

## Comprehensive And Updated FAQs For Employers On The COVID-19 Coronavirus

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**LAST UPDATED: March 16, 2020**

Fisher Phillips has assembled a cross-disciplinary taskforce of attorneys across the country to address the many employment-related issues facing employers in the wake of the COVID-19 coronavirus – especially now that the World Health Organization has declared the outbreak as a pandemic. The COVID-19 Taskforce has created a Frequently Asked Questions (FAQ) document, which has been continually updated since first published on March 3 and will continue to be updated as events warrant. **It has been completely updated to address the many additional workplace law rights and responsibilities given the pandemic designation.** You can contact your Fisher Phillips attorney or any member of the Taskforce with specific questions, and a full listing of the Taskforce members and their practice areas is at the end of this publication.

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**UPDATED: March 12, 2020**

### **BACKGROUND**

A new virus first identified in Wuhan, China in late 2019 has been spreading across the globe and is now in the United States. The new coronavirus, COVID-19, is not a flu but a pneumonia-like infection. Coronaviruses, so called because of their crownlike shape, range from the common cold to SARS-CoV and 2012's MERS (Middle East Respiratory Syndrome). They differ from Avian (H1N1) influenza and swine flu.

On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 coronavirus outbreak as a pandemic. This designation signifies that we are in the midst of a global disease outbreak, which occurs when a new virus emerges for which there is little or no immunity in the human population, begins to cause serious illness, and then spreads easily person-to-person worldwide. There have only been four influenza pandemics since 1900. The most recent pandemic declaration was the H1N1 outbreak in 2009.

Once a pandemic is declared, public health officials use the Pandemic Severity Assessment Framework to determine the impact of the pandemic. Two main factors are used to determine the impact of a pandemic. First, the **clinical severity**, or how serious is the illness associated with infection. Second, the **transmissibility**, or how easily the pandemic virus spreads from person-to-person. The CDC uses these two factors to determine which actions to recommend at a given time during the pandemic. It will be important to monitor the Centers for Disease Control's (CDC's) pandemic severity assessment, as the severity level greatly affects the actions



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that an employer may take during a pandemic.

### **What are the symptoms of the current COVID-19 coronavirus?**

The virus symptoms manifest as a mild to severe respiratory illness with fever, cough, and difficulty breathing. The CDC believes at this time that symptoms may appear in as few as two days or as long as 14 days after exposure.

### **How is the current COVID-19 coronavirus transmitted?**

People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets also land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose, or mouth. Therefore, it is important to stay more than 1 meter (3 feet) away from a person who is sick. The CDC recommends as much as 6 feet. It is possible to catch the virus from someone even before they have symptoms, but little is known about this aspect of the virus at this time.

### **Can the virus spread from contact with infected surfaces or objects?**

It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.

## **WORKPLACE SAFETY ISSUES**

### **UPDATED QUESTION & ANSWER (March 12, 2020)**

#### **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.

#### **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.



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### 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.
- Performing autopsies on known or suspected pandemic patients.

### 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.

### UPDATED ANSWER (March 12, 2020)

#### 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.

During the H1N1 pandemic, the Equal Employment Opportunity Commission (EEOC) stated that advising workers to go home is not disability-related if the symptoms present are akin to the seasonal influenza or the H1N1 virus. Therefore, an employer may require workers to go home if they exhibit symptoms of the COVID-19 coronavirus or the flu.

### UPDATED ANSWER (March 12, 2020)

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



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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 ADA prohibits employers from requiring medical examinations and making disability-related inquiries 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.

Taking an employee's temperature may be unlawful if is not job-related and consistent with business necessity. The inquiry and evaluation into whether taking a temperature is job-related and consistent with business necessity is fact-specific and will vary among employers and situations. The EEOC's position during a pandemic is that employers should rely on the latest CDC and state or local public health assessments to determine whether the pandemic rises to the level of a "direct threat." The assessment by the CDC as to the severity of COVID-19 will provide the objective evidence needed for a medical examination. If COVID-19 coronavirus becomes widespread in the community, as determined by state or local health authorities or the CDC, then employers may take an employee's temperature at work.

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.

