Veterans Health Administration
COVID-19 Supplemental HR FAQs

These answers have been reviewed by OCHCO and OGC, and represent the best interpretation of current policy, law, bulletins, or other guidance by VHA WMC HRCoE. This document is designed to supplement guidance provided by OCHCO based on specific questions posed by VHA managers.

All information contained here is intended to be broad guidance to quickly advise VHA managers during this emergency situation. Management Officials should consult with their labor relations specialist in HR to review applicable labor laws and collective bargaining agreements with questions related to bargaining unit employees and schedule changes. Supervisors are advised to consult with their human resources (HR) staff and District counsel prior to taking any action against an employee, making schedule changes, or if they have remaining questions about leave and premium pay. Supervisors should also consult the relevant collective bargaining agreements (CBA) and labor relations specialist with questions related to bargaining unit employees and applicable labor laws.

Be sure to check out the latest guidance from OCHCO here: https://vaww.va.gov/OHRM/Worklife/Pandemic/.

Compensation

1. **If we move admin staff to shift work, what rules apply regarding night differential and weekend premium pay?**

   - Night differential – 5 U.S.C. 5545 requires that GS employees who work between 6:00 PM and 6:00 AM be entitled to pay for nightwork at their rate of basic pay plus premium pay amounting to 10 percent of that basic rate. Of note, 5 U.S.C. 5545(b)-(c) contain limited exceptions.

   - 5 U.S.C. 5343 requires that prevailing rate employees (wage) are entitled to their scheduled rate plus a night differential –
     (1) amounting to 7½ percent of that scheduled rate for regularly scheduled non-overtime work a majority of the hours of which occur between 3 p.m. and midnight; and
     (2) amounting to 10 percent of that scheduled rate for regularly scheduled non-overtime work a majority of the hours of which occur between 11 p.m. and 8 a.m.
     Night differential as described is considered a part of basic pay.

   - Weekend Premium Pay - Administrative employees have generally not received weekend premium pay; however, there is a provision for Sunday premium pay. (See VA Handbook 5007 Part V, Chapter 6)

- Sunday Premium Pay – A covered employee is entitled to 25 percent of his or her rate of basic pay for work performed during a regularly scheduled, non-overtime, basic 8-hour tour of duty that begins or ends on a Sunday. (See 5 U.S.C. 5546(a) and 6128(c), 5 CFR 550.103, and 5 CFR 550.171-172.) Prevailing rate (wage) employees are entitled to Sunday premium pay pursuant to 5 U.S.C. 5544(a). Physicians, Dentists, and Podiatrists in VHA and the head of the agency are excluded from this coverage.

2. **Can an employee be required to work if they have already exceeded the pay limitation and additional work won't be compensated?**
   - When the biweekly (or annual, if applicable) cap on premium pay is reached, employees may still be ordered to perform overtime work without receiving further compensation. (See Comptroller General Opinions: B-178117, May 1, 1973; B-229089, December 28, 1988; and B-240200, December 20, 1990.) There is no provision to waive the annual limitation on premium pay.
   - Note, the limitations set forth in U.S.C. 5547(a) and 5 CFR 550.105 do not apply to wage employees or FLSA overtime pay.

Labor Relations

1. **I need to limit the number of employees at the office at a given time and in order to accomplish this, I would like to establish a Compressed Work Schedule (CWS) for my employees that doesn't currently exist. Can I do this and what is the bargaining obligation?**

   - For Title 38 employees – Yes. The Department does not have to negotiate issues of direct patient care when it comes to Title 38 employees pursuant to 38 U.S.C. 7422. The facility should make whatever change is necessary to ensure adequate patient care coverage. When possible, the Department should alert the Union of the change in schedule as a courtesy.

