WORKPLACE SAFETY ISSUES

What's the main workplace safety guidance we should follow?

The Occupational Safety and Health Administration (OSHA) recently published Guidance on Preparing Workplaces for COVID-19, outlining steps employers can take to help protect their workforce. OSHA has divided workplaces and work operations into four risk zones, according to the likelihood of employees' occupational exposure during a pandemic. These risk zones are useful in determining appropriate work practices and precautions.

https://www.osha.gov/Publications/OSHA3990.pdf

https://www.osha.gov/Publications/influenza_pandemic.html#difference

Very High Exposure Risk:

Healthcare employees performing aerosol-generating procedures on known or suspected pandemic patients.

Healthcare or laboratory personnel collecting or handling specimens from known or suspected pandemic patients.

High Exposure Risk:

Healthcare delivery and support staff exposed to known or suspected pandemic patients.

Medical transport of known or suspected pandemic patients in enclosed vehicles.

Medium Exposure Risk:

Employees with high-frequency contact with the general population (*such as schools, high population density work environments, and some high-volume retail*).

Lower Exposure Risk (Caution):

Employees who have minimal occupational contact with the general public and other coworkers (*such as office employees*).

What if an employee appears sick?

If any employee presents themselves at work with a fever or difficulty in breathing, this indicates that they should seek medical evaluation. While these symptoms are not always associated with influenza and the likelihood of an employee having the COVID-19 coronavirus is extremely low, it pays to err on the side of caution. Retrain your supervisors on the importance of not overreacting to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.

Can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?

Yes, you are permitted to ask them to seek medical attention and get tested for COVID-19. The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace. The Equal Employment Opportunity Commission (EEOC) confirmed that advising workers to go home is permissible and not considered disability-related if the symptoms present are akin to the COVID-19 coronavirus or the flu.

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Can I take an employee's temperature at work to determine whether they might be infected?

Yes. The EEOC confirmed that measuring employees' body temperatures is permissible given the current circumstances. While the Americans with Disabilities Act (ADA) places restrictions on the inquiries that an employer can make into an employee's medical status, and the EEOC considers taking an employee's temperature to be a "medical examination" under the ADA, the federal agency recognizes the need for this action now because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions.

However, as a practical matter, an employee may be infected with the COVID-19 coronavirus without exhibiting recognized symptoms such as a fever, so temperature checks may not be the most effective method for protecting your workforce.

Note: If the company does business in the State of California (e.g., if you have one or more locations, employees, customers, suppliers, etc. in the state), and your business is subject to the California Consumer Privacy Act (CCPA), then you must provide employees a CCPA-compliant notice prior to or at the same time as your collection of this information. For advice on CCPA compliance, please reach out to your legal team for input and advice.

https://www.eeoc.gov/facts/pandemic_flu.html

What precautions are needed for individuals who are taking the temperatures of employees?

To protect the individual who is taking the temperature, you must first conduct an evaluation of reasonably anticipated hazards and assess the risk to which the individual may be exposed. The safest thing to do would be to assume the testers are going to potentially be exposed to someone who is infected who may cough or sneeze during their interaction. Based on that anticipated exposure, you must then determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including personal protective equipment (*PPE*). Different types of devices can take temperature without exposure to bodily fluids. Further, the tester could have a face shield in case someone sneezes or coughs. Further information can be found at OSHA's website, examining the guidance it provides for healthcare employees (which includes recommendations on gowns, gloves, approved N95 respirators, and eye/face protection).

https://www.osha.gov/SLTC/covid-19/controlprevention.html#health

An employee of ours has tested positive for COVID-19. What should we do?

You should send home all employees who worked closely with that employee to ensure the infection does not spread. Before the infected employee departs, ask them to identify all individuals who worked in close proximity (*within six feet*) for a prolonged period of time (*more than a few minutes*) with them in the previous 14 days to ensure you have a full list of those who should be sent home. When sending the employees home, do not identify by name the infected employee or you could risk a violation of confidentiality laws. If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary. The CDC provides that the employees who worked closely to the infected worker "should then self-monitor for symptoms (*i.e., fever, cough, or shortness of breath*)."

How long should the employees who worked near the employee stay at home? Those employees should first consult and follow the advice of their healthcare providers or public health department regarding the length of time to stay at home. If those resources are not available, the employee should at least remain at home for three days without a fever (achieved

without medication) if they don't develop any other symptoms. If they develop symptoms, they should remain home for at least seven days from the initial onset of the symptoms, and three days without a fever (achieved without medication).

The CDC also provides the following recommendations for most non-healthcare businesses that have suspected or confirmed COVID-19 cases:

- It is recommended to close off areas used by the ill persons 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 persons, focusing especially on frequently touched surfaces.
- To clean and disinfect:
    - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (Note: "cleaning" will remove some germs, but "disinfection" is also necessary).
    - For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
    - Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer's instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
    - Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, 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. Follow the manufacturer's instructions regarding other protective measures recommended on the product labeling.
    - 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.
    - Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks. Training 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.
    - If you require gloves or masks or other PPE, prepare a simple half-page Job Safety Analysis (JSA): list the hazards and the PPE (gloves, masks, etc., as needed), and the person who drafts the JSA should sign and date it.

If employers are using cleaners other than household cleaners with more frequency than an employee would use at home, employers must also ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA's Hazard Communication standard (*29 CFR 1910.1200*). Simply download the manufacturer's Safety Data Sheet (*SDS*) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of the Hazard Communication Program (*which almost all employers maintain*).

One of our employees has a suspected but unconfirmed case of COVID-19. What should we do?

Take the same precautions as noted above. Treat the situation as if the suspected case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee has not tested positive for the virus but has been exhibiting symptoms that lead you to believe a positive diagnosis is possible.

How can we distinguish between a "suspected but unconfirmed" case of COVID-19 and a typical illness?

