



A Union of Professionals

COVID-19 Resources: Essential Personnel FAQ

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Who are essential personnel?

Essential personnel are the people who are on the frontlines protecting us and ensuring our survival during the COVID-19 crisis. They include healthcare workers, emergency services personnel, child care providers, educators, grocery workers, restaurant workers, food supply chain workers, medical supply chain workers, maintenance workers, utility workers, postal workers, sanitation workers, transportation workers, fire, police and other law enforcement, and others. Many federal, state and local government employees who are involved in maintaining our critical public services and infrastructure have also been deemed essential and are continuing to work directly in government buildings and with the public.

Who decides which employees are essential?

There is no one legal definition, standard or process for which workers are essential or how workers are deemed essential during this crisis.

Some collective bargaining agreements, employer policies, and state or federal laws/regulations specified which workers were considered emergency or essential personnel before the crisis.

But since the coronavirus outbreak, many employers have made changes to those designations or created new designations. Some of these are the product of collaborative processes, but many have been made quickly and solely by the employer.

Many state and local governments have issued orders that define certain businesses as essential or nonessential during this crisis. For example, in Pennsylvania, the governor issued an order (bit.ly/PA-gov-order) strongly urging nonessential businesses (for example, most retail stores) to close for at least 14 days. In California, the governor has issued an order (bit.ly/CA-gov-order) that all individuals in the state stay home except as needed to maintain continuity of critical operations. Those operations are defined based on guidelines (bit.ly/CISA-guidance-essential) issued by the Cybersecurity and Infrastructure Security Agency within the Department of Homeland Security.

Find these resources and more at www.aft.org/coronavirus

The **American Federation of Teachers** is a union of 1.7 million professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for our students, their families and our communities. We are committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work our members do.

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Can a union bargain over essential personnel determinations?

If a collective bargaining agreement does not specifically address the matter, employers are not compelled by law to bargain with the union over essential personnel determinations in the public or private sector. However, most private sector employers and some public sector employers will still be required to provide information requested by the union and bargain over the effects.

In the private sector, for employers covered under the National Labor Relations Act, an employer must bargain upon request with the union over the effects of the employer's unilateral determination of essential and nonessential personnel. The employer must bargain over matters that impact not only those employees deemed to be essential but also those employees who no longer need to report to work. Effects bargaining for essential personnel should include items such as work hours and scheduling, pandemic health and safety policies to mitigate exposure to the coronavirus, and leave policies that will govern the workplace during the health crisis.

Public sector employers are governed by state public sector collective bargaining laws (bit.ly/CEPR-public-sector-collective-bargaining). Many of these laws are modeled after the private sector, and state courts and public sector labor bodies often look to the private sector for guidance when interpreting their own bargaining laws. But, there may still be differences that could change the duties and rights of employers to bargain the impact of essential personnel determinations, and state officials such as a governor may use their broad emergency powers to assert more control over public employees' working conditions. However, we would still recommend public sector locals attempt to engage in bargaining over the same items as private

sector workers and secure a memorandum of understanding for their members designated as essential personnel.

An example of a memorandum of understanding that covers essential personnel bargained after an employer's essential personnel determination and a sample information request can be found at the end of this FAQ.

What protections are essential employees entitled to under the law?

Essential employees working during the health crisis are still protected by federal anti-discrimination law (bit.ly/EEOC-laws) covering discrimination based on age, sex, race, color, national origin, religion and disability. States may extend discrimination laws to additional protected categories such as sexual orientation or gender identity.

Federal (dol.gov/coronavirus) and (dol.gov/agencies/whd/state) state wage and hour laws protecting workers' rights to overtime, breaks, and minimum wage are still applicable to essential personnel working during a health crisis.

Private sector workers are still covered by the Occupational Health and Safety Act-regulated health and safety in the workplace, and state and local government workers in 28 states are covered (osha.gov/stateplans) by OSHA state plans. There is currently no federal OSHA standard that would cover preparation and response for the COVID-19 outbreak, but OSHA has issued guidance (bit.ly/OSHA-guidance-workplaces) on "preparing workplaces for COVID-19." OSHA protections are detailed further below.

Essential employees working during the health crisis would still be entitled to collectively bargained leave and covered by federal and local leave laws, subject to the exceptions as described in more detail below.