### **UPDATED QUESTION & ANSWER (March 6, 2020)**

#### **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 for a 14-day period of time to ensure the infection does not spread. Before the employee departs, ask them to identify all individuals who worked in close proximity (three to six feet) 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. You may also want to consider asking a cleaning company to undertake a deep cleaning of your affected workspaces. If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary.

### **UPDATED QUESTION & ANSWER (March 5, 2020)**

#### **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.



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### UPDATED QUESTION & ANSWER (March 12, 2020)

**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 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, or similar facts. You should err on the side of caution but not panic.

If COVID-19 becomes severe, inquiries into an employee’s symptoms, even if disability-related, are considered justified by the EEOC as a “reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.” You must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

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.

### UPDATED QUESTION & ANSWER (March 5, 2020)

**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?**



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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.

### **UPDATED QUESTION & ANSWER (March 6, 2020)**

**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.

### **UPDATED QUESTION & ANSWER (March 9, 2020)**

**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.

### **UPDATED QUESTION & ANSWER (March 16, 2020)**

**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.

### **UPDATED QUESTION & ANSWER (March 9, 2020)**

**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:



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- 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.

### **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."





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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.

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.

### **UPDATED ANSWER (March 15, 2020)**

#### **Can employers in the United States 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



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want to wear a mask to do so without necessarily encouraging them if it makes them feel safer.

### **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.

### **UPDATED QUESTION & ANSWER (March 16, 2020)**

#### **Can we open childcare centers at our workplace for employees' children who are not allowed to go to school?**

No. Though while well-intentioned, childcare centers and daycares require proper licensing from your state. Unless you already have or can obtain the proper licensure, you should refrain from doing so.



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### **UPDATED QUESTION & ANSWER (March 16, 2020)**

#### **Can we instead offer informal “entertainment areas” or “kid zones” for employees’ children who are not allowed to go to school?**

You should probably refrain from offering informal “entertainment areas” or “kid zones” because state regulating agencies may consider them unlicensed daycares. Additionally, the reason that schools have been closed across the country is to encourage social distancing in an effort to stop the spread of the COVID-19 coronavirus. Allowing children to gather in “kid zones” would place children in close quarters and would risk spreading the virus among the children and the workforce. You may instead consider clearly communicating with those on your staff who are able to work remotely that you will be flexible to allow them to parent their children during this time, which may include adjusting schedules, holding phone calls or video meetings during off-hours, and other alterations. Even a quick message letting your employees know that managers will not mind if children are sitting on laps or making noise in the background during phone calls and video conferences could go a long way toward making your employees feel comfortable.

### **UPDATED ANSWER (March 15, 2020)**

#### **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:

1. The case is a confirmed case of COVID-19;
2. The case is work-related, as defined by 29 CFR 1904.5; and
3. 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).

### **UPDATED ANSWER (March 15, 2020)**

#### **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.



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### **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 should healthcare employers do to protect workers from exposure to the COVID-19 coronavirus?**

Healthcare personnel caring for patients with confirmed or possible COVID-19 should adhere to CDC recommendations for infection control and prevention (ICP):

- Assess and triage these patients with acute respiratory symptoms and risk factors for COVID-19 to minimize chances of exposure, including placing a facemask on the patient and isolating them in an Airborne Infection Isolation Room (AIIR), if available;
- Use Standard Precautions, Contact Precautions, and Airborne Precautions and eye protection when caring for patients with confirmed or possible COVID-19;
- Perform hand hygiene with alcohol-based hand rub before and after all patient contact, contact with potentially infectious material, and before putting on and upon removal of PPE, including gloves. Use soap and water if hands are visibly soiled;
- Practice how to properly don, use, and doff personal protective equipment (PPE) in a manner to prevent self-contamination; and
- Perform aerosol-generating procedures in an AIIR, including collection of diagnostic respiratory specimens, while following appropriate IPC practices, including use of appropriate PPE.

