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# Employment Law & Worker Safety Implications of COVID-19

March 31, 2020

**Conn Maciel Carey LLP**  
**Labor & Employment and OSHA Practice Groups**

# Agenda

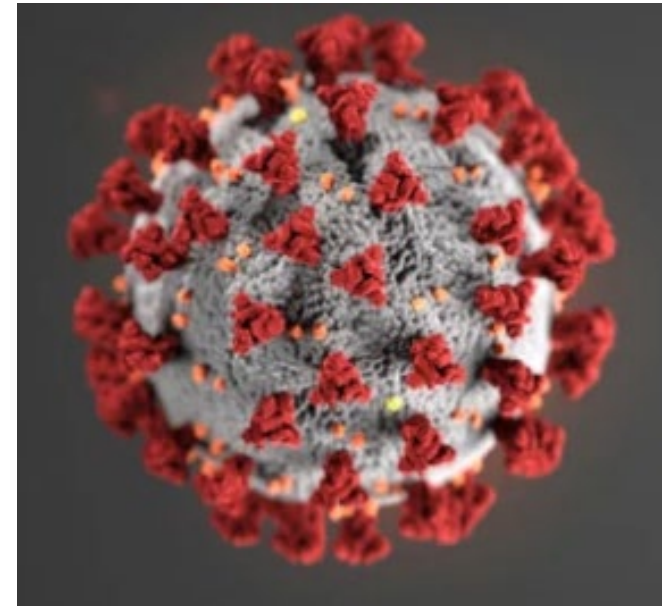
## ✓ Labor and Employment Implications

- EEOC Guidance
- Sick Leave
- Employer FAQs

## ✓ OSHA Implications

- Workplace Safety Guidance
- Respiratory Protection & PPE
- Recordkeeping and Reporting
- Notices of Alleged Hazard (Employee Complaints)

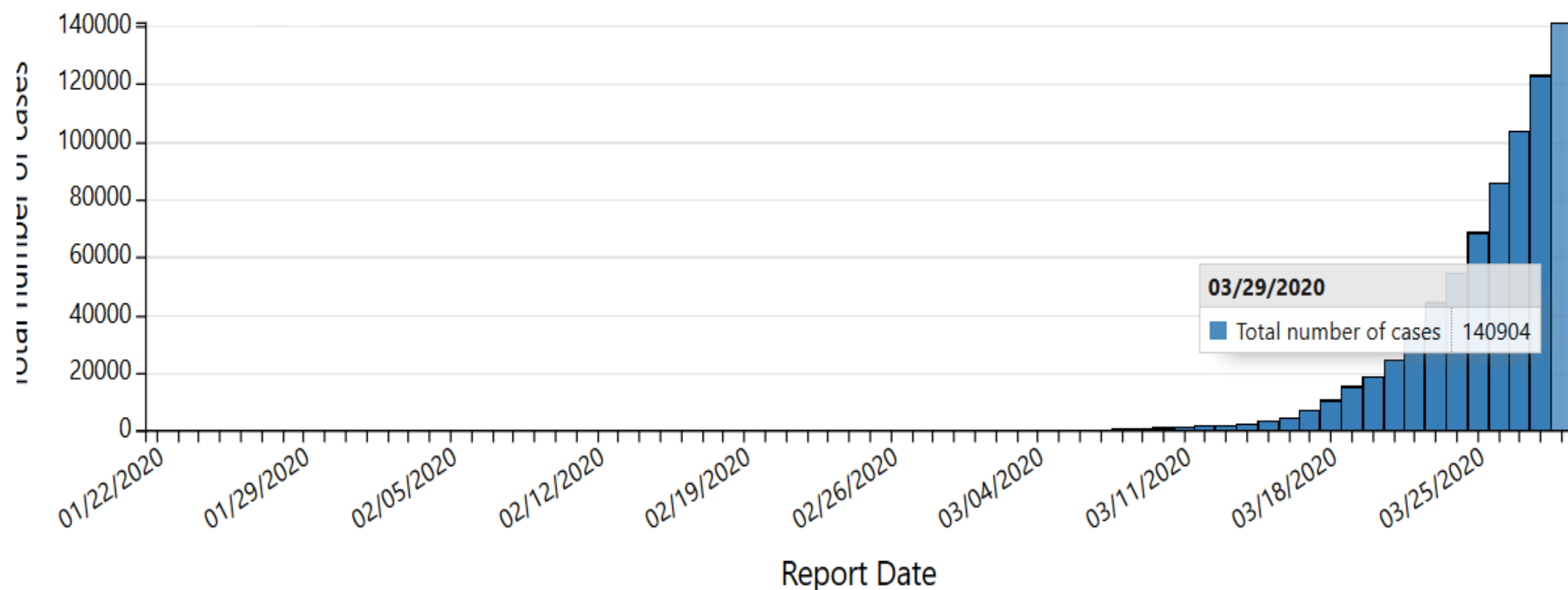
## ✓ CDC Guidance and Best Practices for Employers