There is no easy way for you to make this determination, but you should let logic guide your thinking. The kinds of indicators that will lead you to conclude an illness could be a suspected but unconfirmed case of COVID-19 include whether that employee has a suspected or confirmed COVID-19 case in their household or similar facts, like whether they traveled to a restricted area that is under a Level 2, 3, or 4 Travel Advisory according to the U.S. State Department, whether that employee was exposed to someone who traveled to one of those areas, etc. You should err on the side of caution but not panic.

The EEOC has confirmed that you can inquire into an employee's symptoms, even if such questions are disability-related, as you would be considered to have a "reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat." Inquiries into an employee's symptoms should attempt to distinguish the symptoms of COVID-19 from the common cold and the seasonal flu. This should include inquiries into whether an employee is experiencing:

- Fever, Fatigue, Cough, Sneezing, Aches and pains, Runny or stuffy nose, Sore throat, Diarrhea, Headaches, Shortness of breath

The most common symptoms of COVID-19 are fever and a dry cough. This helpful chart can help you and your employees distinguish between the COVID-19 coronavirus, the seasonal flu, or a common cold.

It is important to remember that you must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

https://www.whs.mil/Portals/75/Coronavirus/COVID-19%20vs%20Cold%20vs%20Flu.jpg?ver=2020-03-10-105044-380

One of our employees self-reported that they came into contact with someone who had a presumptive positive case of COVID-19. What should we do?

Take the same precautions as noted above. Treat the situation as if the suspected case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee is asymptomatic for the virus, but you are acting out of an abundance of caution.

One of our employees has been exposed to the virus but only found out after they had interacted with clients and customers. What should we do?

Take the same precautions as noted above with respect to coworkers, treating the situation as if the exposed employee has a confirmed case of COVID-19 and sending home potentially infected employees that he came into contact with. As for third parties, you should communicate with customers and vendors that came into close contact with the employee to let them know about the potential of a suspected case.

If we learn or suspect that one of our employees has COVID-19, do we have a responsibility to report this information to the CDC?

There is no obligation to report a suspected or confirmed case of COVID-19 to the CDC. The healthcare provider that receives the confirmation of a positive test result is a mandatory reporter who will handle that responsibility.

Can we require an employee to notify the company if they have been exposed, have symptoms, and/or have tested positive for the COVID-19 coronavirus?

Yes, you should require any employee who becomes ill at work with COVID-19 coronavirus symptoms to notify their supervisor. Employees who are suffering from symptoms should be directed to remain at home until they are symptom-free for at least 24 hours.

While outside of work, if an employee begins experiencing symptoms, has been exposed to someone that is exhibiting symptoms, or has tested positive, the employee should contact your company by telephone or email and should not report to work.

We are hiring employees during the outbreak; what steps can we take to protect our workforce?

The EEOC has confirmed that you may screen applicants for symptoms of the COVID-19 coronavirus after you make a conditional job offer, as long as you do so for all entering employees in the same type of job. You can also take an applicant's temperature as part of a post-offer, pre-employment medical exam after you have made a conditional offer of employment.

The EEOC has also said you may delay the start date of an applicant who has COVID-19 or symptoms associated with it. According to current CDC guidance, an individual who has the COVID-19 coronavirus or symptoms associated with it should not be in the workplace. In fact, the EEOC has also said you may withdraw a job offer when you need the applicant to start immediately but the individual has COVID-19 or symptoms of it.

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

What steps can we take now to minimize risk of transmission?

Repeatedly, creatively, and aggressively encourage employees and others to take the same steps they should be taking to avoid the seasonal flu. For the annual influenza, SARS, avian flu, swine flu, and now the COVID-19 coronavirus, the best way to prevent infection is to avoid exposure. The messages you should be giving to your employees are:

- Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with others, especially those who are sick.
- Refrain from shaking hands with others for the time being.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces.
- Perhaps the most important message you can give to employees: stay home when you are sick.

As an employer, you should be doing the following:

- Ensure that employees have ample facilities to wash their hands, including tepid water and soap, and that third-party cleaning/custodial schedules are accelerated.
- Evaluate your remote work capacities and policies (see later section on Remote Work for more information). Teleconference or use other remote work tools in lieu of meeting in person if available.
- Consider staggering employee starting and departing times, along with lunch and break periods, to minimize overcrowding in common areas such as elevators, break rooms, etc.
- Have a single point of contact for employees for all concerns that arise relating to health and safety.
- Follow updates from the CDC and the World Health Organization (WHO) regarding additional precautions.

You may reference OSHA's Guidance on Preparing Workplaces for an Influenza Pandemic for additional information on preparing for an outbreak. https://www.osha.gov/Publications/influenza_pandemic.html

Can an employee refuse to come to work because of fear of infection?

Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (*OSH Act*) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." https://www.osha.gov/as/opa/worker/danger.html

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring travel to China or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. Once

again, this guidance is general, and employers must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in "protected concerted activity for mutual aid or protection." Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers. https://www.nlrb.gov/how-we-work/national-labor-relations-act

On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, "talking with one or more employees about working conditions," "participating in a concerted refusal to work in unsafe conditions," and "joining with co-workers to talk to the media about problems in your workplace." Employees are generally protected against discipline or discharge for engaging in such activity.

What actions can we take if an employee is exhibiting flu-like symptoms but refuses to leave the workplace?

You should first take a collaborate approach. Remind the employee that you are asking them to leave. Try to make them understand the reasons why their departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available such as paid sick leave, use of accrued vacation, or something else that may appease them, you should explain these benefits and how the employee can utilize them.

If the employee still refuses to leave the workplace, you can consider (a) explaining that the employee is now trespassing on private property and if they do not leave you will be forced to call local law enforcement to escort them off the premises; or (b) terminating the employee for insubordination. Termination of the employee, however, should be considered a last resort. Given the current climate, you will need to also consider public perception related to taking overly strong adverse action against an employee expressing concerns or apprehension related to the coronavirus.

When may an employee discontinue home isolation?

Per the CDC, there are three options for determining when a person may end home isolation, using either (1) a time-since-illness-onset option, (2) a time-since-recovery option, or (3) a test-based option.

