

## Part C. Employee and Labor Relations During a Pandemic Health Crisis

During a pandemic health crisis, as at any other time, employees and supervisors are critical to an agency's ability to accomplish its mission. This section provides guidance on unique employee and labor relations issues that may arise in a pandemic health crisis. The questions and answers that follow discuss the roles and responsibilities of agency personnel.

### a. Keeping Employees Away From the Workplace

1. *If an employee exhibits signs of the flu, may a supervisor order him/her to leave work or work from home? If so, will the employee be paid during the absence?*

As with any illness, any medical diagnosis by a supervisor is very problematic and should be avoided. However, when a supervisor observes an employee exhibiting signs of illness, he or she may express general concern regarding the employee's health and remind the employee of his or her leave options for seeking medical attention, such as requesting sick or annual leave. Employees on approved sick or annual leave will continue to be paid during their absence. Although leave is generally voluntary, an agency may direct an employee to take leave. Directing an employee to take leave may constitute enforced leave, which is an adverse action (see discussion in next question). Also see discussion on alternative work arrangements in Part II-A.

2. *If a supervisor orders an employee to leave work, will the employee be placed on administrative leave, or be required to use his/ her annual or sick leave?*

Excused absence (administrative leave) is not an entitlement, and supervisors are not **required** to grant it. An agency's determination to provide excused absence should be consistent with the Administration's Governmentwide policy on granting excused absence during a pandemic influenza. That policy will be addressed in separate guidance.

Obtaining an employee's agreement to take sick leave, annual leave, or leave without pay is preferable, but in some circumstances, a supervisor may require an employee to use his or her sick or annual leave or place an employee in a leave without pay status pending inquiry into the employee's medical condition. In rare circumstances, a supervisor may place the employee on indefinite suspension in a non-pay, non-duty status. These actions generally require advance notice, opportunity to reply, and an agency decision. The agency must have documentation sufficient to prove that its action was justified, and the employee may have the right to grieve or appeal the action taken.

In the case of a pandemic, agency personnel actions aimed at preventing the spread of a disease may occur because of the guidance or directive of public health officials regarding the general danger to public health. Supervisors should consult their human resources staff prior to effecting either enforced leave or indefinite suspension.

3. *If a supervisor suspects an employee is ill or contagious, may the supervisor prohibit the employee from reporting for work or returning to work?*

Unless an agency has evidence (suspicion is not enough) that an employee is physically unable to perform the job or poses a risk to himself/herself or others, it may not prohibit the employee from reporting to work. Such action would constitute a constructive suspension and would be an adverse action requiring advance notice, opportunity to reply, agency decision, and possibly appeal or grievance rights. Supervisors should consult their human resources office before refusing to allow an employee to report for work or to return to work so that proper procedures will be followed and constructive suspension issues can be considered.

4. *May a supervisor require an employee to have a medical exam or physical, or prevent an employee from returning to work until the results of an exam or physical show the employee is not contagious?*

Management may *require* a medical examination when the position occupied by the employee contains properly developed physical or medical requirements (see 5 CFR § 339.301). Most positions do not have established physical or medical requirements. If the criteria are met for requiring a medical examination and the employee refuses the exam, he or she may be disciplined, up to and including removal from Federal service.

Requiring a medical examination based on perception of an employee's flu-like symptoms is very problematic and should be avoided. However, when a supervisor observes an employee exhibiting signs of illness, the supervisor may express concern regarding the employee's health and remind the employee of his or her leave options for seeking medical attention, such as requesting sick or annual leave. If the employee has no leave available, supervisors may approve requests for advanced leave or leave without pay, based on agency policy. Supervisors must approve requests for sick leave when the employee would, as determined by appropriate health authorities or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease.

## **b. Requiring Employees To Work**

1. *If an agency activates emergency preparedness plans and sends designated employees to alternative worksites, may a designated employee refuse to go? If an employee is on travel during the order to deploy, may he or she go home instead of deploying to the designated worksite? If an employee refuses to deploy to the designated worksite from a travel status, who pays for the employee's transportation home?*

Any such designated employees are expected to report for work where deployed or remain at work in dismissal or closure situations, unless otherwise directed by their agencies. An agency may determine that circumstances justify excusing a designated employee from duty and allowing the employee to use accrued leave because of an individual hardship or circumstances unique to the employee. For example, factors such as the illness of a family member or lack of available alternatives to childcare or eldercare may be considered. An employee may not go home instead of deploying to the designated worksite, and employees who refuse to follow emergency related orders may be subject to appropriate discipline, up to and including removal from Federal service. Unauthorized travel expenses are not reimbursable.