In addition, healthcare employers must comply with any state-specific requirements to protect healthcare workers from exposure. For instance, healthcare facilities in California are required to follow recommendations under CAL/OSHA's Aerosol Transmissible Diseases (ATD) Standard, Title 8 of the California Code of Regulations Section 5199. Because COVID-19 meets the criteria for a novel aerosol transmissible pathogen under the ATD Standard, California healthcare employers must provide a powered air purifying respirator with a HEPA filter(s), or a respirator providing equivalent or greater protection, to employees who perform high hazard procedures on COVID-19 persons under investigation or confirmed cases.



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### ISSUES FOR WORKFORCES THAT TRAVEL

#### UPDATED ANSWER (March 16, 2020)

##### 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.

#### UPDATED QUESTION & ANSWER (March 15, 2020)

##### 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



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- People whose entry would further important U.S. law enforcement objective or would be in the national interest.

### **UPDATED QUESTION & ANSWER (March 15, 2020)**

#### **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.

### **UPDATED QUESTION & ANSWER (March 15, 2020)**

#### **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



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be referred to the CDC for medical evaluation.

### **Does the Chinese travel restriction apply to those visiting Taiwan, Hong Kong, and Macau?**

No. It only applies to those who were present in the People's Republic of China, and specifically exempts Hong Kong and Macau. In addition, the U.S. immigration law and various other regulations treat Taiwan (a.k.a. Republic of China) separately from the People's Republic of China. Therefore, Hong Kong, Macau, and Taiwan are all exempt from these travel restrictions.

### **Who is exempt from the Chinese travel restrictions?**

The order provides a long list of exempt immigration statuses. For example, people traveling on crew member visas, or diplomatic or International Organization visas are exempt. It also exempts Lawful Permanent Residents (green card holders), spouses and children (unmarried under 21) of U.S. citizens and green card holders, and parents and siblings of unmarried under 21-year-old U.S. citizens and green card holders.

The proclamation also includes a provision that permits entry of any foreign national 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.

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- 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.

### **UPDATED ANSWER (March 5, 2020)**

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

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.

### **UPDATED ANSWER (March 12, 2020)**

#### **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





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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.

### **UPDATED QUESTION & ANSWER (March 4, 2020)**

**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?**

There is likely no greater risk of this employee being infected with the COVID-19 coronavirus than any of your other employees. Follow the same preventive steps and guidance contained within this FAQ to put your organization in the best position.

### **Can employees refuse to travel as part of their job duties?**

Employees who object on behalf of others or act in groups could be covered by the NLRA's protection of concerted protected activity. You will want to proceed with caution and consult with your attorney before taking any steps in this regard. Moreover, under the federal OSH Act, employees can only refuse to work when a realistic threat is present.

Therefore, if employees refuse your instruction to travel for business to any other country for fear of catching the COVID-19 coronavirus, try to work out an amicable resolution. For example, the employer and the employee can check and discuss the CDC (avoid Nonessential travel), State Department (Do Not Travel to China), and DHS Travel Advisories, which provide guidance on China Travel.

The CDC is also advising that some individuals may be more at risk of infection than others in the general population. Thus, follow the CDC direction on pregnant employees or on related reproductive issues, and do not make decisions without medical support. Moreover, actions by other countries, especially in Asia, may cause employee concerns, and absolute warnings and restrictions like those on China may not exist.

### **REMOTE WORK**



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### **UPDATED QUESTION & ANSWER (March 9, 2020)**

#### **Should we institute a temporary remote work policy in light of the COVID-19 coronavirus outbreak?**

Whether your company implements a remote work policy is entirely dependent on your organization's circumstances and the area of the country where your workers reside. You may not want to introduce a new system in place if you have had not yet had time to test and develop your remote work capabilities. On the other hand, if you have established protocols in place, this could be a good opportunity to leverage them. Regardless of what you choose to do, you should make your decision based on objective evidence and not emotion or fear. Make sure your decision is educated and intentional, not reactionary and spur-of-the-moment.

### **UPDATED QUESTION & ANSWER (March 9, 2020)**

#### **What infrastructure should we have in place for a remote work plan?**

You will want to identify the roles that are critical to your business operations and determine whether those individuals can carry out their jobs while working remotely. If you can proceed, the next critical component is assessing your technological capabilities. Do you have the support in place to assist with the inevitable questions and IT problems that will arise? Do you have sufficient security and privacy protocols in place? Considering these questions will help you determine whether you can move forward with a remote work plan.