Time-since-illness-onset and time-since-recovery strategy (non-test-based strategy): Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue home isolation under the following conditions:

At least three days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and

At least seven days have passed since symptoms first appeared.

Test-based strategy (simplified from initial protocol): Previous recommendations for a test-based strategy remain applicable. However, a test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing. For jurisdictions that choose to use a test-based strategy, the recommended protocol has been

simplified so that only one swab is needed at every sampling. Persons who have COVID-19 who have symptoms and were directed to care for themselves at home may discontinue home isolation under the following conditions:

- Resolution of fever without the use of fever-reducing medications.
- Improvement in respiratory symptoms (e.g., cough, shortness of breath); and
- Negative results of an FDA Emergency Use Authorized molecular assay for COVID-19 from at least two consecutive nasopharyngeal swab specimens collected ≥24 hours apart (total of two negative specimens).
- Individuals with laboratory-confirmed COVID-19 who have not had any symptoms may discontinue home isolation when at least seven days have passed since the date of their first positive COVID-19 diagnostic test and have had no subsequent illness.

The EEOC confirmed that you may require a doctor's note stating the employee is fit for duty before permitting them to return to work. https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Can employer refuse an employee's request to wear a medical mask or respirator?

Yes, under most circumstances – but you may want to consider allowing your workers to wear them if it makes them feel safe. Under the OSHA respiratory protection standard, which covers the use of most safety masks in the workplace, a respirator must be provided to employees only "when such equipment is necessary to protect the health of such employees." Likewise, OSHA rules provide guidance on when a respirator is not required: "an employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard." In almost all work situations, however, there is no currently recognized health or safety hazard – even when employees work near other people and thus there is no need for a mask or respirator.

The WHO has stated that people only need to wear face masks if they are treating someone who is infected with the COVID-19 coronavirus, and that wearing masks may create a false sense of security among the general public. Doctors agree that the best defense against the COVID-19 coronavirus and influenza is simply washing your hands. Thus, the consensus is that there are more appropriate measures of defense than wearing a surgical mask or respirator. However, given the high degree of concern in the general public at the current time, you may consider permitting those workers who want to wear a mask to do so without necessarily encouraging them if it makes them feel safer.

https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134

https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks

Can an employee refuse to work without a mask?

OSHA has addressed the common question of whether an employee can simply refuse to work in unsafe conditions. The safety agency provides the following guidance, which wouldn't require the use of a mask or respirator in most situations. An employee's right to refuse to do a task is protected if all of the following conditions are met:

1. Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so;
2. You refused to work in "good faith." This means that you must genuinely believe that an imminent danger exists;

3. A reasonable person would agree that there is a real danger of death or serious injury; and
4. There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Given the consensus that face masks are only necessary when treating someone who is infected with the COVID-19 coronavirus or influenza, masks are likely not necessary to protect the health of most employees. Therefore, most employers do not have to provide, or allow employees to wear, a surgical mask or respirator to protect against the spread of the COVID-19 coronavirus or influenza. The use of the word "may" in OSHA's respiratory protection standard makes it clear that when a respirator is not necessary to protect the health of an employee, it is within the discretion of the employer to allow employees to use a respirator. Accordingly, you are well within the applicable OSHA standard to deny an employee's request to wear a surgical mask or a respirator in almost all situations.

Absent a legally recognized disability, unique physical condition, or an occupation where employees work directly with those impacted by a condition such as the COVID-19 coronavirus or flu, you are generally not required to allow workers to wear masks at work.

Is COVID-19 a recordable illness for purposes of OSHA Logs?

OSHA recently published guidance on this issue. OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log. You must record instances of workers contracting COVID-19 if the worker contracts the virus while on the job. The illness is not recordable if worker was exposed to the virus while off the clock. You are responsible for recording cases of COVID-19 if:

The case is a confirmed case of COVID-19;

The case is work-related, as defined by 29 CFR 1904.5; and

The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work). https://www.osha.gov/SLTC/covid-19/standards.html

Are employers required to develop a written infectious disease preparedness and response plan?

While you are not required to do so, it is a prudent course of action and highly recommended by OSHA. The elements of such a plan can be found here. OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) applies to occupational exposure to human blood and other potentially infectious materials. While the Bloodborne Pathogens standard does not apply to all workplaces, the provisions may be helpful in controlling some sources of the virus. A good way to satisfy your obligations under these conditions is to prepare the hazard assessment required by OSHA's standards.

https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030

https://www.osha.gov/SLTC/covid-19/hazardrecognition.html

What steps should we take if we use chemicals to combat the COVID-19 coronavirus?

Be mindful of the specific requirements of OSHA's Hazard Communication standard if new chemicals, or temporary employees, are introduced into work areas to combat the COVID-19 coronavirus. You are required to provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. A comprehensive hazard communication program should include contain labeling and other forms of warning, safety data sheets, and employee training. Now is also a good time to retrain employees under OSHA's bloodborne pathogens standard, including revisiting and communicating the elements of your exposure control plan.

What current travel restrictions are in place?

The WHO declared the COVID-19 a pandemic on March 11, 2020, which means the virus is now considered to be spreading around the world and affecting a large number of people. In light of this sustained outbreak on a global scale, President Trump has issued a number of Presidential Proclamations limiting the entry of foreign nationals who were physically present in the following countries during the 14-day period before their attempted entry into the United States: China, Iran, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, and Ireland. The travel restriction on China does not apply to Hong Kong, Macau, or Taiwan.

The restrictions on entry from China, Iran, and the continental European countries listed above are already in effect and will remain in effect until modified or terminated by the President. The restrictions on entry from the U.K. and Ireland will begin at midnight EST on Monday, March 16.

Who is exempt from the travel restrictions?

