

**Information for Union-Signatory Construction Industry Employers  
Regarding Operations During the COVID-19 Pandemic**

**Updated April 15, 2020**



®

**SWACCA**

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## I. INTRODUCTION

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) is continuing to monitor the COVID-19 outbreak, new relevant legislation, and best practices for employers. There are myriad resources available from various outlets at this point. The goal of this document is to provide information specific to union-signatory contractors in a consolidated format for reference.

This document builds on guidance previously issued. Information that remains current from prior correspondence has been retained. New information has been added, including:

- a. Section IV – FAQs, including A(1), A(2), A(3), A(8), B(5), C(1), C(2); and
- b. Section V – Links to Additional Resources.

During the pandemic, SWACCA is providing critical updates to members via email. In addition, SWACCA is regularly publishing developing information on the [SWACCA news blog](#) and [twitter account](#).

This document is current as of the date listed on the cover. It replaces previous guidance. Please note that the information contained in this document is general information – it is not legal advice. Further, it is subject to change as underlying facts and guidance from government agencies and officials change.

## II. GENERAL GUIDANCE

The best general advice remains to take things day by day and focus on your operations. This includes:

- Strict adherence to jobsite hygiene and social distancing strategies. See Workplace Safety FAQ #1, below.
- Reduced crew sizes and limit or eliminate contact/crossover between crews.
- Reassuring employees, suppliers, and customers that you are, though recommended hygiene, jobsite cleanliness, and social distancing strategies, taking the appropriate steps to help ensure a safe work environment.
- Reassuring employees and customers that you are monitoring developments and implementing all possible steps to help maintain a safe work environment.

Employers are encouraged to remain flexible with employees to the extent possible. Employees may express concerns about coming to work, citing worry for themselves or a vulnerable family member. In these situations, we encourage employers to not only reassure employees that they are taking appropriate steps to help ensure a safe work environment but also to permit employees to stay home voluntarily if they so desire. Note, however, that such employees are not eligible for paid sick leave or extended FMLA under the FFCRA. Whether the employee receives unemployment benefits in this circumstance will depend on various factors and must be determined by the applicable unemployment insurance program. On April 15<sup>th</sup>, SWACCA produced a [Guide to Critical Federal Assistance for Individuals](#) which may prove useful in working with employees facing financial challenges.

### III. PAID LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RECOVERY ACT (FFCRA)

The Families First Coronavirus Recovery Act (FFCRA) was signed into law at the federal level on March 18<sup>th</sup> and took effect on April 1<sup>st</sup>. The FFCRA contains paid leave provisions that apply to employers with fewer than 500 employees with a narrow exemption for employers with fewer than 50 employees. Employers with fewer than 500 employees must post the [FFCRA Employee Rights Poster](#) at the workplace immediately. SWACCA has produced a [comprehensive guide on FFCRA paid leave for signatory contractors](#). It was updated on April 15<sup>th</sup> with a supplement that includes a sample paid leave application form.

To be eligible for paid leave under the Act, an employee must take the leave between April 1, 2020 and December 31, 2020, for reasons related to COVID-19.

The FFCRA generally provides for two types of paid leave:

- Up to 80 hours of paid sick leave at the employee's full regular rate of pay for Coronavirus related reasons
  - Paid sick leave is capped at \$511 per day or \$5,110 in the aggregate when used for the employee's own well-being
  - Paid sick leave is capped at \$200 per day or \$2,000 in the aggregate when used for family or child care
- Up to 12 weeks of family care leave, including 10 weeks of paid family care leave, to care for a minor child during a public health emergency
  - The first 10 days of family care leave is unpaid (but an employee may use paid sick leave during this period)
  - Paid family care leave begins after 10 days and is capped at 2/3 the employee's pay up to \$200 per day or \$10,000 in the aggregate

Employers will receive 100% reimbursement for paid leave pursuant to the FFCRA. This includes amounts paid to maintain group health plan coverage during the leave period (which are calculated above and beyond the paid leave maximums). Reimbursement is provided by one or more of three tax credit structures: a) retention of quarterly federal payroll tax remittances in the amount of leave paid; b) application for immediate reimbursement when retained payroll taxes are not sufficient to cover the paid leave; and/or c) refund with the quarterly payroll tax filing.