# Coronavirus in the US

## (as of March 29, 2020)

Cumulative total number of COVID-19 cases in the United States by report date, January 12, 2020 to March 29, 2020, at 4pm ET  
(n=140,904)\*†



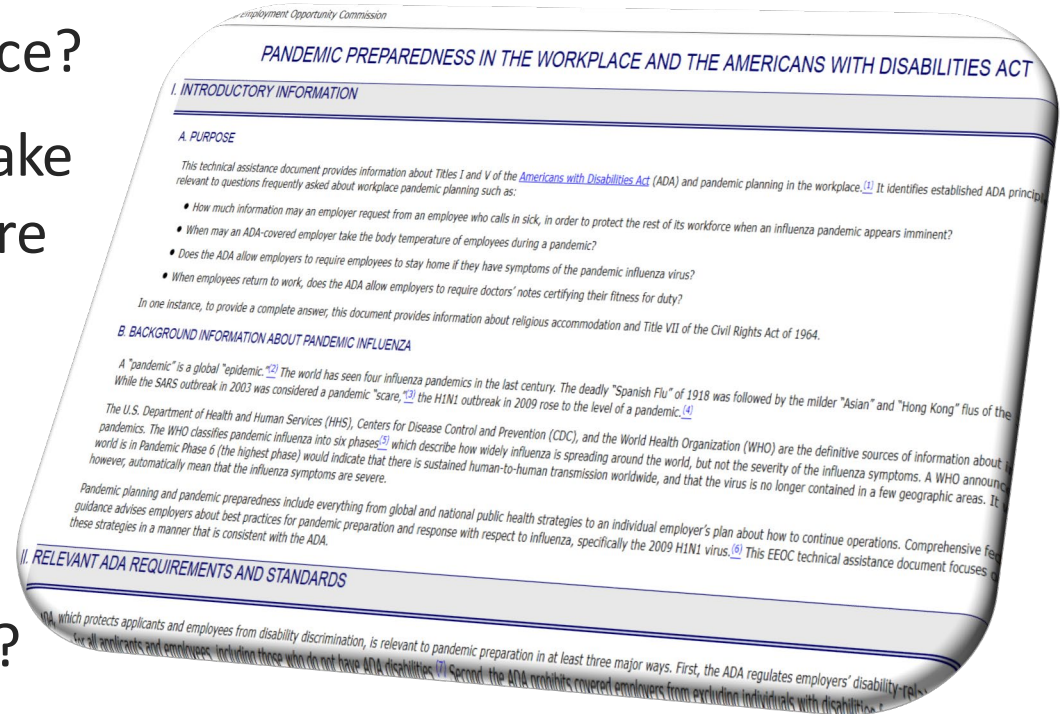


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# Labor & Employment Implications of Coronavirus

# EEOC Guidance on Pandemics

- The EEOC has released Technical Guidance about pandemic planning in the workplace
  - How much info may employers request from employees who call in sick to protect the rest of the workforce?
  - When may employers take employees' temperature during a pandemic?
  - Does the ADA allow employers to require employee stay home if they have symptoms?