The following individuals are not subject to the travel ban on Europe:

- U.S. citizens;
- Lawful permanent residents (green card holders);
- Spouses and children (unmarried under 21) of a U.S. citizen or lawful permanent resident;
- Parents and minor siblings (unmarried under 21) of a U.S. citizen or lawful permanent resident who is unmarried and under the age of 21;
- People traveling at the invitation of the U.S. government to contain or mitigate the virus;
- People traveling on crew member visas, or diplomatic or International Organization visas;
- Certain foreign government officials and their family members;
- Members of the U.S. Armed Forces and their family;
- United Nations personnel;

- People whose entry would not pose a significant risk of spreading the virus, as determined by the CDC. This provision would appear to allow anyone to otherwise seek entry. However, in reality, U.S. Customs and Border Protection may simply utilize the travel restriction rules to deny entry instead of deferring to the CDC's conclusion; and
- People whose entry would further important U.S. law enforcement objective or would be in the national interest.

Are there conditions for the return of those who are exempt from the travel restrictions?

Yes. All U.S. citizens, legal permanent residents, and their immediate families who are returning from a restricted country must self-quarantine in their homes for 14 days after their arrival. In order to ensure compliance, local and state public health officials will contact individuals in the days and weeks following their arrival.

Can employees returning from the restricted countries fly into any airport?

No. The Department of Homeland Security (DHS) has directed all U.S. citizens, legal permanent residents, and their immediate families who are returning from the restricted countries to travel through one of the following 13 airports where DHS has established enhanced entry screening capacities:

- Boston-Logan International Airport (BOS), Massachusetts
- Chicago O'Hare International Airport (ORD), Illinois
- Dallas/Fort Worth International Airport (DFW), Texas
- Detroit Metropolitan Airport (DTW), Michigan
- Daniel K. Inouye International Airport (HNL), Hawaii
- Hartsfield-Jackson Atlanta International Airport (ATL), Georgia
- John F. Kennedy International Airport (JFK), New York
- Los Angeles International Airport, (LAX), California
- Miami International Airport (MIA), Florida
- Newark Liberty International Airport (EWR), New Jersey
- San Francisco International Airport (SFO), California
- Seattle-Tacoma International Airport (SEA), Washington
- Washington-Dulles International Airport (IAD), Virginia

Upon arrival from a restricted country, travelers will undergo an enhanced medical interview where the passengers will be asked about their medical history, current condition, and asked for contact information for local health authorities. Additionally, some passengers will have their temperature taken. Passengers who are not symptomatic will be given written guidance about COVID-19 and be allowed to proceed to their final destination. Passengers who are symptomatic for coronavirus will be referred to the CDC for medical evaluation.

https://www.dhs.gov/publication/notices-arrival-restrictions-coronavirus

Can we prohibit an employee from traveling to a non-restricted area on their personal time?

On March 19, the U.S. Department of State issued a Level 4 "Do Not Travel" advisory warning U.S. citizens to avoid all international travel due to the global impact of COVID-19. The U.S., Mexico, and Canada have also suspended all non-essential travel between the two countries. However, you generally cannot prohibit otherwise legal activity, such as travel abroad by an employee. While a federal court of appeals recently held that it is not necessarily a violation of the ADA to terminate an employee who refuses to cancel personal travel to an area of the world with a high risk of exposure to a deadly disease, you still could risk legal exposure, reduced employee morale, and negative publicity if you do so. This includes pregnant employees or those with medical conditions. However, you should educate your employees before they engage in travel to risky environments to try and work out a solution, and you can – and should – monitor those employees returning from such travel for signs of illness.

What should I do if an employee has recently traveled to an affected area or otherwise may have been exposed to the COVID-19 coronavirus?

As noted above, the ADA prohibits employers from making disability-related inquiries and requiring medical examinations unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a "direct threat" to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

According to the EEOC, whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. The EEOC instructs employers that the assessment by the CDC or public health authorities provides the objective evidence needed for a disability-related inquiry or medical examination. During a pandemic, an employer does not have to wait until an employee develops symptoms to ask questions about exposure to a pandemic influenza during recent travel. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home after traveling, an employer may ask an employee what locations they have traveled to, even if the travel was for personal reasons.

https://www.eeoc.gov/facts/pandemic_flu.html

We have an employee who has recently traveled overseas to a country that is not on any restricted list, but we're worried about the risk of transmission. Should we institute a "soft" quarantine?

The CDC now recommends everyone who returns from international travel to stay at home for 14 days. Although not a requirement, an employer should ask such an employee to self-quarantine for 14 days before returning to work if at all possible, in order to protect other employees and reduce the employer's potential liabilities.

https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html

Does the COVID-19 coronavirus emergency trump HIPAA privacy rules?

No, the government recently sent a stern reminder to all employers, especially those involved in providing healthcare, that they must still comply with the protections contained in the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule during the COVID-19 coronavirus outbreak. The Office for Civil Rights of the U.S. Department of Health and

Human Services (*HHS*) issued a reminder after the WHO declared a global health emergency. In fact, the Rule includes provisions that are directly applicable to the current circumstances.

What are our obligations under the HIPAA privacy rules if we are contacted by officials asking for emergency personal health information about one of our employees?

The privacy restrictions mandated by HIPAA only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions.

Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross. Further, you should be careful not to release information to someone until you have properly identified them.

How should we treat medical information?

It's recommend you treat all medical information as confidential and afford it the same protections as those granted by HIPAA in connection with your group health plan. In certain circumstances, if you have plan information, you can share it with government officials acting in their official capacity, and with health care providers or officially chartered organizations such as the Red Cross. For example, you can share protected health information with providers to help in treatment, or with emergency relief workers to help coordinate services.

In addition, you can share the information with providers or government officials as necessary to locate, identify, or notify family members, guardians, or anyone else responsible for an individual's care, of the individual's location, general condition, or death. In such case, if at all possible, you should get the individual's written or verbal permission to disclose.

However, if the person is unconscious or incapacitated, or cannot be located, information can be shared if doing so would be in the person's best interests. In addition, information can be shared with organizations like the Red Cross, which is authorized by law to assist in disaster relief efforts, even without a person's permission, if providing the information is necessary for the relief organization to respond to an emergency.

Finally, information can be disclosed to authorized personnel without permission of the person whose records are being disclosed if disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.