   - For Title 5 & Hybrid Title 38 employees – Yes. During the COVID-19 pandemic, Management Officials may be interested in establishing CWS schedules for their Title 5 and Hybrid Title 38 employees. Management Officials should understand there are different rules associated with the implementation of a CWS in comparison to changing an employee's tour of duty or shift. Therefore, prior to implementing such change, Management Officials should do the following:

     1. Consult with local labor relations specialists in HR to review applicable labor laws and collective bargaining agreements; and
     2. Explore voluntary participation in a CWS (i.e., employee makes request*)

     Important Notes:

1. *Before discussing or implementing a CWS with your employee(s), contact your labor relations specialist to ascertain Union rights associated with these discussions.
2. Following the conclusion of the COVID-19 pandemic, Management Officials should understand that unless their employee(s) want to voluntarily terminate the CWS, the Department may need to negotiate the termination of such schedule with the union in accordance with the relevant CBA.

2. I need to change my employees' tours of duty from the day shift to the afternoon shift. Can I do this and what is the bargaining obligation?

- For Title 38 employees – Yes. The Department does not have to negotiate issues of direct patient care when it comes to Title 38 employees. The facility should make whatever change is necessary to ensure adequate patient care coverage. When possible, the Department should alert the Union of the change in assignment as a courtesy.

- For Title 5 & Hybrid Title 38 employees – Yes. Prior to making a change in a Title 5 or Hybrid Title 38 employee's tour of duty or shift, Management Officials should give their employees as much advance notice as possible. Additionally, Management Officials should send a courtesy notice to the union and any impact and implementation bargaining, if appropriate, will occur post-implementation and/or after the emergency subsides. Management Officials should consult with their labor relations specialist in HR to review applicable labor laws and collective bargaining agreements with questions related to bargaining unit employees and schedule changes.

Leave

Annual Leave

1. When can a supervisor deny an annual leave (AL) request?

- Approvals of annual leave requests are subject to supervisor's right to schedule. If the supervisor determines that they cannot cover the absence of the employee and the employee's absence will negatively impact the service, then the request may be denied and the employee must report to work or they will be marked AWOL. AWOL is not discipline but it can lead to discipline. See VA Handbook 5011, Part III, Chapter 2, Paragraph 3 for policies for T5/hybrid T38 employees and VA Handbook 5011, Part III, Chapter 3, Paragraph 3 for policies for T38 employees.

2. Can I deny an AL request if I can't spare the person being out of the office? Even if schools are closed or childcare issues are the cause?

- Annual leave requests are based on coverage regardless of the reason the employee needs the leave. Coverage is based on the supervisor decision about the number of employees needed to perform the duties of their department on any given day. If the employee cannot be spared, then the AL request is denied and the employee must come to work or they will be marked AWOL. AWOL is not discipline but it can lead to discipline.

3. Can I deny an AL request for long-scheduled and previously approved vacation time?

Yes, a previously approved annual leave request may be cancelled in an unusual or emergency situation, per VA Handbook 5011, Part III, Chapter 2, Paragraph 3(f). Denial of a leave request or cancellation of approved leave normally needs to be based on the necessity for the employee's services. Leave must not be denied or cancelled for arbitrary or capricious reasons. Denial or cancellation of leave is not disciplinary in character and must not be used as a punitive measure. The reason for cancellation of leave must be based on valid operational needs. Changed circumstances, such as an unexpected lack of personnel to perform work, unanticipated assignments, and similar contingencies which were unknown to management when leave was approved may constitute "valid operational reasons" for leave cancellation.

Sick Leave

4. Under what circumstances can I deny a sick leave (SL) request?

- The general rule for sick leave requests is that they are granted. Accrued sick leave is approved when the employee:
    - Is receiving medical, dental or optical examination or treatment;
    - Is incapacitated for duty;
    - Uses their sick leave to care for a family member who is incapacitated or receiving medical treatment or has a serious health condition, or when the health authorities determine that the employee would jeopardize others because of family members exposure to a communicable disease (limited amount available for this purpose, see below.);
    - Is making arrangements or attend the funeral of family member (limited amounts available for this purpose); or

  Would jeopardize others because of their exposure to a communicable disease, as determined by health officials.
- When a manager or supervisor has an objective belief that the employee or family member is not really sick, the sick leave request may be denied and the employee is required to report to work or they will be marked AWOL. AWOL is not discipline but it can lead to discipline.
- Pursuant to 5 CFR § 630.403 and agency policy, 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.