# FAQ: Can I encourage my employees to stay home if they are sick?

- Yes, CDC recommends that employees w/ symptoms of acute respiratory illness should not go to work until they are free of fever (100.4° F + by oral thermometer), signs of a fever, and any other symptoms for at least 72 hours, w/out use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants)
- Employees should notify their supervisor and stay home if sick



## **FAQ: What can an employer ask an employee who calls in sick to protect the rest of the workforce?**

During a pandemic, employers may ask employees if they are experiencing symptoms of the pandemic virus

- For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat
- Employers must maintain all info about employee illness as a confidential medical record in compliance w/ the ADA

## **FAQ: Can an employer take the body temperature of employees during the COVID-19 pandemic?**

- Yes, because the CDC and state/local health authorities have acknowledged community spread of COVID-19, employers may now measure employees' body temperature
- However, employers should be aware that some people with COVID-19 do not have a fever.



## **FAQ: If an employee refuses to come into work out of fear of COVID-19, but their job duties do not permit telework, is that employee eligible for leave under FMLA or equivalent state leave laws?**

- Employer can take steps to ensure employees feel they are working in a safe working environment, such as extra cleaning, reduced staff, limited interaction w/ co-workers, etc.
- Employee who does not want to report to work due to an unrelated health condition is ineligible for FMLA unless s/he is under the care of a medical provider for a serious health condition
- Just staying home from work out of fear of contracting the virus b/c they are more susceptible due to an underlying health condition is not an FMLA-eligible condition

# Wage & Hour Considerations

**Must non-exempt employees whose work schedules are reduced due to a temporary closure be paid their regular schedule?**

- No, not under the FLSA. State and local law and collective bargaining agreements may have their own minimum hours or “show up pay” requirements, however.

**Must exempt employees like executives and supervisors be paid if they do not work due to a temporary closure?**

- As long as the executive, supervisor, or other exempt employee works part of the week, he/she must be paid for the entire workweek
- However, if an executive, supervisor, or other exempt employee is completely relieved of duty during the temporary closure, the employer can elect not to pay them for that workweek.

# Paid Leave Act

- On March 18, 2020, President Trump signed the “Families First Coronavirus Response Act”
- Includes new paid sick and family leave provisions
- Act provides paid leave benefits to employees of employers with fewer than 500
  - Employers with 50 or fewer employees can apply for a waiver from paid family leave
- Act takes effect on April 1
  - Until December 31, 2020



# Paid Sick Leave Benefits

## Permitted to use paid sick leave to:

- Subject to quarantine or isolation order related to COVID-19
- Advised to self-quarantine due to concerns of COVID-19
- Obtain diagnosis/care for symptoms of COVID-19
- Care for or assist family member meeting the aforementioned criteria
- Care for child whose school/daycare closed due to COVID-19
- Experiencing any other substantially similar condition as defined agencies

Full-time employees entitled to 2 weeks (80 hours)

Part-time employees entitled to avg. number of hours worked over 2-week period

Pay rate is dependent on the reason for the leave

Law explicitly does NOT preempt existing state/local paid sick leave requirements

# Paid Family Leave Benefits

Provides 12 weeks of paid FMLA leave – first 10 days may be unpaid, though employees must be permitted to use other paid leave during that time if they choose

Employees are eligible if they worked for employer for at least 30 calendar days

After the first 10 days, must compensate employees at a rate of at least 2/3 regular rate

Permitted to use paid family leave to care for child whose school/daycare closed due to COVID-19

# Employee Notice and Employer Tax Credits

- Must post/email employee rights notice to all employees, which is available for download on DOL's website
- Covered employers qualify for a dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA

## EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► **PAID LEAVE ENTITLEMENTS**  
Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.


A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

► **ELIGIBLE EMPLOYEES**  
In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

► **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**  
An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:


1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;	5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
2. has been advised by a health care provider to self-quarantine related to COVID-19;	6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;	
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);	

► **ENFORCEMENT**  
The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



**WAGE AND HOUR DIVISION**  
UNITED STATES DEPARTMENT OF LABOR

For additional information  
or to file a complaint:  
**1-866-487-9243**  
TTY: 1-877-889-5627  
[dol.gov/agencies/whd](https://dol.gov/agencies/whd)



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# OSHA Implications of Coronavirus

