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**Government
Contractor's
“Coronavirus
Checklist”**



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Government Contractor's "Coronavirus Checklist"

Wiley continues to closely monitor the COVID-19 crisis and will update this list as new information is available. This alert was originally published on March 19, 2020 and updated on April 24, 2020.

Over the past several weeks, federal, state and local governments have taken unprecedented actions to try to address both the public health and economic impacts of the Coronavirus (COVID-19). These unprecedented actions include the \$2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act, which includes financial relief aimed at easing some of the financial hardships inflicted on various industries, including government contractors. In addition, government contractors have played a key role in responding to the COVID-19 crisis, with contractors being called upon to deliver personal protective equipment (PPE), ventilators, and other badly needed medical supplies.

As we continue to navigate through these uncertain times, the following is an updated "checklist" of key issues that government contractors should consider, in order to protect themselves contractually from the potential disruptions and delays that are likely to arise as this situation continues to unfold.

□ **Identify Available Forms Of Financial Relief**

- As summarized in our previous [alert](#), the CARES Act includes a number of different provisions that may provide a mechanism for government contractors to obtain financial relief from the impacts of COVID-19, including:
 - [Section 3610](#), which expressly authorizes federal agencies to reimburse contractors for the cost of paid leave incurred to keep contractor or subcontractor personnel in a "ready state";
 - The [Paycheck Protection Program \(PPP\)](#), which allocates a total of \$659 billion (including the additional funds in the Paycheck Protection Program and Health Care Enhancement Act, signed into law on April 24, 2020) to enable lenders to make fully-guaranteed (and potentially completely forgivable) loans to small businesses to cover payroll and overhead costs;
 - Various forms of [tax relief](#), including tax credits and deferral of certain tax payments.
- Recent guidance issued by Office of Management and Budget (OMB) regarding Section 3610 specifically warns against "double dipping" (e.g., requesting reimbursement for payroll costs under both Section 3610 and PPP). Therefore, contractors should be careful to ensure that any request for paid leave costs under Section 3610 is justified and adequately supported, and appropriately identifies and offsets any other forms of financial relief received by the contractor (e.g., PPP or tax credits).

□ **Assess The Need For Additional Contractual Protections For COVID-19 Responses**

- As detailed in an earlier [alert](#), contractors that provide goods or services in the fight against COVID-19 may be able to obtain additional protections against liability, including:
 - [Indemnification](#) under Public Law 85-804 for contracts to support certain agencies (e.g., Veterans Affairs (VA), Department of Energy (DOE) in their responses to COVID-19;
 - [PREP Act immunity](#), which protects against certain claims against manufacturers, health care providers and suppliers, and other "covered persons" engaged in "the manufacture, testing, development, distribution, administration, and use of" certain "covered countermeasures" under government contracts and agreements;
 - [Protection from claims](#) under the Defense Production Act of 1950 (DPA), which protects contractors that receive "rated orders" from third-party claims resulting from the contractor's compliance with the DPA.

□ **Check Your Existing Contract Terms**

- Contractors would be well advised to review their contracts to identify those clauses that may impose obligations or provide protections that may be implicated by the current crisis, such as:
 - "Force Majeure" or "Excusable Delay" clauses, such as Federal Acquisition Regulation (FAR) 52.249-14, which protect the contractor against termination for delays in performance that are caused by events outside of the contractor's negligence, fault or control.
 - "Stop Work" or "Suspension of Work" clauses, such as FAR 52.242-14 and -15, which require the contractor to stop or suspend performance for a certain period of time if directed by the Contracting Officer.
 - "Continuation Of Essential Contractor Services" clauses, including Defense Federal Acquisition Regulation Supplement (DFARS) 252.237-7023 and -7024, which require contractors performing work that has been designated as "mission essential functions" to develop plans for the continued performance of the designated services during periods of crisis, such as pandemics.
 - "Rated Orders" issued pursuant to the clause at FAR 52.211-15 and the Defense Priority and Allocation System (DPAS) rules in 15 CFR Part 700, as well as the Health Resources Priority and Allocation System (HRPAS) rules in 45 CFR Part 101. The use of rated orders, which require contractors to give rated orders priority over their commercial business and non-rated government contracts and orders, has proved to be an important tool in securing much-needed supplies in the Government's battle against COVID-19.

□ **Communicate With Your Customers**

- Certain clauses—such as the Force Majeure and Excusable Delay clauses mentioned above—may require contractors to provide notice of a covered event within a certain time, and with certain information, in order to invoke the clauses' protections. Contractors should therefore review their contracts and ensure that they are providing timely and complete notice to preserve their rights.
- In addition to any formal notification requirements, early communication with customers and suppliers may help to mitigate impacts and identify workarounds (e.g., authorization of remote work/telework).
- Early on in the crisis, anecdotal evidence suggested that contracting officials might be reluctant to provide formal direction or stop work orders in order to avoid government liability under certain contract clauses (e.g., Stop Work, Changes) and/or to preserve the government's defenses against potential claims (e.g., the "sovereign acts" defense).
- However, guidance issued in OMB Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*, specifically encourages "continued communication by agencies with their contractors, both small and large, and effective leveraging of flexibilities and authorities to help minimize work disruption."
- Therefore, contractors should continue to communicate with their customers, seek direction where possible, and document their communications in order to preserve their rights in the event of later disputes.

□ **Document Impacts**

- In order to preserve potential claims and defenses, contractors impacted by the COVID-19 crisis should take steps to document those impacts on contract performance, including for example:
 - Inability to access required facilities;
 - Delays by suppliers, other contractors;
 - Shortages of critical materials;
 - Government-directed changes;
 - Unavailability of government personnel; and
 - Other government delays.
- Contractors seeking reimbursement of paid leave costs under Section 3610 of the CARES Act should be particularly mindful of guidance issued by OMB and U.S. Department of Defense (DOD), which emphasize the need for contractors to provide supporting documentation. In fact, OMB guidance suggests requests for reimbursement under Section 3610 may require documentation "beyond that normally submitted to support costs"

- Although the OMB guidance does not identify the specific forms of documentation required, FAQs issued by DOD suggest that Contracting Officers should require the following documentation in assessing requests for reimbursement under Section 3610:
 - Identity of the employees who were provided paid leave;
 - The contract(s) the employees are performing under;
 - The amount and dates of the paid leave provided to the employees for which the contractor is seeking reimbursement;
 - An explanation that each employee –
 - Worked on a site approved by the government, but for COVID-19;
 - Could not perform work on the approved site due to closures or other restrictions resulting from COVID-19;
 - Was unable to telework or otherwise work remotely;
 - Received paid leave beginning no earlier than January 31, 2020, and ending no later than September 30, 2020;
 - Received paid leave at rates calculated based on the rates the contractor would have paid the employee but for the COVID-19 pandemic; and
 - A statement by the contractor that: (1) the costs it is claiming are only for paid leave meeting all of the conditions outlined above; and (2) its claimed costs constitute the only reimbursement or payment it is receiving for this purpose, and that it is not being paid or reimbursed for the same costs via any other source or funding.