Are there any additional protections for members being designated essential personnel?

Generally, there are no automatic protections that attach to being designated essential personnel. However, some collective bargaining agreements or local laws may provide for hazard pay or special health and safety protections for essential personnel. Some states are ensuring that child care is available for essential personnel. For example, in Vermont, the governor issued an executive order (bit.ly/VT-gov-order) providing for child care for essential service providers, and Vermont Emergency Management is keeping an evolving list (bit.ly/VT-emergency-childcare) of who is considered an essential service provider and entitled to child care under the order. Both Minnesota and Vermont have included grocery workers as essential service providers for purposes of being eligible for child care services during the crisis.

Do collective bargaining agreements still apply to essential personnel working during a declared health emergency?

Generally, a collective bargaining agreement would still apply to essential personnel working during a declared health emergency. However, in the public sector, depending on the authority vested in the governor or other elected official, the collective bargaining agreement could be altered by an emergency declaration or executive order. So far, governors in every state, Washington, D.C., and Puerto Rico have declared a state of emergency in response to the COVID-19 pandemic. Orders issued in Minnesota (bit.ly/MN-gov-workforce-covid19)

and Washington, D.C. (bit.ly/DC-declaration-public-emergency) suspend certain provisions of collective bargaining agreements. Please contact AFT's Research and Strategic Initiatives Department if you become aware of any efforts to suspend bargaining rights at the state or local level.

In the private sector, employers must provide reasonable notice and the opportunity to bargain before changing working conditions. Given that circumstances are changing quickly, notice may be as short as the same day or the next day. Private employers may also be able to make unilateral changes to working conditions in response to emergency declarations, executive orders, or public health directives related to essential personnel, but they are still under an obligation to bargain with the union over the impact of those changes.

Unions in both the public and private sectors should seek to bargain over the wages, hours and working conditions that should govern essential personnel during this health crisis. An example of a memorandum of understanding is attached as is guidance regarding executive action applying to public sector employees.

Can members deemed essential refuse to work if they feel unsafe?

The Occupational Safety and Health Administration (OSHA) has issued detailed guidance (bit.ly/OSHA-guidance-workplaces) about the types of safety precautions employers should take for employees working in high-risk occupations, including treating known or suspected COVID-19 patients. According to OSHA, "Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks." Respirators should be used when

their job tasks and exposure risks.” Respirators should be used when coming within six feet of known or suspected COVID-19 patients.

Workers in the private sector have a collective right under the National Labor Relations Act to strike/refuse to work with their co-workers (as long as there is not a collective bargaining agreement with a no-strike clause in effect) to protest unsafe working conditions. Where there is a no-strike clause in effect, Section 502 of the Labor Management Relations Act provides that individual employees choosing to withhold their labor will not be deemed to be engaging in an unlawful strike if the reason they refuse to work is “in good faith because of abnormally dangerous conditions.” However, licensed workers, like nurses, should be aware that refusing to work could put their license at risk. Further, if the union is calling a strike in the healthcare sector, it should be aware of the requirements under Section 8(g) of the National Labor Relations Act (including 10-day notice).

Public sector workers in a few states also have a right to strike but those rights vary based on the state (this resource: bit.ly/CEPR-public-sector-collective-bargaining by the Center for Economic and Policy Research has a chart with information about the right to strike for public sector workers in each state) and are also potentially limited by no-strike clauses in collective bargaining agreements. Additionally, many public sector labor laws, even those that do provide protection for strikes by public sector workers, ban strikes by essential, emergency or public safety personnel.

Additionally, private sector workers have the protection of the Occupational Safety and Health Act (OSHA). OSHA regulations allow employees to refuse to work where there is the possibility of serious injury or death arising from hazardous conditions at the workplace:

If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent

discrimination. The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition. 29 CFR 1977.12(b)(2).

Thus, where employees have a good faith belief that taking on a particular patient assignment will cause imminent death or serious injury, they cannot be retaliated against if they refuse to expose themselves to the dangerous condition. This protection only applies, however, if the employee has asked the employer to correct the dangerous condition and only in the private sector. Twenty-eight states have state OSHA plans that cover state and local government workers, and these plans must be as effective as federal OSHA rules. You can find more information about state OSHA plans here: bit.ly/oshastateplans. Additionally, licensed workers should be aware that they could risk their license by refusing to work.