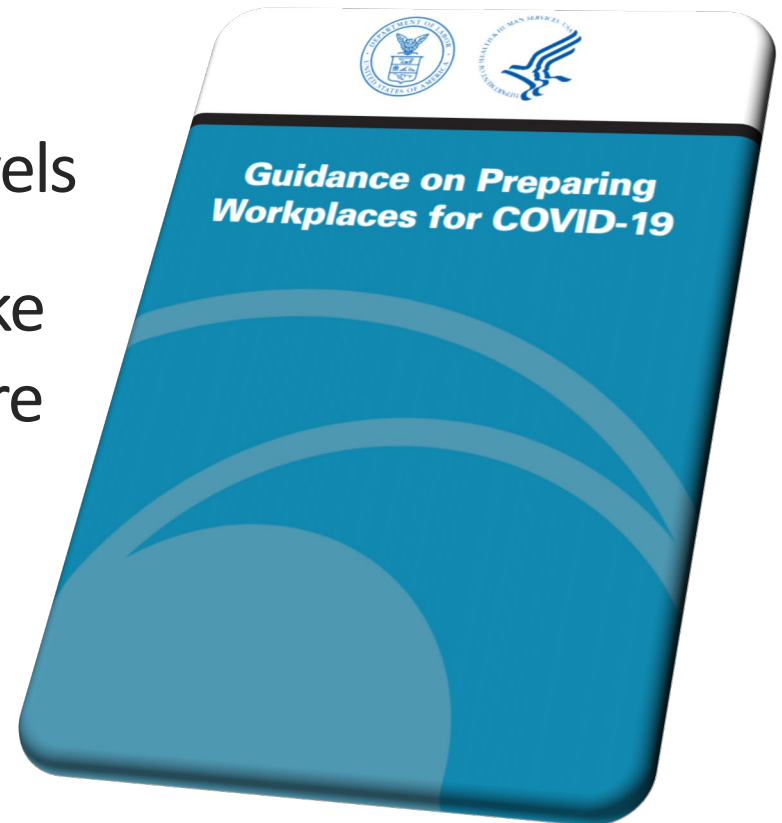
# General Duty Clause

- OSHA lists the General Duty Clause as a relevant standard that may apply to preventing occupational exposure to COVID-19
- Sec. 5(a)(1) of the OSH Act (the General Duty Clause):

“Each employer shall furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”
- 4 elements necessary to prove a violation:
  1. Hazard exists in the workplace;
  2. Employer or its industry “recognizes” the hazard;
  3. Hazard is like to cause death or serious injury; and
  4. Feasible means exist to eliminate/reduce the hazard

# Brand New OSHA Guidance

- Issued March 9, 2020
- Largely follows CDC's guidance
- Divides jobs into risk exposure levels
- Provides steps employers can take to reduce workers' risk of exposure
- Specifies what employers should do to protect workers based on the exposure level of their job



# Job Tasks by Risk Exposure Level

## Very high

- Healthcare / lab workers performing aerosol-generating procedures or handling specimens from known/suspected COVID-19 patients
- Morgue workers performing autopsies on bodies of known/suspected COVID-19 patients

## High

- Healthcare, support, and medical transport exposed to known/suspected COVID-19 patients
- Mortuary workers involved in preparing bodies of known/suspected COVID-19 patients

## Medium

- Those that require frequent and/or close contact (w/in 6 ft.) of people who may be infected w/ COVID-19 patients, but who are not known or suspected COVID-19 patients
- Where there is on-going community transmission, workers in this category may have contact w/ the general public

## Lower

- No required contact w/ people known/suspected of being infected w/ COVID-19, nor frequent close contact (w/in 6 ft.) of general public

# Steps to Reduce Worker Exposures

- Implement infectious diseases preparedness and response plan
- Prepare to implement basic infection prevention measures
- Develop procedures to promptly ID & isolate sick employees
- Develop, implement, and communicate about workplace policies, flexible work arrangements, and protections
- Implementing workplace controls (e.g., engineering controls, administrative controls, safe work practices, and PPE)