□ **Capture Costs**

- While certain relevant contract clauses may provide a basis for a contractor to seek an equitable adjustment to compensate for any increased cost of performance (e.g., clauses relating to "mission critical support"), other clauses may only provide for time extensions (e.g., Excusable Delays).
- In addition, Section 3610 of the CARES Act specifically authorizes reimbursement of paid leave costs for certain employees who have been denied access to approved facilities as a result of COVID-19.
 - Although Section 3610 authorizes reimbursement "at the minimum applicable contract billing rates" up to 40 hours per week, guidance by both DOD and OMB instructs agencies to reimburse only for actual labor costs, plus overhead, but excluding profit/fee.
 - The DOD guidance recommends that contractors establish separate line items in fixed-price and time-and-materials contracts and cost accounts for cost-reimbursement contracts to segregate costs that may be reimbursable under Section 3610.
 - Also, as noted above, Section 3610 also requires contractors to offset any other financial relief received by the contractor, including PPP or tax credits, to prevent "double dipping."
- Therefore, contractors should take steps to segregate the cost impacts resulting from the current crisis—including paid leave costs for employees unable to telework—as well as any other offsetting forms of financial relief received by the contractors (e.g., PPP or tax credits).

□ **Check Your Telework Policies**

- For now, the Office of Personnel Management (OPM) has directed government agencies to continue maximum teleworking for eligible employees in response to the COVID-19 crisis, and industry groups are encouraging agencies to include contractors in those policies. OPM has directed agencies to provide guidance to "employees and contractors" as agencies gradually transition back to normal operations consistent with the national guidelines for *Opening Up American Again*.
- In the meantime, Federal procurement statutes and the FAR encourage contractor teleworking, and contractors should communicate with their Contracting Officers to confirm that teleworking is permitted unless it is expressly prohibited by the contract. See 41 U.S.C. § 3306(f) (the FAR "shall permit telecommuting by employees of federal government contractors," except in limited circumstances); FAR 7.108 ("an agency shall generally not discourage a contractor from allowing its employees to telecommute in the performance of Government contracts" unless the CO determines that contract requirements cannot be met through telework and includes a contract provision prohibiting it).

- Nevertheless, contractors should confirm that their teleworking policies and systems comply with the terms of their contracts, including any cybersecurity requirements in their contracts, such as FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems, DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, and any agency- or contract-specific clauses incorporated into the contract.
- **Review Employment Requirements and Policies**
 - As we previously [outlined](#), contractors should ensure that their COVID-19 responses comply with published vacation and sick leave policies, federal and state wage and hour laws, and furlough provisions in employee contracts.
 - The Families First Coronavirus Response Act (FFCRA or Act), which the President signed into law on March 18, 2020 and we summarized [here](#), includes additional employer obligations for coverage under the Family and Medical Leave Act (FMLA) and paid sick leave. Contractors should understand these new requirements and watch for additional statutory obligations that may be imposed as Congress moves quickly to respond to the crisis. Wiley will continue to provide updates on those topics.

Wiley's Government Contracts team is closely monitoring developments and assisting clients in navigating through this fast-moving crisis, and will provide further Alerts and Webinars as events unfold.

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**Get your priorities
straight!
Navigating the
Defense Priorities
and Allocations
System (DPAS)**



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Quick Reference

What is the Defense Priorities and Allocations System (DPAS)?

DPAS is a statute-based regulatory scheme run generally by the Department of Commerce. DPAS permits certain agencies to issue “rated orders,” for goods and services under specified program. Rated orders, under certain circumstances, must be accepted and could force a business to put existing backlog on hold until the rated order can be fulfilled. See, 15 CFR Part 700.

How does a rated order work?

There are two levels of rated orders: a “DX” rating has a higher priority than a “DO” rating which, in turn, has a higher priority than an “unrated” order. Generally, within each rating level, orders must be fulfilled based on the earliest required delivery date. A prime contractor receiving a rated order can and, as necessary, must, “flow down” the rating to subcontractors or vendors throughout the supply chain.

When can an agency issue a rated order?

An agency can issue a rated order in support of a specified, approved national defense, emergency preparedness and energy production maximization programs. To be an approved program, DOD, DOE, DHS or DHHS must determine that the requirement is necessary or appropriate to promote the national defense or address a national emergency.

Does a business have to accept a rated order?

Not necessarily. There are times when a rated order *must be accepted*, times when an order *must be rejected*, and times when an order *may be rejected*. The DPAS Regulations define these decision points.

What does a rated order recipient do if it accepts an order but then has difficulty meeting a required delivery date?

Recipients may request Special Priorities Assistance (SPA) from the Department of Commerce Bureau of Industry and Security (BIS) or authorized agencies in resolving production or delivery problems that arise. SPA may be requested for any reason in support of the DPAS, such as assisting in obtaining timely deliveries of items needed to satisfy rated orders.

What happens if a rated order recipient doesn't follow the DPAS rules?

A person who willfully violates the DPAS is subject to civil fines, criminal penalties, injunctive action, contractual remedies and administrative actions such as suspension and debarment.

Best Practices

Know the rules.

The DPAS regulations are not complicated or lengthy and some agencies have published manuals or guidebooks describing their application of the DPAS program. For example, the BIS website publishes a link to the DOD DPAS Manual: <https://www.bis.doc.gov/index.php/documents/sies/497-department-of-defense-s-priorities-and-allocations-manual-dod-4400-1-m/file>

Move out smartly.

Time is obviously of the essence in any rated order case, so beyond the required delivery date, there are strict rules for when certain actions must be taken – for example, when to reject an order or to request SPA.

Communicate.

Effective, clear and timely communication, up and down the supply chain, is critical. To seek SPA, for example, an applicant must be able to show it has made a reasonable effort to solve the problem on its own – which requires communication.

Don't discriminate.

A recipient may not use a rated order to gain a better price, obtain delivery sooner than needed or otherwise to gain an unfair competitive advantage. In particular, be prepared to justify any price increases over standard rates.

Document everything.

Rated orders are often associated with high visibility requirements or programs with many stakeholders and elevated risk of audit, investigations or high-level oversight. Assume everything done will come under official scrutiny – make and keep detailed records of who does it, what is done, when it is done, and why it is done.

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**State COVID-19
Lockdowns: What
Contractors
Operating in
“Lockdown” Areas
Need to Know**



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State COVID-19 Lockdowns: What Contractors Operating in “Lockdown” Areas Need to Know

April 7, 2020

As the federal government continues taking steps to mitigate the unfolding COVID-19 public health emergency, state and local governments have started issuing “lockdown” or “stay at home” orders. These orders, among other things, place significant restrictions on or mandate the closure of non-essential businesses. Government contractors with operations in these jurisdictions must understand the scope of applicable restrictions and be prepared to demonstrate that their operations are essential and should continue during the lockdown. Many, but not all, of the states with such orders in place have deemed essential the “federal critical infrastructure sectors” as **defined** by the Department of Homeland Security’s Cybersecurity & Infrastructure Security Agency (CISA), which include the work performed by many government contractors. The Department of Defense has also issued parallel Defense Industrial Base critical infrastructure **guidance**. Read on for further discussion of the impact of these orders on government contractors, best practices, and a state-by-state summary of what has been deemed essential in these orders.

