



# COVID-19: Insights and Guidance

An ABC webinar series featuring industry experts to answer your questions about the legal, safety and economic impacts of COVID-19.



Presented by



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## Agenda

- What OSHA/Safety obligations are Presented by Covid-19 in the Construction Industry?
  - OSHA and the General Duty clause
  - Exposure at the worksite
  - The duty to report and record injuries and illnesses
  - Multi-employer worksite considerations
- Does a quarantine or incubation period need to be paid? What Congress has proposed and what states require?
- When is testing or screening OK under the Americans with Disabilities Act? Privacy and HIPAA issues
- Mandatory shutdowns: the WARN Act (notice of layoffs)
- How do I manage my office employees telecommuting?
- New challenges for apprenticeship and training programs

# OSHA and the General Duty Clause

- Section 5(a)(1) of the Occupational Safety and Health Act of 1970 requires all employers to maintain workplaces free from recognized, serious hazards.
- There is no federal OSHA standard specific to COVID-19 or airborne transmissible diseases. Thus, Section 5(a)(1) would be generally applicable.
- There could be other OSHA standards that could apply tangentially:
  - Personal Protective Equipment
  - Respiratory Protection
  - Hazard Communication
- At this time, OSHA is focused primarily on the healthcare setting where there is the potential for more direct transmission of COVID-19.

## What About Primary Exposure In the Workplace?

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graph LR; A[Employee is diagnosed with COVID-19] --> B[Contact local Department of Public Health for guidance]; B --> C[Identify individuals who may have been exposed]; C --> D[Consider cleaning aspects of the jobsite]; D --> E[Options: Close down the site; quarantine];
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Employee is diagnosed with COVID-19

Contact local Department of Public Health for guidance

Identify individuals who may have been exposed

Consider cleaning aspects of the jobsite

Options: Close down the site; quarantine

# What About Secondary Exposure In the Workplace?

Employee has a family member/roommate/spouse/partner/friend diagnosed with COVID-19 that they have been in close contact with during the last 14 days

Determine if the diagnosed individual has been instructed to self-quarantine by the local Department of Public Health or CDC and, if so, contact for guidance

Employers have the option of identifying individuals who may have been exposed, or waiting until test results are returned

Employers have the option to clean aspects the jobsite

Options: Close down the site; quarantine

# CDC Recommended Cleaning Protocols

- For non-healthcare facilities (e.g., schools, institutions of higher education, offices, daycare centers, businesses, community centers) that do not house persons overnight and are not meant for cleaning staff in healthcare facilities, repatriation sites or households.
- PPE required does NOT include respirators but includes disposable gloves and gowns ***for all tasks, including handling trash***
  - Gloves and gowns should be compatible with the disinfectant products being used.
  - Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash.
  - Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to **clean hands** after removing gloves.
  - Gloves should be removed after cleaning a room or area occupied by ill persons and hands must be cleaned immediately after gloves are removed.
  - Cleaning staff should immediately report breaches in PPE (e.g., tear in gloves) or any potential exposures to their supervisor.
- The guidelines state that employers should: (1) develop policies for worker protection (2) ***provide training to all cleaning staff on site prior to providing cleaning tasks*** (3) training must should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.
- Regarding timing/scope of cleaning:
  - It is recommended to close off areas used by ill person(s) and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets.
  - Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.
  - Cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill person(s) focusing especially on frequently touched surfaces.



