn Act (natural disasters or calamities) does NOT apply to Coronavirus.

New Jersey: 60 days' notice for workforces over 100. There are specific notification requirements under the various WARN acts.

Changes to NJ law regarding mandatory severance pay go into effect in July as well as extending to notice period to 90 days. For the time being, we don't think there will be an issue for these events, but please be mindful as we head into summer and reach out to legal counsel if you feel that you might be looking at layoffs.



New York: 90 days' notice. There are specific notification requirements under the various WARN acts.

Consult with counsel if you think your business qualifies as an employer under any applicable WARN statute and you are considering laying off workers or reducing their time by more than 50%.

Unemployment

In the State of NJ currently, weekly benefits are entitled to 56% of a person's salary. The maximum weekly benefit is \$713 which totals to \$18,538 over 26 weeks. It is likely that unemployment will surge, claims will rise, processing will be delayed. Those who you furlough may be without pay for 4-8 weeks. There have been no specific measures added to expedite this process or extend benefits if necessary as of yet.

1099 Contractors

1099 contractors are NOT employees. If you engage 1099 contractors, refer to your contract before either suspending or terminating work with them. More information on classifying 1099 contractors is available [here](#).



Relevant Statutes / Policies

NJFLA and FMLA

NJFLA applies to companies with 30 or more employees. You may be eligible if you meet the criteria. It provides up to 12 weeks, over a 24 month period, of unpaid job-protected family leave to care for a family member or someone who is the equivalent who is ill. Upon return to work a position that is the same or similar will be available to you.

<https://myleavebenefits.nj.gov/labor/myleavebenefits/assets/pdfs/fact-FLA.pdf>

FMLA applies to companies with 50 or more employees. You may be eligible if you meet the criteria. It provides up to 12 weeks, over a 12 month period, of unpaid job-protected family leave to care for themselves or a family member or someone who is the equivalent who is ill. Upon return to work a position that is the same or similar will be available to you.

<https://www.dol.gov/agencies/whd/fmla>

NJ Earned Paid Sick Leave

Employees accrue this time at 1 hour earned for every 30 hours worked. They may use this time if they are sick, if a family member is sick, if their child is off from school due to closure, and other reasons.

https://nj.gov/labor/wagehour/lawregs/nj_state_wage_and_hour_laws_and_regulations.html#11D1

OSHA

OSHA stands for the Occupational Health and Safety Administration. They are the government agency that would address issues with hazardous materials, safety, and in this case COVID-19 in your workplace.

<https://www.osha.gov>

Policies

Have a clear understanding of what your company's policies are on sick time beyond the NJ Earned Paid Sick Leave, general PTO, and vacation time. You may put a hold on the use of vacation time as you navigate the current circumstances, however you cannot put a hold on sick leave when someone is ill and they have the time available to them.

Define, implement and apply policies consistently to avoid any claims of discrimination.

Consistent Communication

Be honest and clear with information, providing updates as possible and being sure the messaging is consistent. We recommend establishing a communication plan to support this. Be mindful of the tone of your message, especially in written communication. It is more easily misinterpreted.



Make sure that you are scheduling regular updates on what's happening with the business, your teams and checking in with your people. If you can't tell them exactly **what** is going to happen, tell them **when** you will be providing more information. And keep telling them "the when" until you know "the what". Transparency is key - especially in times of uncertainty.

Maintain regular meeting rhythms for efficiency, culture, and employee wellbeing. If you typically do a daily huddle with your team, keep doing it over a conference call. If you meet weekly, do that - and consider increasing frequency while working remotely.

Encourage your people to be safe, practice healthy habits and guidelines from the CDC.

If you have an employee who is diagnosed with Coronavirus, you must share this information with your employees, suppliers and customers, however do NOT share personal health information, ie who is sick.



Frequently Asked Questions:

OSHA / Protected Health Information

Can we isolate people from the workplace who have traveled in from other areas?

You can ask them not to come to the workplace; they can use their sick leave, if available. If an employee cannot work and has no additional leave, you are not obligated to compensate them.

Should we allow 60 or older to work alternative schedules?

Like older workers, people with underlying health issues may experience complications as well if they contract the coronavirus. Consider encouraging everyone in your workforce that is in a high-risk group as defined by the CDC or anyone with concerns about coming to the workplace to talk with their supervisor about working from home or other possible alternatives. **Do not try to identify these individuals.** Rather, send the communication to the entire workforce and allow them to self-identify.

What do you suggest for managing OSHA requirements?