Generally, the state lockdown orders have directed that all entities (businesses and non-profits) utilize telecommuting or work from home procedures to the maximum extent practicable. Where telework is impractical, only essential business or entities are permitted to remain open. The orders have generally included lists of specific categories of entities deemed essential (e.g. healthcare, telecommunications, public safety and security, sanitation, logistics, financial, grocery stores, and national defense, among others). A few have specifically carved out businesses in the defense industrial base. Some states have also established application procedures to be designated as essential for other entities not otherwise covered.

Additionally, some jurisdictions have also restricted local travel with shelter-in-place orders, and others are expected to follow suit as the pandemic continues. The federal government has restricted international air travel, and commercial air travel may become impractical for a period of time as parts of the country shelter in place and airlines are forced to reduce service.

These restrictions may delay or even prevent government contractors from fulfilling their contractual obligations unless they are deemed essential or are authorized for remote work, a circumstance that the Office of Management and Budget has begun to address. In addition to steps we **previously highlighted** that contractors should take to protect themselves contractually from the potential disruptions and delays, contractors should also be proactive in preparing to continue operations under lockdown conditions.

Contractors should immediately begin evaluating all of their operations across the United States to determine whether they are properly considered essential. Where they have operations in a state that has issued a lockdown order that does not clearly cover those operations, contractors should follow instructions to apply for essential status immediately. If they have operations in a state that has not yet issued a lockdown order, they should assume that one will issue and be prepared to apply for essential status, if necessary, immediately. Most states are entertaining exemption applications only by email (even if not explicitly stated in the orders), and considerable delays in processing those applications should be expected.

In addition, contractors should communicate with their contracting officers regarding telework where practicable even if not currently permitted under the contract. If contractor employees are unable to telework, contractors should seek specific written direction from their contracting officers stating that their work and employees are exempted from the applicable lockdown restrictions, even if the business is explicitly covered.

Although lockdown restrictions and enforcement will vary by jurisdiction, some contractors are preparing letters from a senior company official, on company letterhead, for employees to bring with them when traveling to and from work. The letters explain

that the individual works for “Company X,” and that they are supporting a critical function under a government contract. The letters should include as attachments documentation supporting the essential nature of the contractor’s operations, such as state lockdown orders identifying the applicable exception, CISA memoranda, or communication from the contracting officer. Similar documentation should be available at each of the contractor’s business locations within the state, along with copies of the contractor’s pandemic readiness plan, which, at a minimum, should describe the steps the contractor is taking to comply with all Centers for Disease Control and Prevention (CDC) and state health department recommendations for safety. Some contractors, particularly in less densely populated areas, are even reaching out to local law enforcement to make them aware in advance that they will remain open.

We have summarized the relevant provisions of the current lockdown orders that have been issued as of the issuance of this alert, including some of the designated “essential businesses” and whether the orders contain specifics on applying for an exemption. States are continuing to issue lock-down orders and more are expected by the end of the day.

Wiley is actively representing numerous clients who are preparing for lockdown orders in their states, or who are navigating orders that have already issued. Wiley continues to closely monitor the COVID-19 crisis and will update this list as the situation unfolds.

Alabama

- Prohibits all non-work gatherings of 10 persons or more
- Closes all non-essential businesses and beaches
 - Non-essential businesses include entertainment venues; athletic facilities and activities; close-contact service providers; and select retail stores.

Alaska

- Orders residents to stay at home except as necessary to meet critical personal needs or work in critical infrastructure jobs.
- All in-state travel between communities is prohibited unless travel is to support critical infrastructure, or for critical personal needs.
- Closes all non-essential businesses
- Essential services and critical infrastructure include:
 - Healthcare operations
 - Essential infrastructure (CISA list adopted)
 - Financial services sector
 - First responders
 - Essential governmental functions
 - Essential businesses (e.g. grocery stores; food and agriculture; businesses that provide food, shelter, social services, and other necessities of life for economically disadvantaged or otherwise needy individuals; media; gas stations; hardware stores; plumbers, electricians, etc.; businesses providing mailing and shipping services, educational institutions; laundromats; restaurants serving take-out and delivery; Businesses that supply products needed for people to work from home; Businesses that supply other essential businesses with the support or supplies necessary to operate; Businesses that transport goods to grocery stores; transportation providers; Home-based care for seniors, adults, or children; Residential facilities and shelters; Professional services; and Childcare facilities.)

Arizona

- Instructs individuals to stay at home except for:
 - Participate in essential activities

- Employment/Participation in essential functions
 - Utilizing essential businesses
 - Certain employment
- Orders individuals to limit their use of public transportation
- Non-essential businesses can continue to operate in activities that can be done remote
- Essential services include:
 - Healthcare and Public Health Operations
 - Human Services Operations
 - Essential Infrastructure Operations
 - Essential Governmental Functions
- Essential Businesses include:
 - Stores that sell groceries and medicine
 - Food, beverage, and agriculture
 - Outdoor recreation activities
 - Organizations that provide charitable and social services
 - Media
 - Gas stations and businesses needed for transportation
 - Financial institutions
 - Hardware and supply stores
 - Critical trades
 - Mail, post, shipping, logistics, delivery, and pick-up services
 - Educational institutions
 - Laundry services
 - Restaurants for consumption off-premises
 - Supplies to work from home
 - Supplies for Essential Businesses and Operations
 - Transportation
 - Home-based care and services
 - Residential facilities and shelters
 - Professional and personal services
 - Day care centers for employees exempted by this Executive Order
 - Manufacture, distribution, and supply chain for critical products and industries
 - Hotels and motels
 - Funeral services

California

- Orders everyone to stay home except to obtain food, provide or obtain care, or travel to an essential job
 - Per the Order of the State Public Health Officer, essential jobs are those needed to maintain continuity of operations of the “federal critical infrastructure sectors” as defined by CISA

- Certain other essential businesses remain exempt from the order: gas stations, pharmacies, grocery stores, convenience stores, banks, and laundry services
- The Office of Emergency Services is ordered to take necessary steps to ensure compliance
- The order does not provide a mechanism for applying to be designated as essential

Colorado

- Directs everyone to stay at home except for Necessary Activities, Minimum Basic Operations, Critical Government Functions, and Critical Businesses.
 - Exceptions include: obtaining food and other household necessities, going to and from work at critical businesses, seeking medical care, caring for dependents or pets, or caring for a vulnerable person in another location.
- Closes all businesses not considered “Critical Businesses”
- Critical Businesses are defined by a separate public health **order**:
 - Healthcare operations
 - Critical infrastructure
 - Critical manufacturing
 - Critical retail
 - Critical services
 - News media
 - Financial institutions
 - Providers of Basic Necessities to Economically Disadvantaged Populations
 - Construction
 - Defense
 - Critical Services Necessary to Maintain the Safety, Sanitation and Critical Operations of Residences or Other Critical Businesses
 - Vendors that Provide Critical Services or Products, Including Logistics and Technology Support, Child Care and Services