### **UPDATED QUESTION & ANSWER (March 9, 2020)**

#### **What can we do to prepare for a possible remote work scenario?**

There are a number of things you should do today to prepare for the possibility that your workers will need to operate remotely for a period of time.

- Take an inventory of the types of equipment your workers would need to get their job done and ensure they have access to them. This could include laptops, desktop computers, monitors, phones, printers, chargers, office supplies, and similar materials.
- Encourage your employees to prepare for the possibility of an immediate instruction to work at home. They may want to develop a "ready bag" that they take home with them at the end of each day that would allow them to begin working remotely at a moment's notice. This would obviously include laptops, smartphones, and other related technology, but could also include physical items (such as binders, documents, materials).
- Make sure you consider and clearly communicate with your workers about which physical items are acceptable to be taken from the workplace and which need to stay in your location at all times.
- You might want to take the time now to digitize any relevant physical materials to make remote working easier.



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- You will also want to communicate with your workforce about whether they can or should take digital photos of physical calendars, whiteboards, Kanban boards with stickie notes, or similar items, or whether they are prohibited from doing so.
- But perhaps the most important thing you should do is take the time to develop a remote work policy if you do not have one in place, or review and update your existing policy as it relates to this specific situation.

### UPDATED QUESTION & ANSWER (March 9, 2020)

#### What should be included in a remote work policy?

Your policy should lay out the expectations you have for your workers as they embark on their temporary remote work routines. The number one item you should convey to them is that you expect them to help your organization maintain normal business operations during this period of time to the extent possible. Consider all aspects of their work and make sure they understand what is expected of them.

- How strict will your policy be? Are your workers simply encouraged to work at home or absolutely barred from coming to the office?
- Will there be exemptions for “essential” personnel that need to be at a certain physical location?
- Will they need to be available at all times during working hours, or will remote meetings and appointments be scheduled ahead of time? (Take into account that your workers’ lives may be disrupted in other ways because of the COVID-19 outbreak, and therefore they may not be able to maintain normal working hours during this time or may be somewhat distracted by family or medical obligations during certain times of the day.)
- Will remote meetings take place online, over the phone, or on camera?
- Will you prohibit employees from meeting together in person during this period? Will you only restrict in-person meetings of a certain size (no more than three or five workers)?
- Will you prohibit employees from meeting with third parties while doing company business during this period of time?
- Will you prohibit workers from performing work outside of their homes (coffee shops, libraries, etc.) because of security concerns? If this kind of work is permitted, do you have sufficient security infrastructure in place (encryption, password-protection, log-out/lock requirements, etc.) and are your workers aware of your requirements to prevent data breaches or other loss?
- Can workers perform work on their own devices, and if so, do you have a comprehensive BYOD (bring your own device) policy in place?



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You should include an anticipated end date in your remote work announcement, and/or inform your employees that you will provide weekly updates regarding the status of the remote work period.

### **UPDATED QUESTION & ANSWER (March 9, 2020)**

#### **What are some concepts we should keep in mind to ensure our remote work time is productive and successful?**

There are a number of steps you can take to ensure that the temporary remote work time goes well for your workers and for your organization.

- From a functionality standpoint, you may want to agree on a single communications platform that all workers will be required to participate in. It could be email, instant messaging, Slack, Skype, Zoom Conferencing, or some other designated tool.
- Take an honest approach with yourself about whether any concerns you have regarding reduced productivity among your workers while they are working at home are realistic or overblown. Recognize that you aren't babysitting your employees while they are performing work at the office, so you shouldn't begin to micromanage them while they are at home. Keep an eye on the bigger picture and track overall productivity, not moment-by-moment activities.
- In fact, experts say that overwork is more likely for remote workers than a lack of productivity, especially in the first week of a remote work assignment. Keep an eye out for employee burnout and overstressed workers and address your concerns as appropriate.
- Another concern for workers not used to working remotely is that they may feel untethered and disconnected from the organization during this time period. Some tactics to prevent and overcome this problem include:
  - Developing and distributing an agenda for all team get-togethers and meetings, as well as meeting minutes and task lists after they are completed, so that those unable to attend can feel part of the action;
  - Schedule virtual team lunches and digital social time where workers can interact on a social level;
  - Connect workers new to remote work with your experienced remote workers to serve as informal mentors, available to answer questions or give advice about best ways to cope with the change and handle work; and
  - Consider other ways to ensure your workers feel connected with each other and with the organization, whether that includes daily meetings, frequent phone calls or texts, or other actions that can go a long way towards ensuring their peace of mind.