Please review [SWACCA's FFCRA guide](#) for additional information related to FFCRA paid leave.

### IV. ESSENTIAL WORKFORCE NOTICE

If your state is under a shelter-in-place, stay-at-home or similar order and the construction industry has been deemed an essential workforce, it may be advisable – or required, depending on the order – for employees to carry a written exemption notice. We have heard some reports that third parties such as childcare providers are requesting these notices even in jurisdictions where they are not otherwise

required. Below is a sample notice currently in use in the state of Ohio, which may be useful in developing your own notice:

*To Whom it May Concern,*

*The individual in possession of this letter works in a critical construction industry and must travel to and from work and engage in transportation activities regardless of the time of day as an employee in a sector deemed essential by the state of Ohio.*

*The construction industry has been designated a "Critical Sector" under Ohio's Stay at Home 23 page order, section 9, "Essential Infrastructure," issued by state officials. It is therefore the policy of the Ohio Government that this industry function with minimal disruption in the event of an emergency.*

*As such, the individual in possession of this letter is an "Essential Sector" employee of [Employer] and should be exempt from state and local restrictions such as curfews, shelter in place/stay at home orders and other mobility restrictions when travelling to or from work or performing work functions. We ask that you allow this individual to continue in the interest of protecting public health and security.*

*Should you have any questions concerning this letter, please contact [OSHA Director or other responsible manager] at XXX-XXX-XXXX.*

Please note that the contents and requirements of such a notice can and will vary depending on the specific order that was issued. Accordingly, you should check with local legal counsel and/or your SWACCA regional affiliate association to ensure that the notice complies with the applicable order.

## **V. FREQUENTLY ASKED QUESTIONS**

The World Health Organization (WHO) has declared COVID-19 a global pandemic. Based on the guidance of the CDC and public health authorities the COVID-19 pandemic also meets the direct threat standard. These facts change the legal landscape. The following FAQs are based in part on those facts and may therefore apply only during the pandemic. Please also note that the situation continues to rapidly evolve, and advice and best practices may change accordingly.

### **A. Workplace Safety**

#### **1. Is an employee with COVID-19 a recordable injury under OSHA's recordkeeping requirements?**

- a. Possibly, but only under specific circumstances. The U.S. Department of Labor addressed this question at the federal level in a [memo](#) on Friday, April 10, 2020. The memo indicates that COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if: (1) the case is a confirmed case of COVID-19, as defined by Centers for Disease Control and Prevention (CDC); (2) the case is work-related as defined by 29 CFR § 1904.5; and (3) the case involves one or more of the general recording criteria (e.g., death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid) set forth in 29 CFR § 1904.7.

Importantly, the memo indicates that until further notice, for employers in most industries including construction, OSHA will not enforce 29 CFR § 1904 to require other employers to make the same work-relatedness determinations, except where:

- i. There is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and
- ii. The evidence was reasonably available to the employer. For purposes of the memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

Note that this guidance refers to Federal OSHA's enforcement. Consult local resources such as your SWACCA regional affiliate association for information about applicable state requirements.

**2. Can an employer/jobsite require workplace infection control practices (i.e. hygiene and personal distance) and enforce them with a disciplinary policy?**

- a. Yes. And employers are urged to do so. In addition to the jobsite hygiene and social distancing strategies, many contractors have created and implemented new workplace protocols, which may include jobsite screening, reporting procedures, elimination of certain group activities, carpooling/clean vehicle policies, etc. Jobsite hygiene and social distancing strategies may include, per CDC guidelines:
  - i. Worker education – through specific communications and [posters](#) – of the importance of frequent handwashing, hand hygiene, cough and sneeze etiquette;
  - ii. Careful attention to jobsite toilet and hand cleaning facilities to ensure that these facilities are in clean, working order and stocked with soap and/or hand sanitizer;
  - iii. Jobsite and equipment cleanliness measures to ensure regular cleaning of any frequently touched surfaces, limitations on the sharing of tools and equipment on the site, and proper sanitization of any tools or equipment that must be shared;
  - iv. Directing employees to maintaining a minimum physical distance of six (6) feet between all personnel whenever possible;
  - v. Assigning or scheduling work to ensure adequate physical distance between personnel;
  - vi. Limiting or eliminating group gatherings, whether formal (e.g. pre-job meetings) or informal (e.g. break areas);
  - vii. Limiting jobsite visitors;