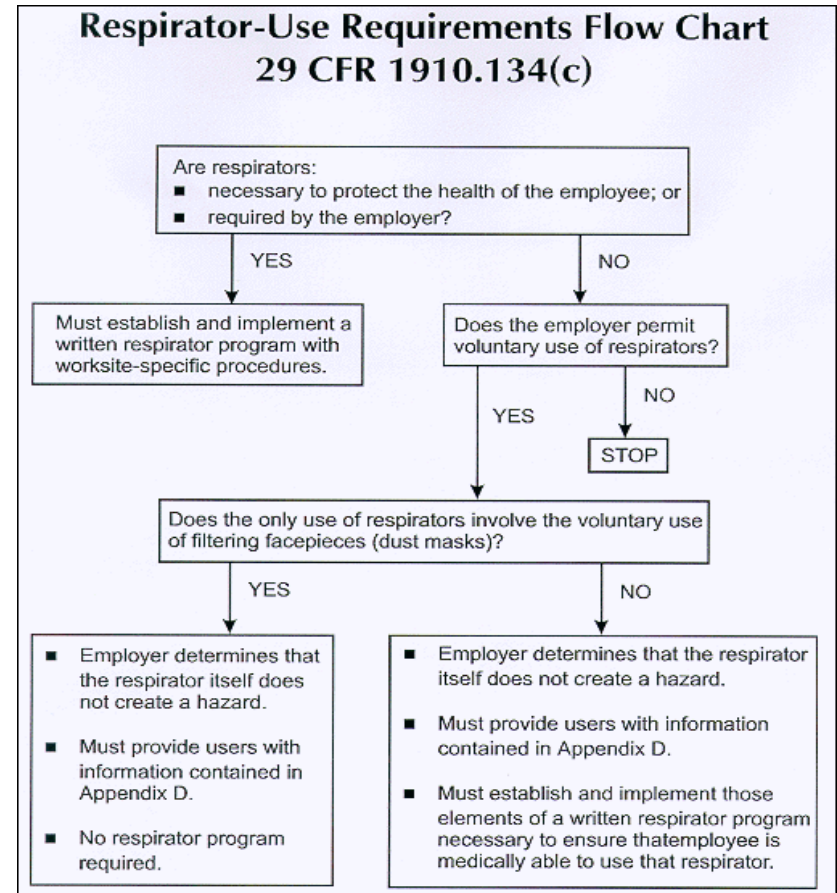
# Protective Measures to Consider

- Engineering controls (e.g., high-efficiency air filters, increasing ventilation rates, installing physical barriers such as sneeze guards, etc.)
- Admin. controls (e.g., require sick workers to stay home, virtual meetings, implement telework if feasible, job rotations/staggered shifts, etc.)
- Safe work practices (procedures to reduce duration, frequency, or intensity of exposures; e.g., requiring regular hand washing)
- Personal Protective Equipment (e.g., face shields, respiratory protection, gloves, gowns, etc.)



# Voluntary Use Respirators

- With public anxiety, employees around the country are asking permission to wear respirators/masks across all industries
- If employers permit “voluntary-use” (i.e., not required by employer for workplace exposures), the employer must still meet certain requirements of the Respiratory Protection Standard:
  - Filtering facepiece mask - provide employees a copy of Appendix D
  - More robust respirator - provide App. D, *and* medical evaluation and fit test, and ensure respirator is properly cleaned/stored/maintained



# FAQ: Do I have to provide or permit use of a respirator or mask if an employee requests it?

- Not if you determined that respiratory protection is not required to address a health hazard (i.e., there is no foreseeable exposure to a toxic chemical or an airborne illness in the workplace)
- However, if you permit voluntary-use of N-95 filtering face-piece masks, OSHA considers those to be respirators, covered by OSHA's respiratory protection standard
- You must confirm use of the mask does not create a health hazard before permitting voluntary use and provide employees a copy of Appendix D of the respiratory protection standard
- NOTE - Surgical masks (no filtering medium) are not respirators

# Personal Protective Equipment

- Conduct a Temporary, Coronavirus-specific PPE Hazard Assessment to ID hazards and PPE required for them
- Select, maintain, use, store and clean PPE
- Train each worker required to use PPE:
  - When PPE is necessary
  - What kind of PPE is necessary
  - How to don/doff, adjust, maintain, clean, and store PPE
  - Limitations of the PPE
  - Understand the useful life of the PPE

## FAQ: Is a confirmed COVID-19 diagnosis of one of my employees recordable on my 300 Log?

- Although OSHA's recordkeeping rule exempts cold/flu, OSHA has explicitly stated that COVID-19 is a recordable illness (if work related)
- Employers only have to record a case of COVID-19 if:
  - The case is a **confirmed case** of COVID-19;
  - The case **is work-related** as defined in 29 CFR 1904.5; and
  - The case involves one or more of the general recording criteria (i.e., medical treatment beyond 1<sup>st</sup> aid; days away; etc.)
- For work relatedness, determine on a case-by-case basis whether it is ***more likely than not that an event or exposure in the workplace caused or contributed to the illness*** based on all circumstances, e.g., work duties
- B/c of difficult work relatedness analysis, OSHA only expects to see recorded cases in healthcare, nursing care, or where there are clusters