These restrictions remain in effect, even after the outbreak has been declared a pandemic.

May covered entities share protected health information with public health authorities?

When there is a legitimate need to share information with public health authorities and others responsible for ensuring public health and safety, covered entities may share PHI to enable them to carry out their public health responsibilities. This may arise with the current outbreak of COVID-19. The key, as always, is to limit disclosures to the minimum necessary to the purpose, strictly in accordance with these parameters.

For example, covered entities may share information as necessary with the Centers for CDC, as well as health departments authorized by law to receive such information, to prevent or control disease or injury. You may even disclose PHI to foreign government agencies that are working with authorized public health authorities.

If our employees are no longer working, are they still entitled to group health plan coverage?

Not necessarily. You need to check your group health plan document (or certificate of coverage if your plan is fully insured) to determine how long employees who are not actively working may remain covered by your group health plan. Once this period expires, active employee coverage must be terminated (unless the insurance carrier or self-funded plan sponsor otherwise agrees to temporarily waive applicable eligibility provisions), and a COBRA notice must be sent. If your plan is self-funded and you would like to waive applicable plan eligibility provisions, you should first make sure that any stop-loss coverage insurance carriers agree to cover claims relating to participants who would otherwise be ineligible for coverage.

What happens to group health plan coverage if employees are not working and unable to pay their share of premiums?

In the normal course of events, group health plan coverage will cease when an employee's share of premiums is not timely paid. However, several actions might be taken that could allow coverage to continue.

First, the insurance carrier providing the health coverage may voluntarily continue the coverage while the disaster is sorted out and until an employer reopens its doors. More likely, the employer may make an arrangement with the insurance carrier providing health coverage to pay the employees' share of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors. Each situation will be different, depending upon the insurance carrier and the relationship between the employer and the insurance carrier. Therefore, each factual situation will need to be individually assessed. Many Local unions have addressed this through MOUs and plan amendments.

Is COVID-19 testing covered by our group health plan?

Yes. The Families First Coronavirus Response Act signed into law by President Trump on March 18 requires group health plans to provide coverage for FDA-approved COVID-19 diagnostic testing products and related items and services furnished during a provider visit. This requirement applies to all fully-insured and self-insured group health plans other than retiree-only plans and other HIPAA excepted benefits. Even grandfathered group health plans must comply.

Mandated coverage must be provided without cost sharing (including deductibles, copayments and coinsurance) beginning March 18 through the end of the public emergency period. Covered services and related cost waivers apply to diagnostic testing, attendant health care provider services (in-person and telehealth), and facility costs (physician office, urgent care center and emergency room) to the extent the costs are related to evaluating the need for, or furnishing, a COVID-19 testing product. In addition to coverage and cost waiver provisions, plans shall not require prior authorization or similar medical management requirements as a precondition of COVID-19 coverage.

Two items are of particular note. First, the above-mentioned coverage requirements, perhaps because temporary in nature, will not be statutorily reflected in ERISA, the Public Health Service Act, or the Internal Revenue Code. Correspondingly, the Act officially charges the Secretaries of HHS, Labor and Treasury with enforcement and implementation oversight "as

if" the provisions were included in/amended these statutes. The Act also specifically authorizes the Secretaries to implement the coverage requirements through sub-regulatory guidance, program instruction or otherwise.

Second, in an effort to facilitate COVID-19 efforts, the IRS issued Notice 2020-15, with specific guidance relating to HDHP qualification and HSA contribution deductibility. In Notice 2020-15, the IRS (1) clarified that vaccines are considered "preventive care" under Internal Revenue Code Section 223; and (2) provided that, until further notice, health benefits, medical services and items purchased in association with testing for or treatment of COVID-19, may be provided by a HDHP, without disqualifying the HDHP or covered individual from making HSA contributions. This latter provision essentially expands the preventive care exception to items and services purchased to test or treat this particular COVID-19 illness. https://www.irs.gov/pub/irs-drop/n-20-15.pdf

How can we better leverage existing group health benefits for our employees?

Employers should consider enhanced promotion of current benefit offerings to ensure employees take advantage of all existing healthcare services offered, such as:

1. Telemedicine services. Telemedicine may be an ideal option for persons seeking medical consultation for mild-non-emergency care. If telemedicine services are offered as part of your group health plan, services may include coordination of diagnosis and treatment plans and or specialist referrals. Telemedicine services may be utilized from the comfort of an employee's own home and may be a valuable option for persons who want to minimize external exposure.

2. Employee Assistance Programs. Employee assistance programs often provide great benefits that impact not only physical but mental health – stress management, elder care, personal finance, and substance abuse consultation are just some of the services commonly provided.

3. Wellness Program Services. Wellness programs are a rich resource of education relating to disease prevention. Many offer basic education on a variety of pertinent topics such as basic hygiene and traveling tips. Wellness programs often include nurse phoneline programs that can be utilized to obtain confidential responses to various health topics.

4. Disease Management Programs. Disease Management Programs are often tailored to employees and/or families at risk of developing chronic medical conditions, such as high blood pressure or diabetes. Individuals in these programs may be more susceptible to COVID-19, so ensure they have opportunity to consult with their coach or case monitor as necessary to manage their health conditions.

5. Free or Discounted Preventive Care. Flu shots and other vaccinations as well as diagnostic testing are often provided at no or low cost (via reductions or waivers in employee premiums, co-pays or deductibles) via a group health plan or wellness program.

In addition to what is currently available under your plan, plan sponsors may consider permitting the plan to cover a larger range of preventive care benefits. Last year, in Notice 2019-45, the IRS and HHS expanded the types of preventive care that will not interfere with HSAs for individuals diagnosed with asthma, heart disease and diabetes – individuals that are at a

higher risk of getting very sick from COVID-19. Plan sponsors may permit the plan to cover these and other specified preventive care benefits at no cost or with some form of cost sharing. https://www.irs.gov/pub/irs-drop/n-19-45.pdf

If we utilize temporary employees to supplement our labor force, may those individuals participate in our group health plan?