Connecticut

- All non-essential in-person businesses and operations must cease
- Essential Businesses, which largely mirror those needed to maintain continuity of operations of the “federal critical infrastructure sectors” as **defined** by CISA, include:
 - essential healthcare operations (e.g. hospitals)
 - essential infrastructure (e.g. utilities including power generation, fuel supply and transmission, public water and wastewater, telecommunications and data centers, airports/airlines transportation infrastructure such as bus, rail, or for-hire vehicles, garages)
 - essential manufacturing (e.g. medical, agricultural, telecommunications, and industries supporting the essential services required to meet national security commitments to the federal government and U.S. military; the defense industrial base, including aerospace, mechanical and software engineers, manufacturing/production workers, aircraft and weapon system mechanics and maintainers)
 - essential retail (e.g. grocery, pharmacy, hardware)
 - essential services (e.g. sanitation, laundry, cleaning, childcare)
 - media
 - financial institutions

- professional services (e.g. legal and accounting)
- social services (e.g. shelters, food banks)
- construction
- defense and national security operations supporting the U.S. Government or a contractor to the US government
- public safety and security
- government support (e.g. logistics, technology support, other support for essential government services)
- Businesses not covered by the order can request an opinion to be deemed essential by the Department of Economic and Community Development

Delaware

- Orders everyone to stay home and prohibits travel except for Essential Activities, which including obtaining necessary health and safety activities, obtaining necessary supplies and services, socially distant recreation, care of others, or to perform work for an Essential Business
- Essential Business includes:
 - Healthcare / Public Health (e.g. hospitals, medical manufacturers, logistics, and research and development, blood and plasma collection, medical cybersecurity, social services, pharmacies, health insurance work that cannot be performed remotely)
 - Law Enforcement and Public Safety
 - Food and Agriculture (e.g. grocery stores and food manufacturers, paper product producers)
 - Energy (e.g. utilities and petroleum and natural gas workers)
 - Water and wastewater
 - Transportation and Logistics (e.g. warehouses, public transit, automotive repair, and air transportation)
 - Public Works (e.g. civil engineers and tradesmen responsible for essential operations of residences)
 - Communications and IT (e.g. communications infrastructure, central offices, media, support for the Network Operations Command Center, Broadcast Operations Control Center and Security Operations Command Center, data centers, cybersecurity)
 - Community-Based Government Operations and Essential Functions
 - Manufacturing
 - Hazardous Materials
 - Financial Services and Insurance
 - Chemical
 - Defense Industrial Base: businesses supporting the essential services required to meet national security commitments to the federal government and U.S. Military, and companies, and their subcontractors, who perform under contract to the Department of Defense providing materials and services to the Department of Defense, and government-owned/contractor- operated and government owned/government-operated facilities.
 - Construction
 - Necessary Product Resellers (e.g. medical supplies, pet stores, hardware)
 - Necessary Retail and Services (e.g. professional services, warehouses, childcare, staffing, retail financial services)
- The order does not provide a mechanism for applying to be designated as essential

Florida

- Orders all persons to limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities
- Closes all non-essential businesses
- Essential services includes critical infrastructure under the CISA List
- Essential businesses include:
 - Healthcare providers; grocery stores; food cultivation; businesses providing food and services to the economically disadvantaged; media; banks and financial institutions; hardware stores; contractors and other tradesmen; businesses providing mailing and shipping services; private colleges and trade schools to facilitate online learning; laundromats; restaurants for consumption off-site; businesses supplying office products and other essential businesses with support; businesses that ship and deliver groceries; transportation; home-based care; assisted living facilities; professional services; landscaping and pool care businesses; childcare facilities enabling employees exempted from the order to work; airport, seaport or government facility; pet supply stores; logistics providers; telecommunications providers; provision of propane or natural gas; office space needed for the essential businesses; open construction sites; architectural, engineering, or land survey services; factories, manufacturing facilities, bottling plant or industrial uses; waste management services; and any business that is interacting with customers solely electronically.

Georgia

- Orders residents and visitors to shelter in place, except if they are:
 - Conducting or participating in essential services
 - Performing necessary travel
 - Are engaged in the performance of, or travel to and from, the performance of Minimum Basic Operations for a business, establishment, corporation, non-profit corporation, or organization not classified as Critical Infrastructure; or
 - Are part of the workforce for Critical Infrastructure and are actively engaged in the performance of, or travel to and from, their respective employment.
- Prohibits gatherings of more than 10 people
- Closes all businesses that are not Critical Infrastructure
 - Critical Infrastructure defined by the CISA List
 - Allows businesses to maintain minimum operations

Hawaii

- Orders everyone “to stay at home or in their place of residence except as necessary to maintain continuity of operations” during the COVID-19 pandemic.
 - Prohibits any gathering more than 10 people.
- Order ceases all non-essential businesses.
- The order exempts a long list of “essential businesses or operations,” defines what people can or cannot do in public, and takes into account social distancing requirements, the homeless population, and criminal penalties.
- Essential businesses are anything used to maintain the critical infrastructure identified by CISA and those designated within the order itself:
 - Healthcare services and facilities;
 - Stores that sell groceries and medicine;
 - Food, beverage, cannabis production and agriculture (e.g. food and beverage manufacturing, production, processing, and cultivation; licensed cannabis cultivation centers; and businesses that provide food, shelter, and other necessities of life for animals);

- Educational institutions;
- Organizations that provide charitable and social services;
- Media;
- Gas stations and businesses needed for transportation;
- Financial institutions;
- Hardware and supply stores;
- Critical trades (e.g. plumbers, electricians, exterminators, cleaning and janitorial staff for commercial and governmental properties, etc.);
- Mail, post, shipping, logistics, delivery, and pick-up services;
- Laundry services;
- Restaurants for consumption off-premises;
- Supplies to work from home;
- Supplies for essential businesses and operations;
- Transportation;
- Home-based care and services;
- Residential facilities and shelters;
- Professional services (e.g. legal services, accounting services, insurance services, real estate services);
- Child care services for employees exempted by this Order;
- Manufacture, distribution, and supply chain for critical products and industries;
- Critical labor union functions;
- Hotels and motels;
- Funeral services; and
- Government functions.