5. **What would constitute an objective reason to believe that the employee is not really sick?**

    - For example, if an employee had previously requested annual leave and that request was denied so the employee requested sick leave or if the employee is given an assignment they don't like and says, "I am going home sick.".

6. **If I have an objective reason to believe the employee is not sick what do I say to the employee?**

    - In cases in which employees present a questionable request for sick leave the supervisor may deny the employees request for sick leave. If leave is denied and the employee does not report for duty (or stay at work), the employee may be marked AWOL. AWOL is not discipline but it can lead to discipline. If the employee is marked AWOL, he/she can clear the record by providing administratively acceptable documentation to support his/her absence.

7. **What if an employee requests AL due to school closures, and if I must I deny it due to operational needs, can they change their request to SL? Can I deny it?**

    - In the event an employee's child has a school closure, an employee may request to take annual leave, advanced annual leave, other paid time off (e.g., earned compensatory time or earned credit hours) or leave without pay.
    - The use of sick leave should be limited to circumstances where an employee has become symptomatic (ill) due to a quarantinable communicable disease, such as COVID-19. Sick leave should be used to cover a period of sickness, as provided in 5 CFR 630.401(a)(2) and VA Handbook 5011. Agencies must grant sick leave when an illness prevents an employee from performing work. If there is a question as to whether sick leave is appropriate, supervisors are advised to consult with their human resources (HR) staff and District counsel prior to taking any action with regard to an employee who he/she believes is not sick.
    - In such a scenario, an employee with a telework agreement may request to telework with appropriate approval. Of note, telework is not a substitute for dependent care and employees should request leave for the time attending to dependents. Supervisors should consult the relevant collective bargaining agreements and labor relations specialist with questions related to bargaining unit employees. In determining their telework and leave decisions, agencies should consider the mission-critical nature of their work.

8. **What if an employee tells me they can't come in because schools are closed, but I don't think they have children? How much can I ask an employee about whether or not they have children?**

    - It will depend on the type of leave the person is requesting. If they are requesting AL then you evaluate that request based on coverage. If you can spare the employee then approve the leave. If you cannot spare the employee then deny the leave and tell the employee they must report to duty or they will be marked AWOL. AWOL is not discipline but it can lead to discipline.
    - If the employee is requesting SL then ask the employee if they are requesting SL for themselves or for a family member. If they tell you no one is sick then deny

the sick leave request and tell them they must report to work or they will be marked AWOL. AWOL is not discipline but it can lead to discipline

- If they tell you a child is sick and you do not have an objective reason to believe that the child is not sick then you must approve the sick leave. The same applies if the employee informs you they are sick.
- There is no requirement that the use of Care and Bereavement Leave (CB) be used for the limited definition of family member that is found in the FMLA. CB may be used, with limitations as to the amount, for anyone who is related by blood or affinity. The employee does not have to be biologically related to the child to care for them when they are sick.