# OSHA Recommended Cleaning Protocols

- **Environmental Decontamination**

- When someone touches a surface or object contaminated with the virus that causes COVID-19, and then touches their own eyes, nose, or mouth, they may expose themselves to the virus.
- Because the transmissibility of COVID-19 from contaminated environmental surfaces and objects is not fully understood, employers should carefully evaluate whether or not work areas occupied by people suspected to have virus may have been contaminated and whether or not they need to be decontaminated in response.
- Outside of healthcare and deathcare facilities, there is typically no need to perform special cleaning or decontamination of work environments when a person suspected of having the virus has been present, unless those environments are visibly contaminated with blood or other body fluids. In limited cases where further cleaning and decontamination may be necessary, consult U.S. Centers for Disease Control and Prevention (CDC) guidance for cleaning and disinfecting environments, including those contaminated with other coronavirus.
- Workers who conduct cleaning tasks must be protected from exposure to blood, certain body fluids, and other potentially infectious materials covered by OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) and from hazardous chemicals used in these tasks. In these cases, the PPE (29 CFR 1910 Subpart I) and Hazard Communication (29 CFR 1910.1200) standards may also apply. Do not use compressed air or water sprays to clean potentially contaminated surfaces, as these techniques may aerosolize infectious material.

# Do I Need to Record a Positive Case or Report to OSHA?

- ***Is COVID-19 Considered an “Illness” under OSHA’s Recordkeeping Rules?***

- OSHA’s recordkeeping rules only apply to injuries or “illnesses.” The rule defines an injury or illness as “an abnormal condition or disorder.” “Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning.” Despite this broad definition, OSHA has essentially excluded from coverage cases of common cold or the seasonal flu. OSHA has made a determination that COVID-19 should *not* be excluded from coverage of the rule – like the common cold or the seasonal flu – and, thus, OSHA is considering it an “illness.” However, OSHA has stated that only confirmed cases of COVID-19 should be considered an illness under the rule. Thus, if an employee simply comes to work with symptoms consistent with COVID-19 (but not a confirmed diagnosis), the recordability analysis would not necessarily be triggered at that time.

- ***When is a COVID-19 Case Considered Recordable?***

- If an employee has a confirmed case of COVID-19, the employer would need to perform an assessment as to whether the case was “work-related” under the rule and, if so, whether it met the rule’s additional recordability criteria (i.e., resulted in a fatality, days away from work, restricted duty, or medical treatment beyond first aid). Given current protocols for treating COVID-19, it is likely that for any case that is confirmed, the additional severity criteria will be met, as affected persons are instructed to self-quarantine and stay home. Thus, the primary issue for employers is whether a particular case is “work-related.”
- A particular illness is work-related under the rule if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for illnesses that result from events or exposures in the work environment, unless it meets certain exceptions. One of those exceptions is that the illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs *outside* of the work environment. Thus, if an employee develops COVID-19 *solely* from an exposure outside of the work environment, it would not be work-related, and thus not recordable.
- The employer’s assessment should consider the work environment itself, the type of work performed, risk of person-to-person transmission given the work environment, and other factors such as community spread. Healthcare work environments, where job activities are more likely to result in person-to-person exposure, would present a more likely scenario of work-relatedness, than non-healthcare settings. However, each work environment is different, and employers must conduct an individualized assessment when a confirmed case of COVID-19 presents.

- ***When is a COVID-19 Case Reportable?***

- As with the recordability analysis above, if an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees. It is important to note, however, that the reporting obligation is time limited. Thus, if a fatality due to COVID-19 occurs after 30 days from the workplace incident leading to the illness, an employer is not required to report it. Similarly, if the in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, an employer is not required to report. Given the nature of COVID-19 and the disease progression, this may result in fewer reports to OSHA despite expected hospitalization of cases going forward.

## Multi-employer Worksite Situations

- OSHA's multi-employer worksite doctrine is an OSHA policy that allows for more than one employer at a worksite to be cited for a hazardous condition that violates an OSHA standard.
- However, due to the language of the OSH Act, OSHA does not apply the doctrine to potential violations of the General Duty Clause.
- Thus, an employer's obligations may be more limited on multi-employer worksites.
- NOTE that OSHA could still potentially cite for violations of standards (e.g., PPE) under the multi-employer worksite doctrine.