viii. Assigning or scheduling personnel to limit or eliminate contact between crews, to ensure that if an employee does contract COVID-19 he/she potentially exposes a minimum number of people; and,

ix. Directing employees to stay home when they are sick. The provisions of the FFCRA could provide them with paid time off.

A construction industry [COVID-19 jobsite safety training video](#) has been produced by an unrelated party. It may be useful to inform employees regarding safe work practices.

**3. Can an employer/jobsite require employees to wear personal protective equipment (PPE) designed to reduce the transmission of COVID-19?**

- a. Yes. However, remember that you will need to make a reasonable accommodation for any employee with a disability, absent undue hardship. Keep in mind that ordinary PPE requirements (e.g. respirator fit test) will continue to apply.

The [CDC is now recommending the use of cloth face masks](#) where social distancing measures are difficult to maintain.

**4. Can I ask an employee if they are experiencing any symptoms of COVID-19 before they come to work? What about employees who report feeling ill at work?**

- a. Yes. Employers may ask employees if they are experiencing any [symptoms of coronavirus](#) (fever, cough, shortness of breath). Employers must maintain all information about employee illness as a confidential medical record.

Also during the pandemic, employers may ask employees who report feeling ill at work, or who call in sick, questions about their [symptoms](#) to determine if they have or may have COVID-19. Again, the employee's response must be kept confidential.

**5. What should I do if an employee is exhibiting symptoms of symptoms of COVID-19?**

- a. Employees who are exhibiting any [symptoms of COVID-19](#) (fever, cough, shortness of breath) should not be permitted to come to work or remain at work. The employee should be asked (but not told) to seek medical care from their health care provider. The CDC has published information for individuals who contract the virus [here](#).

An employee who is experiencing symptoms of COVID-19 and is seeking a diagnosis from a medical provider may be eligible for paid leave pursuant to the FFCRA. See [SWACCA's FFCRA Guide](#) for more information.

**6. What should I do if an employee is confirmed to have COVID-19?**

- a. [The CDC is recommending](#) that employers coordinate with [state](#) and [local](#) health officials so timely and accurate information can guide appropriate responses. Government agencies may become involved in confirmed cases. Employers are generally advised to cooperate with those efforts.



The CDC is also recommending that if an employee is confirmed to have COVID-19, employers should inform fellow employees and other employers on the jobsite of their possible exposure to COVID-19 in the workplace *but maintain confidentiality of the employee's identity*.

The best means of identifying fellow employees who may have been exposed, while also protecting the employee's identity, may be to interview the infected employee by phone. The infected employee should identify anyone with whom he or she had close contact (generally, working within a distance of six feet for more than a few minutes or present for unprotected coughing or sneezing) within the prior 14-day period.

See FAQ #7 in this section for addressing employees who may have been exposed.

The provisions of the FFCRA could provide such an employee with paid time off. See [SWACCA's FFCRA Guide](#) for more information.

#### **7. What about a case of suspected but unconfirmed COVID-19 case?**

- a. If the employer has a reasonable belief that an employee has an unconfirmed COVID-19 infection, the employer should respond as though the employee has tested positive (see question #5, above).

#### **8. What about an employee who has been in contact with someone who has, or is suspected of having COVID-19?**

- a. The guidance on this question is evolving. Previous guidance has generally recommended that employees self-quarantine after contact with a person with suspected or confirmed COVID-19. On April 8<sup>th</sup> the CDC issued [new guidance](#) for [critical infrastructure workers](#) who may have had exposure to a person with suspected or confirmed COVID-19. The comprehensive guidance is available at the link above. Following is a key excerpt:
  - i. Critical Infrastructure workers who have had an exposure but remain asymptomatic should adhere to the following practices prior to and during their work shift:
    - Pre-Screen: Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
    - Regular Monitoring: As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
    - Wear a Mask: The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
    - Social Distance: The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.