9. What are the limitations for the use of CB leave?

- The employee must have sick leave to use. If they do not have a SL balance then there is no entitlement to CB leave. It is just another way to use already accrued SL.
- For routine care, such as taking care of a child with a cold, taking a fiancée to an optical appointment, or taking your mother-in-law to the psychiatrist, an employee can use up to 104 hours of the sick leave annually that they have accrued to provide care to a family member (anyone related by blood or affinity) or take them to routine appointments. The 104 hours is the maximum that the employee can use per leave year of their personal sick leave for someone else's routine illness or to take someone else to doctor's appointments. That is 104 hours total, not per person. Once the annual 104 hours is exhausted, there is no more entitlement to use their personal sick leave for the routine care of a family member.
- If a family member (related by blood or affinity) has a serious health condition (as defined in 5 CFR 630.1202), the employee may use up to 480 hours of their accrued sick leave to provide care for that family member. This requires documentation of the family member's serious health condition. The 480 hours is the maximum amount of an employee's personal sick leave that can be used for someone else's illness. If the employee previously used 100 hours of sick leave for the routine illness of a family member, then they only have 380 hours available for the family member with the serious health condition. If they used 480 hours of SL for a family member with a serious health condition, then they have no time available to use for the routine care for family members.
- Using the 480 hours of CB leave for a serious health condition that was not under FMLA does not exhaust the FMLA entitlement. If you used 480 hours of SL as CB you could still take 480 hours of FMLA to care for a family member with the more limited definition contained in FMLA. This would be unpaid leave although the employee could substitute AL if they chose to do so. They could not substitute SL for unpaid leave under this circumstance as they have used their entitlement to use their SL for someone else's illness

10. In addition to tracking approved Weather & Safety Leave for the virus, can we track sick leave usage for those who have respiratory symptoms?

- We are not allowed to ask an employee about the nature of their illness so tracking this would be available only if the employee volunteered the information. Employees may be referred to Employee Occupational Health Service for screening but we cannot require that Occupational Health share the employee's medical information

for purposes of tracking sick leave usage for respiratory symptoms (or any other condition).
- Supervisors are advised to consult with their human resources (HR) staff or labor relations specialist and District counsel with any questions regarding this matter.

11. Are supervisors allowed to "screen" employees when they phone in, asking what symptoms the employee is presenting, targeting if they have respiratory symptoms. What questions can supervisors ask? If we can ask targeted questions, how can we designate for tracking purposes?

- We are not allowed to ask employees about their symptoms. The Employees may volunteer this information but we are not allowed to force employees to disclose their personal medical information as a condition for approval for requested SL. This is different from the across the board screening questions to allow entry into the facility as it is tied to the employee's personal health condition, not to an overall safety screening for everyone entering the facility.

12. When is Weather & Safety Leave (W&SL) appropriate?

- If the director believes keeping an employee who was exposed to COVID-19 but is asymptomatic and who is not able to telework from the workplace is in the best interest of the health and safety of other employees and patients, then W&SL can be approved. The authority to approve W&SL rests with the agency head and that authority has been delegated to the facility directors for COVID-19. Prior to COVID-19, facility directors could approve up to 7 workdays of W&SL; however, temporary authority has been granted by the Executive in Charge, Veterans Health Administration (EIC) for directors to approve up to 15 workdays to meet the current social distancing guidelines of 14 calendar days. There should be a nexus of exposure in order to justify the use of W&SL for COVID-19; however, the discretion to approve W&SL lies with the director and decisions to approve W&SL should be made based on the information that is available, the operational needs of the facility, and the best interest of the health and safety of the individuals who might be affected if it is not granted. (See also OCHCO HR FAQs #3-6)
- **NOTE** – A recent email from OCHCO included sick leave as an option for an employee who was exposed to COVID-19 but is asymptomatic. This was incorrect and the guidance is being adjusted. Sick Leave for an an employee who was exposed to COVID-19 but is asymptomatic is not appropriate. HR Offices are encouraged to regularly check the HR Emergency Resource Center website for further updates.

13. Can a sick employee be authorized W&SL?

- No. A sick employee should use another appropriate leave category or be sent home to telework if that is appropriate. (See question below and also OCHCO HR FAQs #3-6)

Leave Without Pay

14. If an employee is out of leave but requests leave without pay (LWOP), what are the rules?

- In most cases, LWOP is a matter of administrative discretion. Employees cannot demand LWOP be granted except in certain limited circumstances. See VA Handbook 5011, Part III, Chapter 3, Paragraph 10(a). If you need the person at work, then you can deny the request if it does not fall into one the excluded categories.