# How do I handle leave issues? Does it have to be paid?

- Those testing positive?
- Asymptomatic but exposed and quarantined?
- Those needing to care for children or sick family members?
- Those forced to stay home due to government shutdown orders and/or travel restrictions?
- What is Congress requiring in new paid leave?
  - The House bill
  - Action in the Senate – passage is imminent
  - Exemptions permitted by USDOL
- State paid leave laws (New Littler state-by-state review)

# ADA issues: Taking Employees' Temperatures and other testing?

- **EEOC link:** [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
  - Pre-employment: The ADA prohibits an employer from making **disability-related inquiries** and requiring **medical examinations** of employees, except under limited circumstances
  - **During employment:** The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.
  - A **“direct threat”** is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- **Direct threat** is an important ADA concept during an influenza pandemic.
- EEOC Guidance – As of March 17, 2020, the EEOC has issued guidance specifically concerning COVID-19, the ADA and the Rehabilitation Act. This guidance clearly provides: “The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.” The EEOC has also opined, “Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and attendant precautions, employer may measure employees’ body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.”
- Fitness for duty exams should be permissible for recovered virus victims

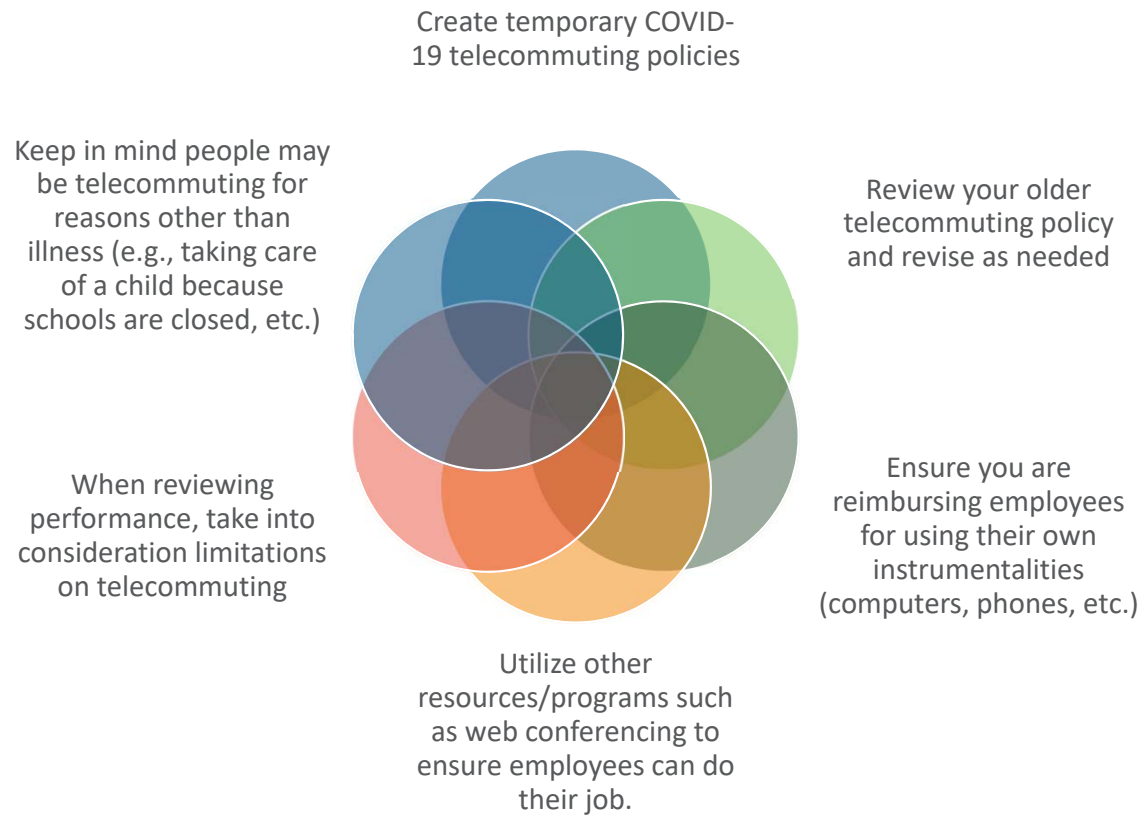
# What if I Have to lay off workers?