It depends on plan terms. Temporary employees are most often excluded from group health plan eligibility because of potential tax issues and the risk of inadvertently creating a multiple employer welfare arrangement. By contrast, the law allows an employer to include, or exclude, temporary employees so plan terms must be examined for guidance.

However, for ACA employer mandate purposes, temporary employees may trigger liability under the employer mandate even if hired through a staffing agency. Applicable large employers recall that ACA health insurance benefit obligations arise when an employee is reasonably expected to or actually performs 130+ hours of service in a calendar month. As a result, employers who engage temporary employees to fill short-term needs relating to COVID-19 should ensure they are classified properly for eligibility purposes and that hours are measured in compliance with the employer's ACA measurement method for full-time employees.

Must we keep paying employees who are not working?

Under the Fair Labor Standards Act (*FLSA*), for the most part the answer is "no." FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.

One possible difference relates to employees treated as exempt FLSA "white collar" employees whose exempt status requires that they be paid on a salary basis. Generally speaking, if such an employee performs at least some work in the employee's designated seven-day workweek, the salary basis rules require that they be paid the entire salary for that particular workweek. There can be exceptions, such as might be the case when the employer is open for business but the employee decides to stay home for the day and performs no work. A U.S. Department of Labor (USDOL) opinion letter addressing these matters can be accessed here.

Also, non-exempt employees paid on a "fluctuating-workweek" basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work. There are a few exceptions, but these are even more-limited than the ones for exempt "salary basis" employees.

Of course, an employer might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

Finally, we caution employers to consider the public relations aspect of not paying employees who may not be working if they have contracted or are avoiding the COVID-19 coronavirus. Given the publicity surrounding this outbreak, it is possible that situations involving these kinds of issues could reach the media and damage your reputation and employee morale. Consider the big picture perspective when making decisions regarding paying or not paying your employees.

Can we charge time missed to vacation and leave balances? (This is not applicable everywhere)

The FLSA generally does not regulate the accumulation and use of vacation and leave. The salary requirements for exempt "white collar" employees can implicate time-off allotments under various circumstances. The USDOL has provided some guidance on this topic in an opinion letter that is accessible here. Again, however, what an employer may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

Does family and medical leave apply to this situation?

Employees requesting leave could conceivably be protected by the Family and Medical Leave Act (FMLA) to the extent they otherwise meet FMLA-eligibility requirements. Even in the absence of state or federal protection, an employer's internal policies may extend protection to such individuals. Of course, there is nothing to prevent you from voluntarily extending an employee's leave, even in the absence of any legal obligation.

Generally, employees are not entitled to take FMLA to stay at home to avoid getting sick. As with many employment laws, the worst thing an employer (or as is often the case, an untrained supervisor) can do at times like this is to reject immediately an unorthodox leave request before the facts are in. When in doubt, the wisest approach is to work with counsel to ensure legal compliance, thereby minimizing exposure to costly litigation.

Does contraction of COVID-19 coronavirus implicate the ADA?

Generally, no, because in most cases the COVID-19 coronavirus is a transitory condition. However, some plaintiffs could make an argument that the ADA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADA coverage.

Can I send employees home who exhibit potential symptoms of contagious illnesses at work?

Yes, sending an employee home who displays symptoms of contagious illnesses would not violate the ADA's restrictions on disability-related actions.

During a pandemic, may an ADA-covered employer ask employees who do not have symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to complications?

Generally, no. However, if the pandemic becomes severe or serious according to local, state, or federal health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only then may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

https://www.eeoc.gov/facts/pandemic_flu.html#4

Do we have any EEO concerns related to the COVID-19 coronavirus?

Employers cannot select employees for disparate treatment based on national origin. The CDC recently warned: "Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19."

Employers will need to closely monitor any concerns that employees of Asian descent are being subjected to disparate treatment or harassed in the workplace because of national origin. This may include employees avoiding other employees because of their national origin.

An employer may not base a decision to bar an employee from the workplace on the employee's national origin. However, if an employee, regardless of their race or national origin, was recently in China and has symptoms of the COVID-19 coronavirus, you may have a legitimate reason to bar that employee from the workplace.

https://www.cdc.gov/coronavirus/2019-ncov/downloads/what-you-should-do.pdf

Do we have an obligation to provide notice under the federal WARN Act if we are forced to suspend operations on account of the coronavirus and its aftermath?

Yes, if your company is covered by the Worker Adjustment and Retraining Notification (WARN) Act. The federal WARN Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so for economic reasons. It is important to keep in mind that these quoted terms are defined under WARN's regulations, and that they are not intended to cover every single layoff or plant closing.

Generally speaking, employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff — which can be triggered with a layoff of as few as 50 employees under federal law (potentially less under applicable state laws). Note, however, that if employees are laid off for less than six months, then they do not suffer an employment loss and, depending on the particular circumstances, notice may not be required. Unfortunately, in situations like this, it is hard to know how long the layoff will occur and notice cannot be provided retroactively, so providing notice is usually the best practice.

In cases where its notice requirements would otherwise apply, the WARN Act provides a specific exception when layoffs or plant closings occur due to unforeseeable business circumstances, or are the result of a natural disaster. These provisions may apply to the COVID-19 coronavirus. But due to the fact-specific analysis required, these exceptions are often litigated.

Moreover, these exceptions are limited, in that an employer relying upon them must still provide "as much notice as is practicable, and at that time shall give a brief statement of the basis for reducing the notification period." In other words, once you are in a position to evaluate the immediate impact of the outbreak upon your workforce, you must then provide specific notice to "affected employees" (as well as unions and government entities, as discussed below) as soon as practicable. You must also provide a statement explaining the failure to provide more extensive notice, which in this case would obviously be tied to the unforeseeable nature of the outbreak and its aftermath.

The WARN Act has specific provisions requiring notice to employees, unions and certain government entities. The Act further specifies the specific information that must be contained in each notice. Even a seemingly minor deviation from these requirements can trigger a violation. Also keep in mind that some states have "mini-WARN" laws that may apply. Please work with your employment counsel to ensure compliant notices are provided.

https://www.dol.gov/general/topic/termination/plantclosings

https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf

Will this law really be enforced in light of the outbreak?