15. When must LWOP be granted?

- They are listed in the third column of the attached chart. See also VA Handbook 5011, Part III, Chapter 3, Paragraph 10(a). We must grant LWOP for FMLA (if the employee qualifies), to provide care to a covered service member, for period of service in the armed forces, when a service-connected disabled veteran is seeking treatment for their service connected disability and when an employee is out while covered under worker's compensation.

<u>Other general questions</u>

16. Schools are closing in most of the US for extended periods. What is a reasonable amount of time to give people to get their childcare arrangements in order before requiring them to return to duty?

- That is up to the individual supervisor based on the needs of the service. The employee's request for leave for this purpose should be evaluated based on the kind of leave they are requesting.

Annual Leave	Sick Leave	LWOP	LWOP
Earned Benefit Right to use ***subject*** to supervisor's right to schedule. Granting or denying is based on workload and staffing only and whether employee can be spared.	**Earned Benefit** Right to use under the following conditions: Unlimited (up to accrued balance) for employee's own incapacitation, examination, or treatment. Up to 104 Hours each leave year for family member's[1] *incapacitation, examination, treatment, or funeral.* Up to 12 weeks each leave year for family member's *serious health condition*[2]. Up to 26 weeks in a 12 month period to care for a covered service member. [1] Family member defined very broadly for this purpose. [2] Does not include common illnesses.	**Entitlement** Right to use when the following apply: Up to 12 weeks in a 12 month period under the FMLA for a serious health condition for self or family member[1]. Up to 26 weeks in a 12 month period to care for a covered service member. For periods of service in the uniformed service. For service-connected disabled Veterans' absence for necessary medical treatments. While covered under worker's compensation (if not separated by agency). [1] Family member defined more narrow.	**Discretionary** May be granted at the agency's discretion and when it is in the best interests of the agency. Examples include: Illness. As a reasonable accommodation. Relocation. Participation in job-related professional development. Educational activities.

VHA Human Resource Development – December 2014
(This is general guidance only for training purposes. See **5 CFR 630 Subparts A through M** for complete details)

Reasonable Accommodation

1. **My employee has requested a reasonable accommodation. Do I need to approve it?**
   - Reasonable accommodation requests must also be evaluated on a case-by-case basis and undue hardship considered in whether to approve, disapprove, or propose an alternative accommodation.

2. **What is an undue hardship?**
   - The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer. "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer

in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. However, an employee's supervisor may not deny an accommodation request because the accommodation would be too costly to the Agency. Only the Secretary of Veterans Affairs has authority to make such a determination. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation

- Source – The U.S. Equal Employment Opportunity Commission's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*

3. **My employee has requested a reasonable accommodation. Who do I talk to start the process?**
    - Managers should work with their Local Reasonable Accommodation Coordinator (LRAC) to process and evaluate a reasonable accommodation request.

4. **Does an employer have to allow an employee with a disability to work at home as a reasonable accommodation?**
    - An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship. Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader). For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.
    - Source – The U.S. Equal Employment Opportunity Commission's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*

5. **What are some proactive steps I can take to ensure that employees are aware that telework during the COVID-19 pandemic is temporary and won't last permanently?**
    - It is possible you are thinking about allowing some of your employees who do not normally telework to be allowed to temporarily telework during the COVID-19 pandemic to create additional flexibility and safeguards. If you decide to allow your employees to telework temporarily and not on a permanent basis, you

should inform your employees in writing that it is temporary in nature and that the agency may be sacrificing essential functions across the board to create flexibility and safeguards during this pandemic. Finally, you should take notes of the essential functions (i.e., a fundamental duty of the position) that could not be performed while on telework.