## FAQ: Same question, but for reporting it to OSHA?

- Same analysis for work-relatedness applies.
- Reporting only required where there is a death or in-patient hospitalization
- Hospitalization is reportable only if the employee is formally admitted to the in-patient service of the hospital for treatment, and that ***must occur w/in 24 hours of the work-related exposure***
- Fatality is reportable only if it occurs w/in 30 days of the work-related exposure

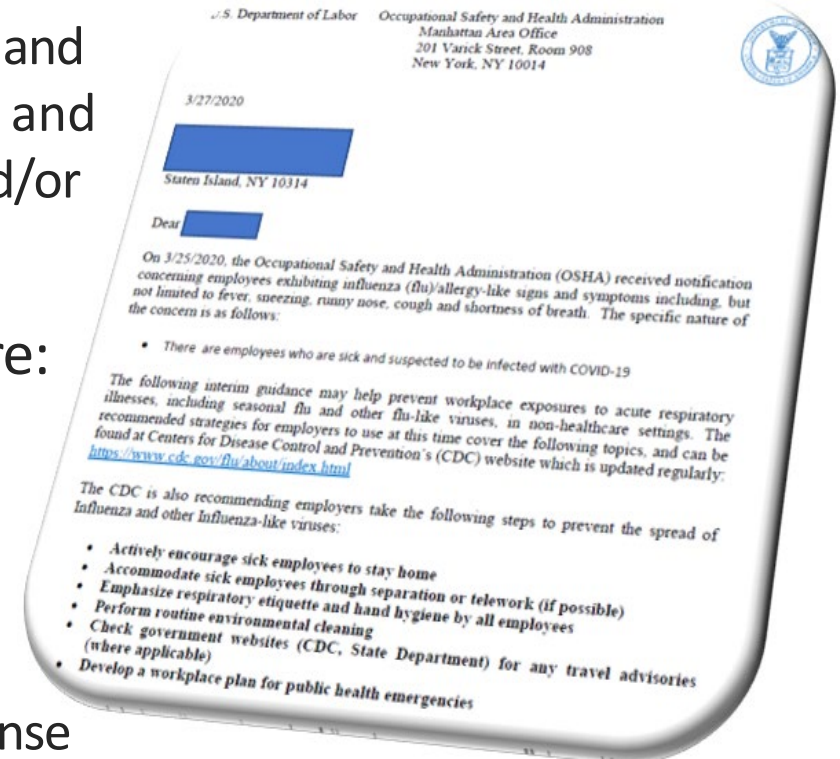
### Recording workplace exposures to COVID-19

OSHA recordkeeping requirements at 29 CFR Part 1904 mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.

While 29 CFR 1904.5(b)(2)(viii) exempts recording of the common cold and flu, **COVID-19 is a recordable illness** when a worker is infected on the job.