### **INTERNATIONAL WORKFORCES**



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### **UPDATED ANSWER (March 15, 2020)**

#### **What should we do about expats working abroad and our global workforce?**

Generally, the reaction to the COVID-19 coronavirus varies from country to country (or even jurisdiction to jurisdiction within a particular country). Employers with expats or other employees abroad should ensure copies of all expat assignment agreements and contracts are nearby if needed for reference. Most often the resolution of issues related to obligations with respect to these employees begin with reviewing applicable contractual obligations and agreements. You should also review all travel, medical, and other insurance policies to determine coverage limitations and to help assess risk.

If you have expats or globally mobile employees who become stranded in a particular jurisdiction either because of locally imposed travel restrictions or simply an inability to obtain transportation, you should be prepared to provide emergency support that may include assistance with accommodations, local medical and security advice, and possibly a temporary financial supplement until onward travel can be arranged. Again, a thorough review of contractual obligations and applicable policy documents is the starting point.

### **UPDATED ANSWER (March 15, 2020)**

#### **Should we bring our expats home?**

In some circumstances, it may be best practice to do so. You should undertake a careful evaluation of conditions in the location where they are living and working on a frequent basis. It would be a good practice to require your expat employees to regularly report back on conditions and their circumstances. When evaluating a decision to bring an expatriate home, a careful review of travel restrictions and health screening obligations upon return should be considered.

#### **What if one of our expat employees becomes quarantined abroad?**

If an expat or employee is quarantined abroad, you should seek legal and other advice regarding the particular facts and circumstances of the situation. You will need to develop a plan to meet your obligations to the employee and their family, as well as your company needs. Each situation will be different, so your advice will need to be tailored to the situation.

#### **What about our expats located in an area that is heavily affected by the COVID-19 outbreak?**

In areas currently heavily affected, you should undertake a thorough review of conditions as they pertain to all employees within the area on a daily basis. The applicable laws vary from jurisdiction to jurisdiction. Some countries impose significant obligations concerning a duty of care to employees on employers that are more comprehensive than U.S. rules. You should not assume the law in other jurisdictions applies as it does here.



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### IMMIGRATION ISSUES

#### **What will happen to my foreign national's immigration status if they are stuck outside the U.S.?**

Generally speaking, U.S. immigration law only applies to a foreign national when that person is physically in the country. In most situations, a person is not considered to have failed to maintain lawful immigration status if they are not physically in the U.S. The employee's absence from the U.S., however, could trigger other collateral immigration issues. It is important to seek specific legal advice for each impacted case.

#### **UPDATED QUESTION & ANSWER (March 15, 2020)**

#### **Do the Presidential Proclamations mean that the U.S. consulates will deny all visa applications filed in the restricted counties in those non-exempt categories?**

A blanket visa denial rule is unlikely because the terms of these orders make it permissible to depart from a restricted country, remain in a third country for 14 days, and then lawfully seek entry into the U.S.

Certain consular posts have alerted applicants of reduced or suspended visa services, including China, India, Italy, Paris, France, Dublin, Ireland, Munich, Germany, and Madrid, Spain. Further cancellations and reductions in visa services are possible in the coming days.

The Department of State compiled a list of embassy websites for country-specific information concerning COVID-19. This page provides links to the COVID-19 dedicated page for each nation's embassy which includes information concerning health services, recommendations, and in some cases, information concerning a reduction or temporary suspension of visa services. Employers should check the respective post or embassy's website before foreign national employees travel abroad and before planning the transfer of employees to the U.S. Due to the ongoing situation relating to the COVID-19 coronavirus outbreak, the U.S. Embassy and Consulates have very limited staffing and may be unable to respond to requests regarding regular visa services.