In the aftermath of an outbreak, the extent to which the USDOL will focus upon enforcement of the WARN Act remains to be seen. Nonetheless, the law provides stiff penalties for non-compliance, including up to 60 days of back pay and benefits, along with a civil penalty of up to $500 per day. More importantly, it provides for a private cause of action in federal court, suggesting that employers may soon be responding to lawsuits arising under the WARN Act regardless of the enforcing agency's official position.

Consequently, we advise that you evaluate your current situations to ascertain whether the most recent outbreak has triggered a WARN Act qualifying event in your organization. If so, provide as much notice to affected employees as is practicable under the circumstances. When in doubt, the best approach is to work through counsel to arrive at a safe but practical solution to a potentially thorny situation for many employers that are impacted by the outbreak, either directly or indirectly.

My employee alleges that they contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?

It depends. If the employee is a health care worker or first responder, the answer is likely yes (subject to variations in state law). For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact-specific.

It is important to note that the workers' compensation system is a no-fault system, meaning that an employee claiming a work-related injury does not need to prove negligence on the part of the employer. Instead, the employee need only prove that the injury occurred at work and was proximately caused by their employment. Additionally, the virus is not an "injury" but is instead analyzed under state law to determine if it is an "occupational disease." To be an occupational disease (again subject to state law variations), an employee must generally show two things:

the illness or disease must be "occupational," meaning that it arose out of and was in the course of employment; and

the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

The general test in determining whether an injury "arises out of and in the course of employment" is whether the employee was involved in some activity where they were benefitting the employer and was exposed to the virus. Importantly, special consideration will be given to health care workers and first responders, as these employees will likely enjoy a presumption

that any communicable disease was contracted as the result of employment. This would also include plant nurses and physicians who are exposed to the virus while at the worksite.

As for other categories of employees, compensability for a workers' compensation claim will be determined on a case-by-case basis. The key point will be whether the employee contracted the virus at work and whether the contraction of the disease was "peculiar" to their employment. Even if the employer takes all of the right steps to protect the employees from exposure, a compensable claim may be determined where the employee can show that they contracted the virus after an exposure, the exposure was peculiar to the work, and there are no alternative means of exposure demonstrated.

Absent state legislation on this topic, an employee seeking workers' compensation benefits for a coronavirus infection will still have to provide medical evidence to support the claim. Employers who seek to contest such a claim may be able to challenge the allowance if there is another alternative exposure or if the employee's medical evidence is merely speculative.

Finally, employers should be aware that states are taking action on this issue. For instance, Washington Governor Jay Inslee recently directed his Department of Labor and Industries to "ensure" workers' compensation protections for health care workers and first responders. The directive instructs the Department to change its policies regarding coverage for these two groups and to "provide benefits to these workers during the time they're quarantined after being exposed to COVID-129 on the job." We expect other states to follow Washington's lead.

My employee contracted COVID-19 while on a business trip for my company. Is this a compensable workers' compensation claim?

Again, it depends. While an employee who contracts a disease while traveling for business may be eligible for workers' compensation benefits in many jurisdictions, the analysis will be very fact-specific. In most states, the worker will need to satisfy the test for compensability outlined above. States often differentiate between exposures that occur while "working" during a business trip versus exposures that occur during "down time." Some states create almost strict liability for any injury that occurs on a business trip, whether the employee is working or not. But again, in order to have a compensable claim, the employee must, at a minimum, establish that they had an exposure to the coronavirus while traveling for business. Like other matters, these cases are best examined on a case-by-case basis under advice of counsel.

What are the likely benefits an employee will be eligible to receive if their coronavirus infection is found to be a compensable workers' compensation claim?

The good news is that, except in rare situations, an employee diagnosed with the virus will have no significant long-term health care problems. Therefore, medical costs associated with the claim are likely to be limited to visits to the family physician and anti-viral medications. More significant cases may involve hospital stays of two to three weeks.

The compensation costs should also be limited to the lost time associated to any recovery time. They may also be associated with lost time due to quarantine as required by the employer or local, state, or federal government agencies.

There could be more significant costs in extreme and rare situations involving complications from the virus. However, these cases would usually be limited to claimants who are older or suffer from immune deficiencies.

Can my company make changes to unionized employees work schedules or duties in response to the COVID-19 coronavirus?

The National Labor Relations Act (NLRA) imposes on employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. Generally speaking, employers who make unilateral changes to these facets of employment may be subject to unfair labor practice charges that would apply even in emergency situations such as this one, unless your collective bargaining agreement provides otherwise. Many collective bargaining agreements contain provisions that allow for employer flexibility in determining work assignments, scheduling, and layoffs. The first authority for determining your rights and obligations is your own collective bargaining agreement.

I have a "force majeure" clause in my contract. Does it cover an outbreak such as the COVID-19 coronavirus?

Possibly. A "force majeure" clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. Whether an outbreak like the COVID-19 coronavirus triggers the force majeure clause in a contract, and the effect of that clause on the provisions of the contract, will vary significantly with each employer.

There is no force majeure clause in my contract. Does that mean I still have to abide by all of the contract provisions during the outbreak?

The general duty to bargain over changes in contractual terms may be suspended where compelling economic exigencies compel prompt action. The law views "compelling economic exigencies" as extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action and make a unilateral change.

Although an outbreak like the COVID-19 coronavirus would seem to fit the description of a "compelling economic exigency," realize that its effect will be different for every employer. That is, while it may suspend the duty to bargain for one employer whose only facility was infected, it will likely not suspend the duty for an employer that has lost significant accounts or contracts as a result of the outbreak. In practice, the safest course of action (and the one most likely to avoid future litigation) is to notify the union in all cases, even if you believe that your particular situation fits into the "compelling economic exigency" category.

How much notice do I have to give the union before I make a change to my contract?