Overtime

1. **What can I do as a manager if a significant amount of my staff has called off sick and I am operating under a shortage?**
   - Management has the statutory right to assign work. The right to assign work includes the right to assign overtime and determine when it will be worked. If you need employees to cover shifts, you can mandate overtime for all positions*. This includes calling employees back to work if needed.
   - ***Note:** There are additional requirements/criteria that must be met to mandate overtime for *nursing staff.*

2. **What positions fall under *nursing staff*?**
   - A registered nurse (including nurse anesthetists);
   - A licensed practical or vocational nurse;
   - A nurse assistant appointed under this chapter or title 5; and,
   - Any other nurse position designated by the Secretary for purposes of this section.

3. **How is overtime for *nursing staff* different?**
   - Unless a nursing staff employee elects to work overtime voluntarily, there are certain emergency circumstances that must be met before mandating overtime. Specifically, the following (<u>all</u> criteria must be met):

     1) Full-time nursing staff may be required to work hours otherwise prohibited (mandatory overtime) if:

        a. the work is a consequence of an emergency that could not have been reasonably anticipated;
        b. the emergency is non-recurring and is not caused by or aggravated by inattention or lack of reasonable contingency planning;
        c. management has exhausted all good faith and reasonable attempts to obtain voluntary workers;
        d. the nurse staff have critical skills and expertise that are required for the work; and,
        e. the work involves work for which the standard of care for a patient assignment requires continuity of care through completion of a case, treatment, or procedure.

     2) Nursing staff may not be required to work hours after the need for a direct role by the staff responding to medical needs resulting from the emergency ends.

See 38 U.S.C. 7459.

4. **I need to mandate overtime for *nursing staff* but I don't know if my situation meets the above criteria. What do I do?**
   - Managers should consult with HR and District counsel to determine appropriate steps or if their circumstances are met to mandate *nursing staff* to perform overtime.

5. **It's Saturday night and the offices of HR and district counsel are closed for advisement and I need to decide whether to mandate *nursing staff* or not. What do I do?**
   - The manager should evaluate the circumstances and use his or her best judgment to ascertain whether the required criteria applies to their situation.

6. **What labor relations obligations are there with assigning overtime?**
   - The Department should strive to follow all procedural requirements agreed upon in collective bargaining agreements, local supplemental agreements and Memorandums of Understanding when assigning overtime. Management officials should consult with labor relations specialists in HR or District counsel with questions related to procedures outlined in labor agreements or any exemptions thereto in light of emergency situations.

7. **As a manager, am I limited to assigning overtime to just employees on duty or campus?**
   - No. This includes the ability to call back employees to work. Managers should strive to follow all procedural requirements agreed upon in collective bargaining agreements, local supplemental agreements and Memorandums of Understanding when calling employees back to work for overtime. Management officials should consult with labor relations specialists in HR or District counsel with questions related to procedures outlined in labor agreements or any exemptions thereto in light of emergency situations.

Screenings

1. **Is there currently a requirement VHA-wide to screen every visitor (Veterans, visitors and employees) who enters a medical center?**
   - Yes. Screening is required at every VA medical center.

2. **Is the VA allowed to screen everyone who comes on VA property?**
   - Yes, the VA has the authority to screen all visitors (Veterans, visitors and employees). However, Veterans and visitors must be made clear that their answers are completely voluntary, and refusal to answer these questions will not have any

impact on their eligibility for or receipt of care. Employees are mandated to answer the screening questions.

3. **What questions are being asked to all visitors, Veterans and employees who enter Federal property?**
   - Each person is being asked the following four screening questions:
     a) What is the purpose of your visit today?
     b) Have you traveled to an area with widespread or sustained community transmission of coronavirus (within the last 14 days)?
     c) Have you been in contact with a person that has confirmed Coronavirus?
     d) Have you had or currently have a fever (≥ 100.4F or greater within the last 48-72 hours)?
     e) Do you have a new or worsening cough AND/OR shortness of breath?
     f) Do you have any flu-like symptoms (such as nasal congestion, sore throat or headache)?