Idaho

- Requires residents to stay and work from home as much as possible while ensuring all essential services
- Prohibits nonessential travel and gatherings of any size
- Mandates that businesses and government offices cease “nonessential operations at physical locations”
- Essential businesses include:
 - Healthcare operations and essential infrastructure
 - Grocery stores
 - Food cultivation and production
 - Veterinary services
 - Residential and home-based care
 - Pharmacies
 - Hardware stores
 - Gas stations
 - Laundromats
 - Financial institutions (including banks, credit unions, and insurance companies)
 - Essential state and local government functions

- Limited child care for essential workers
- Contractors
- Infrastructure
- Public safety (including emergency responders)
- Hotels/motels
- Maintenance (including electricians, plumbers, utility services, and mechanics)
- Media

Illinois

- Gatherings of more than 10 are prohibited
- All non-essential in-person businesses and operations must cease
- Orders everyone to stay home and prohibits travel except for Essential Activities, Essential Government Functions, or to operate Essential Businesses and Operations
 - Essential Activities, including obtaining necessary health and safety activities, obtaining necessary supplies and services, socially distant recreation, care of others
 - Healthcare and Public Health Operations, including hospitals, medical manufacturers, logistics, and research and development
 - Essential Government Functions, including public safety, courts, military, housing and shelter
 - Essential Businesses and Operations, including:
 - grocery
 - charitable social services
 - media
 - gas stations and transportation infrastructure
 - financial institutions
 - hardware and supply stores
 - construction essential for residences, Essential Activities, and Essential Businesses and Operations
 - mail and package services
 - educational institutions providing distance learning, critical research, or other essential functions
 - manufacturing, distribution, and supply chain of essential supplies, including agriculture and food processing
 - professional services (legal, accounting, real estate, insurance)
- The order does not provide a mechanism for applying to be designated as essential

Indiana

- Order calls for all individuals to stay at home except for essential activities, essential government functions, or to participate in essential business and operations.
 - Prohibits any gathering larger than 10 people.
 - Only permits essential travel but allows for public transportation to still function using social distancing requirements.
- Ceases all nonessential businesses.
- Essential businesses include Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure, as well as:

- CISA List;
- Stores selling groceries and medicine;
- Food, beverage, and agriculture;
- Organizations providing charitable and social services;
- Religious entities (provided it adheres to CDC’s guidance on social gatherings);
- Media;
- Gas stations and businesses needed for transportation;
- Financial and insurance institutions;
- Hardware and supply stores;
- Critical trades;
- Mail, post, shipping, logistics, delivery, and pick-up services;
- Educational institutions;
- Laundry services;
- Restaurants for Consumption Off-Premises;
- Supplies to work from home;
- Supplies for essential businesses and operations;
- Transportation;
- Home-based care and services;
- Residential facilities and shelters;
- Professional services;
- Manufacture, distribution, and supply chain for critical products and industries;
- Critical labor union functions;
- Hotels and motels; and
- Funeral services

Kansas

- Directs residents to stay in their homes unless performing an essential activity—which includes:
 - Obtaining food, medicine and other household necessities;
 - Going to and from work at a business or organization performing an essential function as identified in the Kansas Essential Function Framework (based off of the CISA list);
 - Seeking medical care;
 - Caring for children, family members or pets, or caring for a vulnerable person in another location;
 - Engaging in an outdoor activity, provided individuals maintain a distance of six feet from one another and abide by the 10-person limitation on gathering size.
- Order lists multiple pages of essential businesses under four functional areas: Connect, Distribute, Manage, and Supply

Kentucky

- Ordered all nonessential retailers to close within about 24 hours and mandated all elective medical procedures end.
- Life-sustaining retail businesses that will stay open include grocery stores, pharmacies, banks, hardware stores, gas stations, and other businesses that provide staple goods.

- Mandated that entertainment, sporting goods, clothing, shoe, jewelry and furniture stores, florists, bookstores, and auto dealers close.
 - Non-essential retail businesses can still fill phone and online orders through curbside services or delivery.
- Retail businesses that remain open must follow, to the fullest extent practicable, social distancing and hygiene guidance from the CDC and the Kentucky Department for Public Health.
- Failure to follow the order could subject a business to closure.

Louisiana

- Gatherings of more than 10 are prohibited
- All state offices are closed to the public
- Orders everyone to stay home and prohibits travel except for Essential Activities, which include:
 - Obtaining food, medicine, or other essential supplies
 - Obtaining non-elective medical care
 - Travel to essential jobs, defined as those needed to maintain continuity of operations of the “federal critical infrastructure sectors” as **defined** by CISA, in addition to those jobs necessary to provide the other Essential Activities in the order
 - Travel to visit relatives, to places of worship, or to engage in outdoor activities
- The order does not provide a mechanism for applying to be designated as essential

Maine

- Orders individuals to stay home except:
 - To conduct or participate in Essential Activities
 - Workers at Essential Businesses and Operations
 - Workers at Non-Essential Businesses to engage in minimal operations or delivery of goods
- Limits in-store gatherings based on square footage
- All non-essential businesses must cease on site operations
- Essential businesses and operations include:
 - CISA List
 - Food processing and agriculture; fishing and aquaculture; industrial manufacturing; construction and maintenance of essential infrastructure; trash collection and transfer stations; grocery and household goods; forest products; essential home repair, hardware and auto repair; pharmacy and other medical, psychiatric, and long-term care facilities; group homes and residential treatment facilities; biomedical, life science, behavioral health, health care, dental care, and long-term services and supports providers and organizations; child care providers; post offices and shipping outlets; banks and credit unions; gas stations and laundromats; veterinary clinics, animal welfare and animal feed and supply stores; truck delivery and distribution of goods; public transportation; legal, business, professional, environmental permitting and insurance services; hotel and commercial lodging; and all utilities.

Maryland

- Orders all residents to stay in their homes except to conduct or participate in essential activities or to work at an essential business
- Essential activities include:
 - Obtaining necessary supplies or services for one's self, family, household members, pets, or livestock;

- Engaging in activities essential for the health and safety of one’s self, family, household members, pets, or livestock;
- Caring for a family member, friend, pet, or livestock in another household or location;
- Traveling to and from an educational institution for purposes of receiving meals or instructional materials for distance learning;
- Engaging in outdoor exercise activities but only in compliance with applicable social distancing guidance;
- Travel required by a law enforcement officer or court order; or
- Traveling to and from a federal, State, or local government building for a necessary purpose.
- Order calls for the closure of non-essential businesses and bans any gathering of more than 10 people
- Order excludes:
 - Critical infrastructure sectors identified by CISA
 - Federal, state or local government unit, building, or facility
 - Media
 - Any non-profit organizations or facilities providing essential services to low-income persons

Massachusetts

- Gatherings of more than 10 are prohibited
- All non-essential in-person businesses and operations must cease
- Essential Business includes those needed to maintain continuity of operations of the “federal critical infrastructure sectors” as **defined** by CISA including:
 - Healthcare / Public Health (e.g. hospitals, medical manufacturers, logistics, and research and development, blood and plasma collection, medical cybersecurity, social services, pharmacies, health insurance work that cannot be performed remotely)
 - Law Enforcement and Public Safety
 - Food and Agriculture (e.g. grocery stores and food manufacturers, paper product producers)
 - Energy (e.g. utilities and petroleum and natural gas workers)
 - Water and wastewater
 - Transportation and Logistics (e.g. warehouses, public transit, automotive repair, and air transportation)
 - Public Works (e.g. civil engineers and tradesmen responsible for essential operations of residences)
 - Communications and IT (e.g. communications infrastructure, central offices, media, support for the Network Operations Command Center, Broadcast Operations Control Center and Security Operations Command Center, data centers, cybersecurity)
 - Community-Based Government Operations and Essential Functions
 - Critical Manufacturing (e.g. medical supply chains, transportation, energy, communications, food and agriculture, chemical manufacturing, nuclear facilities, the operation of dams, water and wastewater treatment, emergency services, and the defense industrial base)
 - Hazardous Materials
 - Financial Services and Insurance
 - Chemical
 - Defense Industrial Base: businesses supporting the essential services required to meet national security commitments to the federal government and U.S. Military, and companies, and their subcontractors, who perform under contract to the Department of Defense providing materials and services to the Department of Defense, and government-owned/contractor-operated and government owned/government-operated facilities.