2. *Will an employee who has direct contact with the public (e.g., investigator, park ranger, health care professional, police officer, firefighter) be required to report for work and perform the normal duties of his or her position? If an employee refuses, will the employee be fired?*

Employees are expected to report for work and perform the normal duties of their positions. If an employee fails to report for duty without an administratively acceptable reason for his or her absence, the employee could be considered absent without leave and may be subject to disciplinary action, up to and including removal from Federal service. The agency makes the determination as to whether the employee has an administratively acceptable reason for his or her absence.

When an employee reports for work, he or she is expected to first carry out lawful supervisory orders to work, and may later choose to appeal or grieve an order after complying with it. An employee who refuses to comply with a supervisor's order may be disciplined, up to and including removal from Federal service. However, an employee may refuse to carry out a particular work assignment if, at the time the assignment is given, the employee reasonably believes carrying it out will endanger his or her safety or health.

3. *May an employee leave work or refuse to report for work because he or she is afraid of contracting the flu from co-workers?*

If an employee is concerned about contracting the flu from a co-worker, the employee should first raise the concern with his or her supervisor to discuss appropriate action, such as moving to a different work area, taking annual leave, or teleworking. Employees who leave their duty stations without approval may be considered absent without leave (AWOL). AWOL may result in disciplinary action, up to and including removal from Federal service.

4. *Could an agency take disciplinary action against an employee who is absent without leave (AWOL) despite the employee's good faith efforts to report for work?*

An agency may discipline an employee who is AWOL. The decision to take such action is at the discretion of the agency, after consideration of the facts and circumstances regarding the unauthorized absence. Employees having difficulty reporting to work should discuss the circumstances of their absence with their supervisor in a timely manner.

5. *May an employee refuse to use required safety equipment (e.g., protective equipment or decontamination stations) provided by the agency?*

When an agency requires employees to follow certain safety procedures, such as using protective equipment or going through a decontamination station, it is to protect the safety and health of its employees. As with any other agency policy, employees are expected to comply with agency safety and health policies. Employees who refuse to comply may be subject to appropriate disciplinary action, up to and including removal from Federal service.

6. *May an employee refuse to report for work if he or she believes it is unsafe, even though the threat of contracting the flu has subsided?*

The Federal community is working to protect the health and safety of employees in the workplace by following recommendations from Departments and agencies such as the Department of Health and Human Services and the Centers for Disease Control and Prevention. Therefore, it is unlikely an employee will be directed to report for work when it is unsafe to do so.

If an employee refuses to report for work based on his or her personal belief that it is unsafe to do so, and the employee is not in an approved leave status, the employee may be considered absent without leave (AWOL). An agency may take disciplinary action for AWOL, up to and including removal from Federal service.

### **c. Leave Issues**

1. *May an employee who is not sick call in sick because he or she is afraid of contracting the flu?*

No. Generally, an employee may use sick leave when he or she is unable to work due to a physical or mental illness or is receiving medical examination or treatment.

An employee who is not eligible for sick leave may request annual leave. An employee has the right to take annual leave, subject to the right of the supervisor to schedule the time at which annual leave may be taken. If an employee's request for leave is denied and the employee still refuses to report for work, the employee may be considered AWOL and may be subject to disciplinary action, up to and including removal from Federal service.

Agencies should inform employees of the preventive measures taken to ensure a safe workplace during a pandemic Influenza. Also see discussion of alternative work arrangements in Part III-A.

2. *May an employee call in sick after a supervisor has canceled annual leave and ordered the employee to report for work?*

An employee is entitled to use sick leave under certain conditions. However, under 5 CFR 630.403, an agency may grant sick leave only when supported by administratively acceptable evidence. If the supervisor does not grant the request for sick leave or any other leave, the employee may be considered AWOL. An agency may take disciplinary action for AWOL, up to and including removal from Federal service. Also see discussion of leave flexibilities in Section III-B.

### **d. Labor Relations**

1. *Is there any flexibility on labor-management agreements during an emergency?*

Yes, there is some flexibility. In an emergency, management has the right to alter working conditions without bargaining prior to implementing the change. However, post-implementation bargaining may be required. In this regard, if management follows applicable procedures contained in existing collective bargaining agreements, bargaining would not be required over the procedure. In situations where an agency wishes to use

different procedures, or where there are no existing contractual procedures or past practices covering the action, an agency may have post-implementation bargaining obligations. With regard to any of these situations, supervisors and managers should seek guidance and advice from their Office of General Counsel and human resources personnel.