The law requires employers to give the union "adequate" notice of a proposed change to the collective bargaining agreement, so as to engage in meaningful bargaining over that change on request. There is no hard and fast rule as to how much notice is adequate. But where an employer can show a need for a prompt change and time is of the essence, a notice period as short as a couple of days might be considered adequate under the circumstances. Note: each agreement establishes a certain protocol to terminate or amend the agreement.

Wouldn't our no-strike clause prohibit bargaining unit members from refusing to work?

That would likely depend on a host of factors ranging from the articulated rationale for withholding services to specific language within the no-strike clause itself. Most such provisions effectively preclude covered employees from striking or otherwise refusing to perform work as scheduled. By the same token, long-standing labor relations doctrine generally requires bargaining unit members to, "work now, and grieve later."

That being said, such provisions do not necessarily trump those aspects within Section 13(a) of the OSH Act entitling all employees to refuse to work if they reasonably believe they are in imminent danger, and compelling employees (particularly in high risk industries) to report for work under such circumstances may also present adverse public relations implications. Consequently, circumstances like these are best examined on a case-by-case basis under advice of counsel and – in some circumstances, following dialogue with the authorized bargaining representative.

Can the union strike if we refuse to make any changes to our CBA in light of the COVID-19 crisis?

Probably not. Most collective-bargaining agreements (CBAs) contain no-strike provisions prohibiting unions from striking in support of demands for changes to the agreement. Because parties are not required to make mid-term CBA changes, it typically would be illegal for a union to strike under these circumstances.

https://www.nlrb.gov/rights-we-protect/rights/nlra-and-right-strike

We need to modify employee schedules and work hours in response to the COVID-19 pandemic, but our CBA appears to prohibit us from doing so. What can we do to implement these necessary changes?

In the absence of CBA language expressly allowing unilateral modification of such policies, the employer may do so only with the union's consent. While it is acceptable for either party to propose mid-term modifications, the other side is not required to agree (or even bargain over it). Importantly, in times like these, you should stress to the union how critical it is to secure necessary changes to avoid the prospect of potential layoffs or shutdowns in the short term.

The union is asking us to sign Letters of Understanding and related documents that would require us to make changes to things like our attendance and layoff policies. Do we have to sign these? How should we respond? (NDERA or MOU)

You should carefully scrutinize any union demand to change existing policies (even under the current circumstances), especially if those policies are outlined in a CBA. Employers generally do not have an obligation to bargain over policy changes mid-term and therefore would have no obligation to sign a Letter of Understanding changing such policies on demand. While either party may propose a mid-term contract modification, the other side is not required to agree (or even bargain over it) at that stage of the process.

If, on the other hand, the union is responding to new policies addressing COVID-19 concerns, and the subject matter falls outside the CBA, the union would potentially retain the right to bargain over implementation and the effects on unit employees. If no CBA is in effect and you are confronted with a union proposal to change existing policies, you will most likely be obligated to bargain in good faith over the proposed change but not to automatically make any changes on demand.

We are laying off many of our bargaining unit employees who participate in a multiemployer pension plan. Will this result in withdrawal liability?

Probably not. A withdrawal is normally not triggered unless an employer permanently ceases contributions to a multiemployer pension plan on behalf of its bargaining unit employees. A temporary layoff would not be a "permanent" cessation.

However, care must be taken if the employer does not intend to rehire some of the bargaining unit, or if it plans to close a contributing facility or shift production to other locations that do not contribute to the plan. A combination of these actions can trigger a partial withdrawal and partial withdrawal liability if the employer is not careful. Partial withdrawals can also take place if an employer's contributory hours or weeks fall by more than 70%. However, this reduction must continue for three years before a partial withdrawal is triggered.

We are now bargaining for a new CBA. Are we obligated to continue meeting at reasonable times and places for bargaining purposes?

Yes. Absent any emergency guidance by the NLRB, the parties are generally required to continue engaging in good faith negotiations for a new agreement. The good faith requirement, however, does not impose a minimum standard in terms of frequency, duration, or even nature of bargaining sessions, and things such as schedules, safety concerns, and inability to travel may be taken into account if the NLRB is ever called upon to evaluate whether a party engaged in good faith bargaining during the COVID-19 pandemic.

To best protect your interests under these unique circumstances, you are encouraged to regularly communicate with the union regarding your desire to further the bargaining process and explain any operational or business challenges that may pose constraints on the ability to meet and negotiate. As always, if the union suggests a bargaining date that does not work from a logistical or operational standpoint, be sure to articulate (preferably in writing) why, and be prepared to consider alternatives, including telephonic conferences or Skype sessions. The key to avoiding bad faith bargaining allegations is to stay engaged and communicate on a proactive basis.

A local union representing our workers has sent us an information request seeking a number of items, ranging from a copy of our COVID-19 business plan to detailed information about how we intend to manage the crisis. Are we required to respond?

If you maintain unprivileged documents fitting these descriptions, you would likely have to furnish them to the extent they otherwise relate to employment terms and conditions. Therefore, you should consider consulting with legal counsel before embarking upon the development of any strategic plans to address COVID-19 issues. If you have already developed a plan and no privilege applies, it may still raise certain confidentiality concerns, especially within the healthcare industry (where patient privacy laws may also apply).

Does our CBA exempt us from complying with new federal emergency FMLA expansion and paid leave requirements or related federal provisions that may soon be implemented?

Probably not. The Families First Coronavirus Response Act (which applies to employers with less than 500 employees) states that its provisions may not operate to "diminish" benefits within pending CBAs. It does not, however, exempt those CBAs from meeting the new legal requirements. This is consistent with how the FMLA and other employment-related statutes such as Title VII operate.

Generally speaking, a CBA can provide greater protection than that afforded by law, but it cannot provide less protection. Nonetheless, the Families First Coronavirus Response Act does permit employers covered by multiemployer bargaining agreements to make additional contributions to their multiemployer trust or benefit plans in lieu of offering the new paid leave.

https://docs.house.gov/billsthisweek/20200309/BILLS-116hr6201-SUS.pdf