- Disinfect and Clean work spaces: Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

Note that many employers are taking the steps described above even in the absence of an employee's potential exposure to a person with suspected or confirmed COVID-19.

**9. Can an employee return to work after exhibiting symptoms of illness or testing positive for COVID-19?**

- a. Yes, but an employer can require assurances that the employee is no longer ill before returning to work. There are generally two ways to clear an employee to return to work after symptoms of illness. The first is to request a medical doctor's certification to return to work. The second, which may be more practical given current challenges in receiving medical care, is for the employee to self-quarantine for [the period recommended by the CDC](#).

A quarantined employee may be eligible for paid time off under the provisions of the FFCRA. See [SWACCA's FFCRA Guide](#) for more information.

**10. Can I screen or test workers for COVID-19?**

- a. During a pandemic, employers generally *can* screen employees by inquiring about flu-like symptoms. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may take additional measures such as checking employees' body temperatures. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to confidentiality requirements. Employers should understand that not all employees who have COVID-19 will have a fever; however, this practice is now being recommended by the CDC for employees who may have been exposed to COVID-19.

**11. Can I restrict an employee's personal travel?**

- a. No; however, employers may ask workers about their own or a family member's recent travel, even if the travel occurred on personal time. [The CDC is regularly updating its guidance related to travel](#).

**B. Human Resources/Payroll**

**1. Can I send employees home due to the impacts of the pandemic?**

- a. Generally, yes:
  - i. Employers can voluntarily close a jobsite or office.
  - ii. Employers can choose to send home ONLY those employees who exhibit influenza-like symptoms, keeping the workplace open to symptom-free employees.
  - iii. Employers may also implement teleworking opportunities or mandates for employees who can perform their work remotely.

Note that an employer may be required to provide a reasonable accommodation pursuant to the Americans with Disabilities Act and/or state law for employees with underlying health conditions that put them at higher risk.

**2. What if an owner or general closes a jobsite, but my company would like to continue to work?**

- a. Employees can be sent to another jobsite. If there is not another jobsite where work is available or a match for the employee's skills, a layoff may be appropriate.

**3. How should I handle other employee absences during this time?**

- a. It is generally advisable to avoid disciplining any employee who chooses not to work for any reason related to the COVID-19 outbreak. Whether such employee receives unemployment benefits in such situation should generally be determined by the applicable unemployment insurance program.

**4. Do I have to pay employees if I send them home?**

- a. Generally, you are not required to pay hourly workers for hours that they do not work unless you have terms in place that provide for paid time off. Salaried, exempt workers typically may not have their weekly pay amounts reduced, but you normally may require them to exhaust vacation or sick time that is available to them. Note the following:
  - i. Federal, state and local laws (for example, the Fair Labor Standards Act) remain effective. Remember to consider these when making decisions related to employee pay and employment.
  - ii. Construction union collective bargaining agreements do not normally contain any provisions that would require you to pay workers for time off; however, you should be mindful of show-up pay provisions that mandate a minimum number of hours to be paid if a worker is told to report for work but no work is available for him/her.
  - iii. Employees who are sick or need to care for family members may be entitled to paid leave under the FFCRA. See [SWACCA's FFCRA Guide](#) for more information.

**5. Can an employee collect unemployment if I send him home? What if I lay him off? What if the employee asks for a layoff?**

- a. Whether such employee receives unemployment benefits in such situation should generally be determined by the applicable unemployment insurance program. Note that many states have made temporary changes to unemployment insurance programs during the COVID-19 pandemic.

## C. Business Concerns

### 1. **If my company (or my subcontractor) can't complete performance on my construction contract due to circumstances that are attributable to COVID-19, what are my rights and responsibilities?**

- a. You should examine your construction project contract and consult legal counsel in this situation. Your contract might contain language (e.g. a *force majeure* clause) that could excuse the inability to perform contract obligations depending on the facts and circumstances. Pay particular attention to any notice requirements as you explore the contract language.