4. **What are the privacy implications associated with screening <u>Veterans and visitors</u>?**
   - There are no privacy issues implicated in VA's asking these questions as long as it's made clear to the Veterans that answering the questions is completely voluntary, and refusal to answer these questions will not have any impact on their eligibility for or receipt of care.
   - Veterans may not be denied treatment, but positive screens may require isolation and protections for the patient and other individuals. For instance, the patient would not be placed in the waiting room but would instead be moved to an environment more isolated. Visitors could be denied admission under the authority of the Secretary to protect VA property pursuant to 38 C.F.R. § 1.218(a)(3). The same would apply to all other individuals who are not Veteran patients. Thus, while an individual denied admission could be removed or prohibited from entering the property, and VA police could enforce what would be a violation of federal law, detention of patients or forced compliance with medical orders falls outside of activities that would be authorized and VA police could not assist in forced medical compliance. Police assistance could be available if the appropriate federal or state orders are issued but at the moment forced medical compliance has not been authorized and VA police lack authority.

5. **What are the privacy implications associated with screening <u>employees</u>?**
   - There are no privacy issues implicated in VA's asking of these questions to employees.

6. **Are there any privacy concerns related to Occupational Health or Human Resources asking an employee for their Coronavirus test results?**
   - There are no privacy issues implicated in merely requesting these results. If questions are being asked, HR should provide courtesy notification, when possible, to the local union regarding the questions being asked. Occupational Health may not share the employee's test results with the individual's supervisor or with HR without his/her authorization. By contrast, if an employee shares his/her test results with HR,

that information may be shared without his/her authorization with other VA personnel to the extent it is necessary for those employees to perform their duties, which may include taking appropriate steps to prevent, reduce, or respond to exposure to an infected individual.

7. Are there EEO concerns with asking employees questions related to their health and Coronavirus test results?

- The only guidance available on this matter is the EEOC Guidance on Pandemic Preparation in Workplace and the Americans with Disability Act. Although this document provides guidance related to influenza pandemics, it would be applicable to the current COVID-19 pandemic as well. Given the provisions of the Rehabilitation Act (which is the Federal government version of the Americans with Disabilities Amendment Act), infection with the COVID-19 would be considered to be a covered disability. The guidance provides three circumstances in which disability-related inquires might arise:

    a) Before a conditional offer of employment- Disability-related inquiries are prohibited.
    b) After a conditional offer of employment, but before individual begins to work- permits disability-related inquiries and medical examinations if all entering employees in the same job category are subjected to the same inquires and/or examinations.
    c) During Employment- Disability-related inquiries are prohibited unless there is objective evidence that (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employee with a covered medical condition will pose a direct threat to the health and safety of the employee or others.

- Given the serious and sometime fatal nature of the COVID-19, criteria (2) above would support the Agency's right to ask disability-related questions of any VA employee, including the results of an employee's COVID-19 test, without violating the Rehabilitation Act.
- However, all information about employees obtained through disability-related inquires or medical examinations must be kept confidential and must be collected and maintained on separate forms and in a separate medical file under the name of the individual.

8. Can we direct medical exams (such as taking temperature and mouth swabs) of our VA employees?

- Yes. During a pandemic event, the Department can direct medical exams on all employees based on a direct threat analysis. (See OCHCO HR FAQ #13)

9. What if an employee refuses a medical exam (such as taking temperature and mouth swabs)?

- When an employee reports for work, they are expected to first carry out lawful supervisory orders to perform assigned 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.

- If Supervisors are considering taking an adverse action in light of an employee's actions, supervisors should consult with their human resources (HR) staff and District counsel to review agency policy, collective bargaining agreements and applicable law with respect to any applicable collective bargaining provisions.
- See also OCHCO HR FAQ #8