Workers who have disabilities under the Americans with Disabilities Act or similar state laws that would make them particularly vulnerable to COVID-19 may be able to ask for an accommodation, including taking paid or unpaid leave or having less direct contact with the public or those who are sick.

Please contact the AFT Legal Department for guidance on specific situations.

Can members deemed essential take leave because they or a family member are exhibiting coronavirus symptoms?

Yes. The Families First Coronavirus Response Act (FFCRA) includes provisions that provide some workers up to two work weeks of job-protected, immediately available paid sick days for coronavirus-related health and caregiving reasons, and up to three - required. The time may be used for quarantine, diagnosis or care of oneself or a family member, or to care for a child whose school or usual source of care is closed.

Employers covered by the FFCRA include those employed by private sector businesses with 500 or fewer employees and public sector employers. Some employers with fewer than 50 employees will be able to obtain exemptions. The leave provided under the FFCRA is available to employees of a covered employer who has 30 days of employment. For more details on the FFCRA, see this summary (bit.ly/NPWF-FFCRA) by the National Partnership for Women & Families.

Many workers may also be able to take advantage of leave under the Family Medical Leave Act (FMLA) (bit.ly/DOL-FMLA) or state and local leave laws (bit.ly/state-local-leave).

What other kinds of protections are unions and workers demanding to protect essential employees?

Workers and their unions have been on the frontlines of demanding that laws are followed with respect to worker and community health and safety, and to gain protections beyond our

current laws, which in many cases are not nearly sufficient.

Here are some inspiring examples:

- United Teachers Los Angeles is calling (bit.ly/UTLA-statement) on state and local officials to provide free and reliable broadband internet access as well as access to electronic devices for students while at home; debt forgiveness; suspended rent and mortgage payments; suspended eviction court and utility shut-offs; and suspension of penalties for schools based on attendance or missed standardized assessments.
- The Chicago Teachers Union, in coalition with the community, called (ctulocal1.org/posts/covid-letter) a news conference to demand that the mayor take all action within the mayor's authority to support 15 days of paid sick leave for all Chicago Public Schools parents and Chicago residents and immediately suspend all evictions. The union has also demanded that the district suspend use of the School Quality Ratings Policy (SQRP).
- The Wisconsin Federation of Nurses and Health Professionals is calling (wfnhp.aft.org) on hospitals and state officials to adopt a policy of paid leave forgiveness; provide COVID-19 testing and coverage for all related medical treatment at no cost to employees; and to provide child care subsidies or alternative methods of child care to all healthcare workers in need of child care.
- The Ohio Nurses Association has <https://ohnurses.org/ohio-nurses-calling-for-five-efforts-to-prevent-the-spread-of-covid-19/> called on state officials to allow no-cost testing and telemedicine and on hospitals to enhance transparency and communication between health facilities and workers.
- The AFT Higher Education Division has put forward a set of principles (bit.ly/AFT-AAUP-guidance) for state and employer responses to COVID-19, including that clinical faculty members and academic staff at teaching hospitals or engaged in healthcare should be

provided with adequate protective equipment and that every employee should be held harmless economically and professionally for the dislocations caused by COVID-19.

- The State Employees Bargaining Agent Coalition (SEBAC) in Connecticut has asked for a daily point of contact between a designated union leader for each bargaining unit, and a designated management representative to ensure continuous sharing of information. SEBAC has submitted a set of demands (bit.ly/SEBAC-report) regarding essential employees in response to the administration's actions under the state of emergency.
- UFCW Local 27, which represents workers in the mid-Atlantic is demanding (bit.ly/BaltimoreSun-coronavirus) the government provide grocery store workers with protective equipment, free coronavirus testing, protections against unfair termination or discrimination for any exposed workers, unemployment benefits for displaced workers and additional aid to help low-income families take care of their children.
- Amazon workers in New York are demanding (bit.ly/Amazon-workers-petition) paid sick leave and child care accommodations. They also temporarily shut down (bit.ly/Amazon-warehouse-shutdown) an Amazon warehouse where there had been a confirmed COVID-19 case.