New contracts entered into after the declaration of the pandemic may require special considerations. Traditional force majeure clauses may not apply in these circumstances because the pandemic is already a known factor. Especially if you cannot be confident of your ability to perform the contract during the pandemic, it is generally advisable that you seek specific legal counsel on this subject to ensure appropriate protections are in place.

### 2. **What financial assistance is available to my Company?**

- a. Government loan and loan forgiveness programs have been implemented through the U.S. Small Business Administration (SBA), including but not limited to the [Paycheck Protection Program](#) and [Economic Injury Disaster Loans with an Emergency Advance](#) component. The best resources for these programs is the [SBA website](#) and the bank(s) with which your company already has an established relationship. These programs are extremely popular – employers are advised to contact their current bank (if they haven't already) and act immediately to receive assistance.

## D. Union Benefit Plans

### 1. **Health and Welfare Plans**

- a. The Families First Coronavirus Recovery Act requires plans to adopt specific changes, including free COVID-19 testing. The plan administrator should be contacted directly with questions.

### 2. **Pension Plans**

- a. The investment market activity will impact fund investments. The impact to defined benefit plans remains to be seen and will depend in no small part on future investment performance. Multiemployer pension relief and reform is being discussed at the federal level in light of the pandemic.

Participant balances in defined contribution plans will fluctuate accordingly. Should an employee be without work for an extended period of time, some defined contribution plans have provisions for hardship withdrawals. The plan administrator should be contacted directly with questions.

### 3. Vacation/Savings Plans

- a. Contributions made to savings plans are generally available to employees upon deposit. Vacation fund distributions are determined by the trustees of the particular plan. Any decision to change the distribution rules for a vacation plan would be made by trustees on a fund-by-fund basis. The plan administrator should be contacted directly with questions.

### 4. Apprenticeship and Education Programs

- a. Many apprenticeship training centers have been closed due to the COVID-19 outbreak. This may impact apprentice level progression or other training requirements. The apprenticeship program should be contacted directly with questions. If the apprenticeship program administration is not available, it is appropriate to contact your SWACCA regional affiliate association with questions. Employers and employees should contact their location union for more information.

## VI. LINKS TO ADDITIONAL RESOURCES

### A. Federal Centers for Disease Control and Prevention

- [Interim Guidance for Businesses and Employers](#)
- [Fact Sheets and Posters for Bulletin Boards and Toolbox Talks](#)
- [Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission](#) (see workplace strategies on page 6)
- **New (issued April 8, 2020):** [Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#)
- [Recommendation Regarding Use of Cloth Face Coverings \(Masks\)](#)

### B. Federal OSHA

- [OSHA website for workers and employers about the evolving coronavirus outbreak](#)
- [Guidance on Preparing Workplaces for COVID-19](#)
- **New (issued April 10, 2020):** [Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\)](#)
- **New (issued April 13, 2020):** [Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#)

### C. Federal Department of Labor

- [COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers](#) (Keep in mind that a collective bargaining agreement may contain requirements that exceed the requirements of the FLSA)

- [COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers](#)
- [Information about FFCRA Paid Leave](#) (see also [SWACCA's FFCRA guide](#))

**D. Federal Equal Opportunity Employment Commission**

- [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act \(ADA\)](#)
- **New (issued April 10, 2020):** [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)

**E. Other**

- [List of State Executive Orders Related to COVID-19](#)
- **New (issued April 3, 2020):** [Construction industry COVID-19 jobsite safety training video](#)
- **New (issued April 15, 2020):** [SWACCA Guide to Critical Federal Assistance for Individuals](#)

**Signatory Wall and Ceiling Contractors Alliance (SWACCA)**

529 14th Street NW, Suite 1280

Washington, D.C. 20045

(202) 591-2474

[info@swacca.org](mailto:info@swacca.org)

[www.swacca.org](http://www.swacca.org)