Employers need to send home employees who are symptomatic. Return 14 days from an area of high probability or infection rate, they can work remotely or take paid sick leave. You can ask a healthcare provider to issue a return to work clearance.

Employers are obligated to make sure they are getting the workplace clean and sanitized. Give out hand sanitizer and clean high touch areas.

If everyone is not remote, but someone is diagnosed with COVID-19, do you have to tell the others whom not to contact?

Do not reveal personal employee information and make sure that the entire workforce is informed (not just a subset or department). If you have people that are sick, you must let other employees know that there is a confirmed or suspected case, but you cannot share who it is.

What about when authorities need to back track contact information?

Of course, cooperate with any authorities. An investigation by authorities of your workplace will involve Protected Health information of your employees. We suggest contacting counsel for guidance should the authorities enter the workplace in order to conduct such an investigation.

What if an employee finds out that someone that they are close to has it?

If you are close to someone who is infected, you should be tested. Employees should take themselves out of the workplace when they have had exposure. Make this a part of your communications plan. Check with the CDC guidance on self-quarantine.



Can we ask if they have been tested for coronavirus?

No. This is confidential health information. You can ask people to stay home if they are symptomatic. You can ask, in the interest of workplace safety, that if an employee tests positive for COVID-19, that they self identify, meaning that they reach out to HR or the business owner confidentially so that you can notify the rest of the workforce.

Can you ask an employee if they have Coronavirus?

No, you should not. Instead, request that employees reach out to HR confidentially so that you can notify the rest of the workforce.

What if you have an employee who works in food and becomes sick with the virus?

Keep the employee's information confidential (including their identity), but notify employees, vendors, visitors – anyone who may have had contact with the employee.

Can you ask an employee who was ill to return to work only after they have met certain conditions?

Yes. Use CDC guidance for when no longer contagious, but it is okay to ask for conditional return.

N.B: The CDC is recommending that you not require a fitness for duty certification (doctor's note) because healthcare professionals are anticipated to be overwhelmed with caring for patients.

Is Coronavirus protected under FMLA?

Yes, as it's currently understood it should qualify as a serious health condition under the FMLA.

What can you do to allay anxiety about this illness?

Provide information, listen to concerns, provide alternate scheduling, if appropriate.
Allow the employee to wear a mask (if employee prefers to, not recommended by CDC or required)

Can you ask employees to voluntarily share personal travel info?

Yes, but make sure to direct the question to the entire workforce.

If an employee is known to have been exposed to COVID-19 and tries to come to work, can they?

No - if you have this objective information, the workspace must remain a safe space, per OSHA requirements. **If a remote team member becomes ill:** If exempt and they worked a partial week, they must be paid for the full week; if non-exempt and they worked a partial week, they must be paid for the time worked.

Ultimately, state and local paid sick leave laws prevail. Also, check employee contracts and policies. (For NJ: Use [Department of Labor and Workforce Development](#))



If the employer says that the company is shut down, or that **we** want someone to self quarantine, do they take their own PTO / Vacation Time? What happens if they don't have enough to cover or run out? Do they go unpaid?

If the company is shut down, for example a state of emergency, you can continue to pay them, you can request that they take vacation time, or you can put them on furlough.

If you ask them to self-quarantine, ostensibly because they are symptomatic or have been exposed, then they should use their paid sick leave. When that runs out, they have the option to use vacation time or unpaid leave if they qualify. IF they are confirmed as having COVID-19, then their time out of the office may qualify as FMLA leave. Note that FMLA leave is protected but unpaid. They may qualify for short term disability benefits from the state.

Furloughs / Layoffs / WARN

What are the obligations and communications for these employers with fewer than 50 or 30 employees ?

If an employee is ill, have them use Paid Sick Leave first.

Consider front loading the Paid Sick Leave time, for employees who are ill. For employees who are not ill, they can use their PTO. Consider front loading the PTO as well, if applicable.

Unemployment Benefits may be available to support those employees who are affected.

What would you suggest for a small business who may be in financial distress?

See the steps outlined above for more options.

If we request that they not come into the office or close the office, do we have to pay them?

We are recommending that employers pay when they can, for employee wellbeing, retention and employer branding. That said, if you cannot continue to pay, you do have the furlough option. See above.

Is the prevailing state for a WARN notice based on the workplace or residence?

The workplace location determines the WARN statute that applies.

Communications

How should I communicate updates?

It's really important that your people know who they will hear from. Nominate someone to manage communications if you don't already have someone in the role. It's ok to say "We don't know the timing yet, so we'll be giving you regular updates on Mondays or at our weekly team meetings."