# Notices of Alleged Hazards (Employee Complaints)

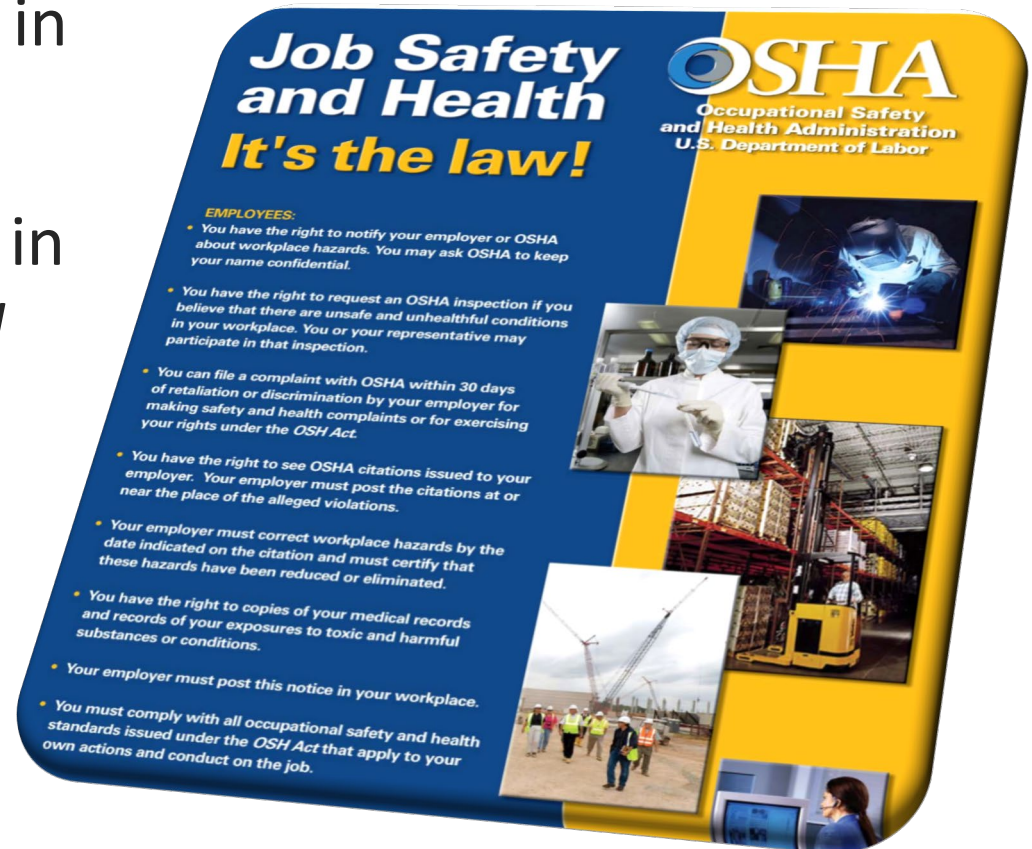
- Historically, when OSHA receives an employee complaint about workplace safety, it responds in one of two ways:
  1. Opens an unannounced on-site compliance inspections
  2. Sends a letter relaying the complaint and asking the employer to investigate and respond (to refute the complaint and/or describe steps taken to address it)
- OSHA is inundated w/ complaints re: employers' COVID-19 Action Plans, so OSHA has a new 3<sup>rd</sup> option:
  3. Sends a letter relaying the complaint and describing OSHA's COVID-19 guidance, but NOT asking for a response





## Sec. 11(c) – Retaliation Protection

- Co-workers of sick employee who refuses to work may be protected by OSH Act's anti-retaliation provisions, if the employee believes in good faith there is:
  - an imminent danger in their workplace; *and*
  - insufficient time to eliminate the danger through resort to regular statutory enforcement





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# CDC Guidance and Best Practices for Employers

# Interim Guidance for Business/Employers

## Recommended Best Practices

- Actively encourage sick employees to stay home
- Ensure sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies
- Separate sick employees and send them home immediately
- Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees
- Instruct employees to clean their hands often with an alcohol-based hand sanitizer (at least 60-95% alcohol), or wash their hands w/ soap and water for at least 20 seconds
- Provide soap and water and alcohol-based hand rubs in the workplace, and ensure adequate supplies are maintained
- Perform routine environmental cleaning

# Interim Guidance for Business/Employers

## Recommended Best Practices

- Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs
- Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before each use
- Advise employees before traveling to take certain steps, such as checking the CDC's Traveler's Health Notices for the latest guidance and recommendations for each country
- Employees who are well but who have a sick family member at home w/ COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their exposure potential

# Protections to Consider

- Temp. PPE Hazard Assessment (consider gloves, gowns, respirators)
- Educate employees in good hygiene practices
- Signage/communication for employees/guests re: hygiene practices
- Require sick employees/guests to stay out of the workplace
- Limit workforce presence/shift schedules
- Restrict access to areas w/in the workplace
- Provide adequate supply alcohol-based hand sanitizer, cleaning supplies, and hand soap
- Discourage use of other workers' phones, desks, offices, tools and equipment
- Regularly dispose trash and recyclable material

Occupational Risk Pyramid  
for COVID-19





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## ... **2020 Labor & Employment WEBINAR SERIES** ...