- Will WARN (or State WARN) come into play?
  - WARN's 60-day notice requirement for "mass layoffs" (more than 50 if 1/3 of the workforce)
  - Exception for temporary construction worksites
  - Exception for unforeseeable business circumstance (UBC) layoffs
  - State laws may differ (see NY and CA)
  - CA has just suspended its 60-day notice mandate (3/17/20); but must cite UBC
- Compliance with collective bargaining requirements
  - Recent union efforts to bargain mid-term over Covid-19 "effects"

# What About Medical Privacy and HIPAA Issues?

- The HIPAA Privacy Rule protects the privacy of patients' health information (protected health information) but is balanced to ensure that appropriate uses and disclosures of that information may be made when necessary to treat a patient, to protect the nation's public health and for other critical purposes.
- The Privacy Rule permits covered entities to disclose needed, protected health information without individual authorization:
  - ***To a public health authority***, such as the CDC or a state or local health department;
  - ***At the direction of a public health authority, to a foreign government agency***;
  - ***To persons at risk*** of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease.
- Health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider's standards of ethical conduct.

# Office Employees Telecommuting and Working from Home?





## Impact on apprenticeship and training?

- Transitioning from classroom training to on-line
- If classes have to be cancelled, what guidance is available?

# How Do I Communicate with my Employees? What Communications Should I Prepare?

Provide email or memorandum to employees

Acknowledge that safety is the Company's highest priority

Inform employees that there is no immediate cause for concern but in an abundance of caution the Company is taking precautionary measures

Provide some background on the Coronavirus

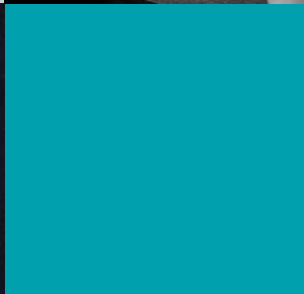
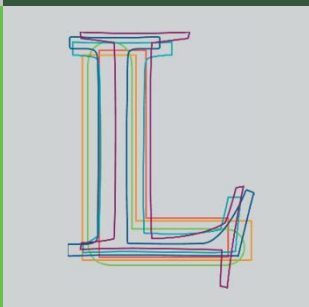
Inform employees of potential 14 day incubation and/or the requirement for a fitness for duty

Inform employees of travel restrictions including business and personal travel

Provide contact information for human resources or other person responsible for action plan.

## MORE RESOURCES

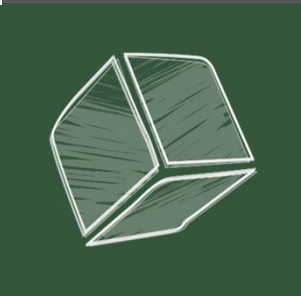
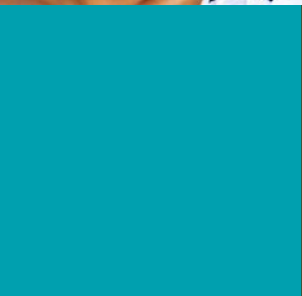
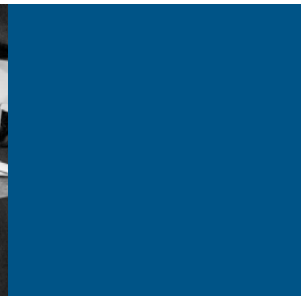
- <https://www.abc.org/Coronavirus-Resources-for-Employers#LiveAccordionContent509612421-la>
- <https://www.littler.com/coronavirus>
- <https://www.cdc.gov/>



# Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.





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