Does a furlough require employee acknowledgment?

Hand delivery of the furlough notice is best; in the alternative, having the affected employee sign an acknowledgement is also good practice, though it is **not required** under the federal WARN statute.

The federal and state WARN statutes and their regulations are quite complex. We recommend contacting counsel if you think your business might be headed toward a layoff or a reduction of hours more than 50%.

Remote work

Can I split my workforce into two groups, one of which can work remotely and the other cannot?

It depends on the various responsibilities and duties. If their duties require them to be on site, then they can be required to be on site. It must be based on objective information, such as their respective **job descriptions**.

Clarified: Can employees be treated differently if remote work is not accommodated? Field force, for example. And does a company put itself at risk if you say you cannot work remotely?

It comes down to an employee's duties and responsibilities. As long as you are even handed across the board, ie - everyone can work from home in the same employee job category.

NB if employees don't want to come to work because they are afraid, then they should use PTO not Sick Leave. It should be communicated to your employees that they should contact their supervisor if they have concerns. The supervisor must then escalate internally and/or contact HR.

Is it discriminatory to say you have to come in?

The decision to have employees come to work should be based on their respective job descriptions and/or duties, the needs of the business and other objective factors.

Are there tools we can use to monitor their work?

Yes, there are many time-tracking and work tracking products on the market. Time Doctor, Time clock wizard, Tsheets, Deputy, Homebase, and 7shifts are all options to consider.

A note on monitoring and tracking apps - We recommend setting expectations and goals clearly and manage accordingly. Remember, it will be challenging for a while. Be flexible. Try to have some other projects available if work is slowing down, and build it into your planning where you can.

If a new hire is to start but has recently traveled, can they wait to start?

You may have them begin as 'work from home' or delay their start.



How do you make sure my people are working effectively when going remote?

It always comes down to trust. Set clear goals, objectives, KPIs - measure accordingly. Communication is so important here. Be clear with expectations and let your employees know that you value them and we're all doing the best we can.

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Additional Information:

SHRM Webcast:

An Exclusive SHRM/CDC Update: How Business, Workers, and Workplaces Should Respond to COVID-19

[CDC Official Asks Employers to Do All They Can to Slow Coronavirus](#)

As an employer, what can you do?

Comments from: Dr. Jay C. Butler, Deputy Director for Infectious Diseases at the CDC

Promote telework where possible

Butler said the most important thing employers can do at this time is encourage sick employees to stay home. They must act quickly, at the first sign of illness, because the virus appears to be most contagious in the first days that a person is sick. "Some of your workers may want to tough it out, but this is not a good time for that," Butler said. "It's important to communicate as early as possible and have flexible telework options so people can minimize their contact at the early phase."

Have flexible sick leave policies

Encourage sick workers to stay home by using paid time off, allowing them to go into a negative leave balance or exploring short-term disability. Employers also could choose to pay them if there is no other leave available.

- Remind employees - don't come in if sick - even if mild illness, stay home
- Be prepared for school closures, have flexible policies ready
- Emphasize hand hygiene, respiratory etiquette (sneeze into elbow)
- If an employer learns that an employee has been infected:

Butler said employers who learn that an employee may have been infected with the coronavirus should work with their state or local health department to determine the course of action. Health officials are still trying to determine how long a person with the disease is contagious. "In general, we're thinking at least 14 days after onset of symptoms and three days after symptoms have resolved. Bottom line, this is probably not a 24-hour bug."

Alexander Alonso, Ph.D., SHRM-SCP, Chief Knowledge Officer at SHRM, **noted that employers have an obligation to notify other employees and customers who may have been in contact with a sick employee.**

- Increase cleaning/sanitizing practices, follow OSHA guidelines <https://www.osha.gov/>
- Best Practice: Use CDC Resources and **check back frequently for updates.**



CDC Resources for Businesses:

[Resources for Businesses and Employers](#)
[Interim Guidance for Businesses and Employers](#)
www.cdc.gov

NJ DOL information on COVID-19:

[Department of Labor and Workforce Development](#)

OSHA:

[Home | Occupational Safety and Health Administration](#)

PLEASE NOTE:

This is a critical time in all of our businesses and is likely to generate additional change requirements in your business. Please take the time to carefully review your alternatives.

If you need help preparing communications to your employee population, please [contact us](#).

*Thank you so much for spending this time with us.
For additional information, please find us on [LinkedIn](#) and join us in the [Red Clover Community Group](#).*