#### **Does the Presidential Proclamation affect those with visas?**

The Proclamation specifically exempts any alien seeking entry into or transiting the United States pursuant to an A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 visa.

#### **If my foreign national employee is subject to these travel restrictions, what are my options to get them back to the U.S. as soon as possible?**



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This will be a case-by-case analysis, but most likely the employee will have to consider going to a third country, remain in that third country for at least 14 days, and then proceed to the U.S. This may require extra planning, such as dealing with a visa to go to the third country. In addition, when several other countries have started to implement similar travel restrictions, the situation remains in flux. It is also unclear if the administration would expand this order to include more countries and regions depending on the ongoing situation of the outbreak.

### **What issues can we expect green card holders to encounter?**

Travel restrictions may cause issues for green card holders who have already been outside of the United States for an extended period of time. Extended absences from the United States by green card holders may lead to extensive questioning upon re-entry or a determination that the green card holder has abandoned their permanent resident status.

### **What happens to employees on temporary visas who cannot work?**

Pending specific guidance from DHS, these workers would presumably be treated as if they were on an approved, unpaid leave, and therefore would not be out-of-status for failing to work.

### **UPDATED ANSWER (March 15, 2020)**

#### **Must I pay an H-1B alien the salary listed in the petition even if that person cannot now work?**

Again, you could presumably put such a person on an unpaid leave of absence until they are able to work again. Employers must provide H-1B workers with the same benefits and working conditions as U.S. citizen employees.

### **UPDATED QUESTION & ANSWER (March 15, 2020)**

#### **What if my H-1B employees must now work remotely from home?**

Under normal circumstances, H-1B workers are restricted to working at the worksites listed on the underlying Labor Condition Application (LCA) filed with the U.S. Department of Labor. The H-1B regulations, however, allow H-1B workers to work remotely temporarily if the new worksite is within the normal commuting distance from the worksite listed on the LCA. A new or amended H-1B petition is not required when the employee is at a new worksite for up to 30 workdays, and in some cases 60 workdays (where the employee is still based at the permanent worksite).

### **UPDATED QUESTION & ANSWER (March 15, 2020)**

#### **How can we continue to complete Form I-9 if employees are working remotely?**

Until further guidance is released by DHS, employers must continue to review a new hire's original documents – and this review process must be undertaken “in person” so that the employers, or an employer's authorized representative, can ensure that the documents relate to the individual



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seeking employment and that they appear to be genuine. You can complete the Form I-9 for remote workers in the following ways:

- Designate an authorized representative to fill out Forms I-9 on behalf of the company, including managers, personnel officers, foremen, agents, staff at your state unemployment or workforce agency, neighbors, or a notary public. The challenge for employers will be to find a representative with an open business. DHS does not require the authorized representative to have specific agreements or other documentation for Form I-9 purposes. If an authorized representative fills out Form I-9 on behalf of the employer, the employer is still liable for any violations in connection with the form or the verification process.
- If Fisher Phillips has an office location where the employee is located, the employee can come into one of our offices and we can complete the I-9; or
- There are roving notary services offered online that will drive to the employee's location and complete the I-9 for a fee.

Under all the options listed above, social distancing is encouraged to the extent possible until DHS agrees to more practical considerations for employers, such as suspending I-9 enforcement for a specified period of time, relaxing the rules on using teleconferencing to review documents, or allowing companies to make temporary notations in their I-9 files until business operations resume. Suspension of I-9 enforcement at this time is unlikely since Immigration and Customs Enforcement (ICE) served Notices of Inspection on hundreds of employers across the U.S. as the COVID-19 threat escalated during the week of March 9, 2020.

### HEALTHCARE/HIPAA ISSUES

#### **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





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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.

### **UPDATED ANSWER (March 12, 2020)**

#### **How should we treat medical information?**

We 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.



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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.