- Construction
- Necessary Product Resellers (e.g. medical supplies, pet stores, hardware)
- Businesses not covered by the order may request designation [here](#).

Michigan

- Order prohibits in-person work that is not necessary to sustain or protect life
- Order calls for all individuals to stay at home except:
 - To engage in outdoor activity with remaining at least six feet from people from outside the individual's household;
 - To perform their jobs as critical infrastructure workers after being so designated by their employers;
 - To conduct minimum basic operations after being designated to perform such work by their employers;
 - To perform necessary government activities;
 - To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets);
 - To obtain necessary services or supplies for themselves, their family or household members, and their vehicles. *Individuals must secure such services or supplies via delivery to the maximum extent possible;*
 - To care for a family member or a family member's pet in another household;
 - To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons;
 - To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted;
 - To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court;
 - To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
- Critical infrastructure is considered that described by CISA. In addition:
 - Child care workers who need to serve critical infrastructure workers;
 - Workers at designated suppliers and distribution centers;
 - Workers in the insurance industry;
 - Workers and volunteers for businesses or operations providing food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities;
 - Workers performing critical labor union functions.

Minnesota

- Orders everyone to stay home except to engage in the designated Activities and Critical Sector work
 - Activities include: Relocation to ensure safety; Health and safety activities; Outdoor activities; Necessary supplies and services; Essential intrastate and interstate travel; Care of others; Displacement; and Tribal Activities & Land.
- Critical sectors include:

- CISA list; Healthcare and public health; Law enforcement, public safety, and first responders; Food and agriculture; Energy; Water and wastewater; Transportation and logistics; Public Works; Communications and information technology; Other community-based government operations and essential functions; Critical manufacturing; Hazardous materials; Financial services; Chemical; Defense industrial base; Tribal Governments; The Judicial Branch; The Executive Branch; Executive Constitutional Offices; The Legislative Branch; Federal Employees; National Guard; Faith leaders and workers; Education; Construction and critical trade; Child care providers; Hotels, residential facilities, and shelters; Shelters for displaced individuals; Charitable and social services organizations; Legal service; Notaries; Critical Labor Union Function; Laundry services; Animal shelters and veterinarians; Real Estate Transactions; and Essential Supply Stores

Mississippi

- Issued a shelter in place order
 - Individuals may leave residence for essential activities and essential travel
- Ceases all non-essential businesses and operations except minimum operations
- Essential businesses include
 - Essential Government Functions; Essential Healthcare Operations; Essential Infrastructure; Essential Manufacturing; Agriculture and Farming; Essential Retail (e.g. grocery stores); Media; Professional services; Providers of Basic Necessities to the Economically Disadvantaged; Construction and Construction Related Services; Maintain Safety and Sanitation; Essential Vendors (e.g. Logistics and technology support, child care programs and services, medical waste disposal and hazardous waste disposal); Religious Entities not exceeding 10 people; Financial services; Defense industrial base; and CISA list

Montana

- Orders individuals to stay at home except for essential activities or to operate essential businesses and operations
- Closes all non-essential businesses and operations
- Prohibits gatherings of all sizes and limits travel to essential travel or travel for essential activities
- Essential businesses include:
 - CISA List
 - Stores that sell groceries and medicine
 - Food and beverage production and agriculture
 - Organizations that provide charitable and social services
 - Media
 - Gas stations and businesses needed for transportation
 - Financial and real estate services and institutions
 - Hardware and supply stores
 - Critical trades
 - Mail, post, shipping, logistics, delivery, and pick-up services
 - Educational institutions
 - Laundry services
 - Restaurants for consumption off-premises
 - Supplies to work from home
 - Supplies for essential businesses and operations
 - Transportation

- Home-based care and services
- Residential facilities and shelters
- Professional services
- Manufacture, distribution, and supply chain for critical products and industries
- Critical labor union functions
- Hotels and motels
- Funeral services

Nevada

- All non-essential in-person businesses and operations must cease
- Essential businesses included in the order:
 - Health care providers
 - Grocery stores, convenience stores, pharmacies, and cannabis delivery dispensaries
 - Financial institutions
 - Security services
 - Gas stations
 - Construction, mining, manufacturing and infrastructure operations
 - Those needed to maintain continuity of operations of the “federal critical infrastructure sectors” as defined by CISA, in addition to those jobs necessary to provide the other Essential Activities in the order
- The order does not provide a mechanism for applying to be designated as essential

New Hampshire

- Directs everyone to stay at home except for essentials
- Directs all non-essential businesses that haven’t already closed to end “in-person and public-interacting operations”
- Closes all beaches and prohibits all gatherings with more than 10 individuals
- List of industry sectors providing essential services include:
 - Law Enforcement, Public Safety, First Responders
 - Food and Agriculture
 - Health Care/Public Health/Human Services
 - Electricity industry
 - Petroleum workers
 - Natural and propane gas workers
 - Steam workers
 - Waste and Wastewater
 - Transportation and Logistics
 - Public Works
 - Communications
 - Information Technology
 - Other Community-Based Essential Functions
 - Manufacturing

- Hazardous Materials
- Financial Services
- Chemical
- Defense Industrial Base

New Jersey

- Orders everyone to stay home except to obtain food, goods, or services from an essential retail business; to provide or obtain care, safety, or social services; for religious, political, or educational reasons; or to travel to an essential job
- Telework ordered wherever practicable
- All gatherings are cancelled
- Travel using public transportation strongly discouraged
- All non-essential business closed, which does not include the following essential businesses and essential employees:
 - Healthcare facilities
 - Ancillary stores within healthcare facilities
 - Pharmacies, medical marijuana dispensaries, and medical supply stores
 - Grocery stores, including gas stations, convenience stores, and liquor stores
 - Hardware and home improvement stores
 - Banks and other financial institutions
 - Car dealerships, but only for auto maintenance and repair, and auto mechanics
 - Printing and office supply shops
 - Mail and delivery stores
 - Cashiers or store clerks at essential retail
 - Construction workers
 - Utility workers
 - Repair workers
 - Warehouse workers
 - Lab researchers
 - Information technology maintenance workers
 - Janitorial and custodial staff
 - Certain administrative staff
- The Order also exempts public safety, media, essential social services, operations of the federal government or the movement of federal officials acting in their official capacity
- The State Director of Emergency Management has the authority to make additions, amendments, clarifications, exceptions, and exclusions