California Employment Law Update for 2020

Wednesday, January 15th

Illinois and DC Area State Law Update

Tuesday, February 18th

Whistleblower / Retaliation Issues and Strategies

Wednesday, March 25th

Impact of the #MeToo Movement: Enforcement and State Law

Wednesday, April 22nd

Are Your Websites ADA Compliant? What Employers Need to Know

Wednesday, May 12th

Withdrawal Liability and Pensions

Wednesday, June 24th

The State of the Law Regarding Marijuana and Drug Testing

Wednesday, July 15th

OSHA and Labor & Employment Issues: Employee Discipline

Tuesday, August 19th

NLRB Update

Wednesday, September 16th

Conducting Background Checks: Federal, State and Local Law

Tuesday, October 13th

Federal Wage and Hour Update

Wednesday, November 11th

Delaying Retirement: Impact of America's Aging Workforce

Wednesday, December 16th

# the **OSHA** DEFENSE report



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OSHA's 2019 in Review and 2020 Forecast

Thursday, January 23rd

OSHA Settlement Tips and Strategies

Tuesday, February 25th

Strategies for Responding to Whistleblower Complaints

Wednesday, March 25th

Annual Cal/OSHA Update

Thursday, April 16th

E-Recordkeeping and Injury Reporting Update

Wednesday, May 20th

OSHA's PPE Standards - Top 5 Risks and Mistakes

Tuesday, June 16th

What You Need to Know About OSHA's General Duty Clause

Thursday, July 23rd

Employee Discipline - OSHA and Labor & Employment Issues

Wednesday, August 19th

Privileged Audits and Investigations and OSHA's Self-Audit Policy

Tuesday, September 22nd

Impact of the Election on OSHA

Thursday, October 22nd

Updates about OSHA's PSM Standard and EPA's RMP Rule

Tuesday, November 17th

Impact of America's Aging Workforce on OSHA and Employment Law

Wednesday, December 16th

# Kara M. Maciel

[kmaciel@connmaciel.com](mailto:kmaciel@connmaciel.com) • 202.909.2730

**Kara M. Maciel** is a founding partner of **Conn Maciel Carey LLP** and Chair of the Labor • Employment Practice in representing employers in all aspects of the employment relationship:

- Defends employers in litigation at both the federal and state levels, including matters related to ADA, FLSA, FMLA, Title VII, and affirmative action/OFCCP regulations
- Counsels employers on compliance with federal and state law, including issues related to hiring, discipline, internal investigations, and termination
- Advises unionized and non-unionized workplaces regarding the employer's rights under the National Labor Relations Act

# Eric J. Conn

[econn@connmaciel.com](mailto:econn@connmaciel.com) / 202.909.2737

**Eric J. Conn** is Chair of the OSHA • Workplace Safety Practice at **Conn Maciel Carey**, where he focuses his practice on all aspects of occupational safety & health law:

- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
- Manages investigations of catastrophic workplace accidents, including explosions and chemical releases
- Handles all aspects of OSHA litigation, from criminal prosecutions to appeals of citations
- Writes & speaks regularly on safety & health law issues
- Conducts safety training & compliance counseling

# Aaron R. Gelb

[agelb@connmaciel.com](mailto:agelb@connmaciel.com) / 312.868.0294

**AARON R. GELB** is a Partner in the Labor • Employment and OSHA Groups in **Conn Maciel Carey's** Chicago office:

- Aaron represents employers in all aspects of the employer-employee relationship with a particular emphasis on worker safety and employment litigation.
- He advises employers through inspections and enforcement actions involving fed OSHA and state OSH programs, while managing the full range of litigation against OSHA.

# Lindsay A. DiSalvo

[ldisalvo@connmaciel.com](mailto:ldisalvo@connmaciel.com) • 202.909.2734

**Lindsay A. DiSalvo** is an Associate at **Conn Maciel Carey LLP** in the Firm's OSHA • Workplace Safety and Employment Practices:

- Represents and advises employers in all aspects of the employer-employee relationship including wage/hour disputes and claims of discrimination
- Reviews and revises employee handbooks and workplace policies and procedures
- Represents employers during inspections and investigations conducted by the federal and state OSHA
- Advises and counsels employers in responding to notices of employee safety complaints and OSHA citations
- Helps develop and audit safety and health programs

# QUESTIONS?