### **BENEFITS/GROUP HEALTH PLAN ADMINISTRATION**

#### **UPDATED ANSWER (March 4, 2020)**

##### **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.

#### **UPDATED ANSWER (March 4, 2020)**

##### **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.

#### **UPDATED QUESTION & ANSWER (March 15, 2020)**

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

It depends. If your plan is insured, you should contact your insurer to confirm coverage and cost-sharing parameters. As of early March 2020, insured plans in California, New York, Oregon, and Washington must cover COVID-19 testing at no cost to members, and a growing number of states are implementing similar mandates. In addition, several major insurers have stated that for insured



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plans, doctor initiated/provided diagnostic COVID-19 testing will be provided at no cost. Note, however, that the cost waivers applicable for testing do not extend to treatment activities at this time.

Self-insured plans are not required to provide COVID-19 coverage but are under increasing pressure to do so. Plans that want to provide coverage should note that TPAs are actively encouraging and facilitating employer coverage of diagnostic testing for coronavirus and in at least one case, a large ASO is requiring its self-insured employer clients to “opt-out” of cost-sharing for coronavirus testing.

Another item of particular note involves qualifying high deductible health plans (HDHPs) with health savings accounts (HSAs). Tax free contributions, by an employee or employer, to a HSA, are permitted only if: (1) an employee is enrolled in a HDHP that is prohibited from covering most services, other than “preventive care,” before the deductible is met and (2) an employee is not covered by any health plan that is not a HDHP.

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. Health plan language may impact what constitutes treatment and testing.

Employers should also keep an eye on proposed legislation. The U.S. House passed the Families First Coronavirus Response Act (H.R. 6201) on March 14, and is going to the Senate for consideration. Health provisions in H.R. 6201 include requiring private health plans to cover COVID-19 diagnostic testing, and related provider and facility costs, at no cost to the consumer and extending similar coverage and cost waiving benefits through select Medicare and Medicaid provisions.

### **UPDATED QUESTION & ANSWER (March 12, 2020)**

#### **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:

- 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



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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.

- 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.
- 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.
- 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.
- 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.

### **UPDATED QUESTION & ANSWER (March 12, 2020)**

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

It depends on plan terms. Independent contractors 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



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properly for eligibility purposes and that hours are measured in compliance with the employer's ACA measurement method for full-time employees.

### **WAGE AND HOUR ISSUES**

#### **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?**

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.



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### EMPLOYEE LEAVE/ADA

#### **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.

#### **UPDATED QUESTION & ANSWER (March 12, 2020)**

#### **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.

#### **May an employer encourage employees to telework as an infection-control strategy?**



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Yes. The EEOC has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

### **DISCRIMINATION/HARASSMENT/EEO ISSUES**

#### **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.

### **LABOR RELATIONS**

#### **My workforce is unionized. Can my company make changes to unionized employees work schedules or duties in response to the COVID-19 coronavirus?**

The 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



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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.

### **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.





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### WARN ACT/PLANT CLOSINGS

#### **Do we have an obligation to provide notice under the 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 extensively 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. 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 so providing notice is usually the best practice.

Fortunately, even in cases where its notice requirements would otherwise apply, the WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances. This provision may apply to the COVID-19 coronavirus. But due to the fact-specific analysis required, this exception is often litigated.

Moreover, this exception is limited, in that an employer relying upon it 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.” 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 information that must be contained in each notice. Keep in mind that some states have “mini-WARN” laws that may apply. Please work with your employment counsel to ensure compliance notices are provided.

#### **Will this law really be enforced this law 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



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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.

### WORKERS' COMPENSATION

#### UPDATED QUESTION & ANSWER (March 9, 2020)

#### **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



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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.

### **UPDATED QUESTION & ANSWER (March 9, 2020)**

**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.

### **UPDATED QUESTION & ANSWER (March 9, 2020)**

**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.



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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.

### **EDUCATIONAL INSTITUTIONS**

Our Education Practice Group has published its own set of FAQs and a 10-Point Action Plan For Educational Institutions which can be accessed [here](#).

### **FISHER PHILLIPS COVID-19 TASKFORCE MEMBERS**

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### **CONCLUSION**

We will continue to monitor this rapidly developing situation and provide updates as appropriate, including updating this FAQ on as-needed basis. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our COVID-19 Taskforce, headed by Travis Vance and Howard Mavity.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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