New Mexico

- Instructs all individuals to stay home except for outings essential to health, safety, and welfare
- Prohibits all gatherings of five or more people
- Order ceases all non-essential businesses and essential businesses should minimize their operations and staff to the greatest extent possible
- “Essential business” means any business or non-profit entity falling within one or more of the following categories:

- Health care operations; Homeless shelters, food banks, and other services providing care to indigent or needy populations; Childcare facilities necessary to provide services to those workers employed by essential businesses and essential non-profit entities; Grocery stores; Farms, ranches and other food cultivation; All facilities used by law enforcement personnel, first responders, firefighters, emergency management personnel, and dispatch operators; Infrastructure operations; Manufacturing operations; Services necessary to maintain the safety and sanitation of residences or essential businesses; Media services; Gas stations; Hardware stores; Laundromats and dry cleaner services; Utilities; Funeral homes, crematoriums, and cemeteries; Banks, credit unions, insurance providers, payroll services, brokerage services, and investment management firms; Real estate services; Businesses providing mailing and shipping services; Laboratories and defense and national security-related operations supporting the United States government or a contractor to the United States government; Restaurants, but only for delivery or carry out and local breweries or distillers but only for carry out; Professional services; and Logistics and businesses that store, ship, or deliver groceries, food, goods, or services directly to residences or retailers.

New York

- Non-essential gatherings of any size for any reason banned
- All non-essential business must shut down in-office functions
- Applies to business lines: if part of the business is essential then only that part of the business is exempt
- Categories of exempt businesses provided in New York’s guidance to Executive Order 202 include:
 - essential healthcare operations (e.g. hospitals)
 - essential infrastructure (e.g. utilities including power generation, fuel supply and transmission, public water and wastewater, telecommunications and data centers, airports/airlines transportation infrastructure such as bus, rail, or for-hire vehicles, garages)
 - essential manufacturing (e.g. medical, agricultural, telecommunications)
 - essential retail (e.g. grocery, pharmacy, hardware)
 - essential services (sanitation, laundry, cleaning, childcare)
 - media
 - financial institutions
 - social services (e.g. shelters, food banks)
 - construction
 - defense and national security operations supporting the U.S. Government or a contractor to the U.S. Government
 - public safety and security
 - government support (e.g. logistics, technology support, other support for essential government services)
 - single occupant businesses (e.g. gas stations)
- An application process has been established to request designation as essential for business not listed in the order. The application requires a description of the business at the location seeking the designation and must be submitted under penalty of perjury.

North Carolina

- Orders people to stay at home for 30 days
- Prohibits gatherings of more than 10 people
- Only permits leaving home and traveling for essential activities
- Ceases all operations of non-essential businesses, not including minimum basic operations and working from home
- Provides for essential businesses to continue to operate while prioritizing social distancing measures—including:

- CISA List
- Restaurants that provide take-out, drive-thru, or delivery
- Grocery stores
- ABC stores and beer and wine stores
- Doctors and other healthcare providers
- Pharmacies
- Hardware stores
- Post offices
- Office supply stores
- Gas stations and convenience stores
- Veterinarians and pet supply stores
- Hotels, airlines, buses, taxis, and rideshare services
- Places of worship

Ohio

- Orders everyone to stay home and prohibits travel except for Essential Activities, Health Care and Public Health Operations, Human Services Operations, Essential Infrastructure, Essential Government Functions, or to operate Essential Businesses and Operations
 - Essential Activities: obtaining necessary health and safety activities, obtaining necessary supplies and services, socially distant recreation, care of others
 - Healthcare and Public Health Operations: includes hospitals, medical manufacturers, logistics, and research and development
 - Human Services Operations: includes homeless shelters and foodbanks
 - Essential Infrastructure: including construction, food production and distribution, storage facilities, utilities, sanitation, telecommunications, and cybersecurity operations
 - Essential Government Functions: public safety, courts, military, housing and shelter
 - Essential Businesses and Operations:
 - those needed to maintain continuity of operations of the “federal critical infrastructure sectors” as defined by CISA,
 - stores selling groceries and pharmacies
 - charitable social services
 - media and First Amendment protected speech
 - gas stations and transportation infrastructure
 - financial institutions
 - hardware and supply stores
 - construction essential for residences, Essential Activities, and Essential Businesses and Operations
 - mail and package services
 - educational institutions providing distance learning, critical research, or other essential functions
 - manufacturing, distribution, and supply chain of essential supplies, including agriculture and food processing
 - professional services (legal, accounting, real estate, insurance)
- The order does not provide a mechanism for applying to be designated as essential

Oregon

- Orders everyone to stay home to the maximum extent possible
 - Prohibits all nonessential social and recreational gatherings, regardless of size
 - Can go outside for recreational activities as long as maintaining social distancing
- Orders closing of all retail businesses in which close personal contact is difficult to avoid, such as barber shops, arcades, gyms, and theaters.
- Businesses that are not closed by the order must implement social distancing policies in order to remain open
 - Focuses on listing which businesses must close instead of defining businesses that can stay open

Pennsylvania

- Gatherings of more than 10 encouraged to be postponed
- Freedom to travel remains, but residents encouraged to avoid nonessential travel
- All “non-life sustaining businesses” must close in-person locations, except gas stations, food retailers, and transportation companies
 - - The Order includes an **attachment** of those industries deemed to be “life sustaining”
 - **List of life-sustaining businesses** is intended to closely reflect list of businesses CISA defined as needed to maintain continuity of operations of the “federal critical infrastructure sectors”
- Enforcement actions will be taken against businesses that do not comply
- Waiver applications can be submitted requiring a statement of why the business is “life-sustaining,” what plans are in place to mitigate COVID-19, and how many employees will be working at the requested waiver location

Rhode Island

- Requires residents to stay home unless traveling to work, traveling for medical treatment, exercising, or obtaining necessities
- Prohibits gatherings of more than five people
- Closes all non-critical retail businesses in-person operations
- Critical retail businesses include, but are not limited to, food and beverage stores (e.g., supermarkets, liquor, specialty food, and convenience stores, farmers' markets, food banks and pantries), pharmacies and medical supply stores, compassion centers, pet supply stores, printing shops, mail and delivery stores and operations, gas stations, laundromats, electronics and telecommunications stores, office supply, industrial and agricultural/seafood equipment and supply stores, hardware stores, funeral homes, auto repair and supply, banks and credit unions, firearms stores, healthcare and public safety professional uniform stores, and other stores and businesses identified as critical by the Department of Business Regulation.

Vermont

- Orders everyone to stay at home
 - Leaving only for essential reasons such as: personal safety; groceries or medicine; curbside pick-up of goods, meals, or beverages; medical care; exercise; care of others; and work, as set forth further below. Vermonters shall significantly restrict normal activities outside the home or place of residence, consistent with CDC guidance, to help stop the spread of the virus.
- Closes all businesses not considered critical to public health and safety, as well as economic and national security shall remain in operation
- Critical businesses include:

- Health care operations; law enforcement; critical infrastructure; construction; critical manufacturing; retail serving basic human needs; fuel products and supply; hardware stores; transportation and agriculture sectors; trash collection; agriculture and farms; lodging; mailing and shipping; news media; banks and related financial institutions; providers of necessities and services to economically disadvantaged populations; and other vendors of technical, security, logistics, custodial, and equipment repair and maintenance services.

Virginia

- Issues a stay-at-home order that allows people to leave their homes to obtain food, exercise, supplies, or medical care
- Closes Virginia's beaches to everything but exercising and fishing. Closes campgrounds.
- Prohibits all public and private in person gatherings of 10 or more individuals
- Closes all public access to recreational and entertainment businesses
- Closes all businesses that cannot adhere to the 10 patron limit
 - Restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets may continue to offer delivery and take-out services.
- Essential retail businesses may remain open during their normal business hours. Such businesses are:
 - Grocery stores, pharmacies, and other retailers that sell food and beverage products or pharmacy products, including dollar stores, and department stores with grocery or pharmacy operations;
 - Medical, laboratory, and vision supply retailers;
 - Electronic retailers that sell or service cell phones, computers, tablets, and other communications technology;
 - Automotive parts, accessories, and tire retailers as well as automotive repair facilities;
 - Home improvement, hardware, building material, and building supply retailers;
 - Lawn and garden equipment retailers;
 - Beer, wine, and liquor stores;
 - Retail functions of gas stations and convenience stores;
 - Retail located within healthcare facilities;
 - Banks and other financial institutions with retail functions;
 - Pet and feed stores;
 - Printing and office supply stores; and
 - Laundromats and dry cleaners.

Washington

- Prohibits anyone from leaving their home or place of residence except: (1) to conduct or participate in essential activities, and/or (2) for employment in essential business services
- Closes all non-essential business and all essential businesses are encouraged to remain open and maintain operations, but must establish and implement social distancing and sanitation measures
- Essential activities permitted are limited to the following:
 - Obtaining necessary supplies and services for family or household members and pets.
 - Engaging in activities essential for the health and safety of family, household members and pets.
 - Caring for a family member, friend, or pet in another household or residence, and to transport a family member, friend, or their pet for essential health and safety activities, and to obtain necessary supplies and services.
 - Engaging in outdoor exercise activities but only if appropriate social distancing practices are used.
- Essential businesses are in the following sector:
 - Healthcare/public health

- Emergency services sector
- Food and agriculture
- Energy
- Water and wastewater
- Transportation and logistics
- Communications and IT
- Other community-based government operations and essential functions
- Critical manufacturing
- Hazardous materials
- Financial services
- Chemical
- Defense industrial base

Washington, DC

- Closes all nonessential businesses
- Prohibits any gatherings larger than 10 people
- Essential businesses, which may remain open, include:
 - Healthcare and public health operations
 - Essential infrastructure
 - Food and household products and services
 - Social services providing the necessities of life
 - Communications and IT
 - Energy and automotive
 - Financial services
 - Educational institutions
 - Transportation and logistics
 - Construction and building trades
 - Housing and living facilities
 - Professional services
 - Childcare facilities

West Virginia

- Issues an order to stay-at-home and directs residents to only leave for an essential activity, which includes:
 - Obtaining food, medicine, and similar goods
 - Obtaining non-elective medical care and treatment
 - Going to and from essential workplace
 - Going to and from the home of a family member
 - Going to and from the home of another individual who is entitled to visitation
 - Going to and from a place of worship
 - Engaging in an outdoor activity

- Prohibits any gathering larger than 10 people
- Closes all nonessential businesses and operations
- Essential businesses include:
 - CISA critical infrastructure; Healthcare, public health operations, and health insurance companies; Grocery stores and pharmacies; Food, beverage, and agriculture; Essential governmental functions; Human services organizations and childcare facilities and providers; Essential infrastructure; Coal mining and coal-fired electric generation facilities; Manufacture, distribution, and supply chain for critical products and industries; Transportation and travel related businesses and gas stations; Financial and insurance institutions; Hardware and supply stores; Critical trades; Mail, post, shipping, logistics, delivery, and pick-up services; Religious entities; Educational institutions; Laundry services; Supplies to work from home; Supplies for essential businesses and operations; Home-based care and services; Residential facilities and shelters; Professional services; Media; Hotels and motels; Funeral services

Wisconsin

- Orders all individuals to stay at home except when leaving for the following:
 - Essential activities
 - Essential governmental functions
 - To operate essential businesses and operations
 - To perform non-essential minimum basic operations
 - Essential travel
 - Special situations
- Prohibits gatherings of any size
- Closes all non-essential businesses and operations except:
 - Minimum Basic Operations, as defined below, and
 - Any operations consisting exclusively of employees or contractors performing activities at their own home or residences (i.e., working from home).
- Essential businesses include
 - CISA critical infrastructure; Stores that sell groceries and medicine; Food and beverage production, transport and agriculture; Restaurants and bars (as carry out only); Child care settings; Organizations providing charitable and social services; Weddings, funerals, and religious entities complying with 10 or fewer people; Funeral establishments; Media; Gas stations and businesses needed for transportation; Financial institutions and services; Hardware and supplies store; Critical trades; Mail, post, shipping, logistics, delivery, and pick-up; Laundry services; Supplies to work from home; Supplies for essential businesses and operations and essential governmental functions; Transportation; Home-based care and services; Professional services; Manufacture, distribution, and supply chain for critical products and industries; Critical labor union; Hotels and motels; Higher educational institutions; Wisconsin Economic Development Corporation (WEDC) designated businesses

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**Employment & Labor Guidance
Related to Coronavirus (COVID-19)**

Employer's Guide to Reopening the Workplace

May 2020



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Employer's Guide to Reopening the Workplace

Only two months ago, businesses across the country were forced to take fairly radical steps to modify their business practices to slow the spread of COVID-19. In response to federal recommendations, and state and local orders, companies took unprecedented efforts to protect their workers, their customers, and the public, with significant impacts on their businesses and their lives.

Now, attention turns to reopening the economy and developing a “new normal” for businesses that must find a way to operate. The crisis has created a new set of challenges that have the potential to change employer-employee relationships, including creating safe work environments, implementing new practices to reduce further spread of COVID-19, and assuring employees it is finally safe to return to work.

There is no one-size-fits-all plan for reopening. How and when businesses reopen will depend on their location, the size and nature of operations, the risk the employer is willing to assume, and of course, the continued spread of the virus itself. This article is intended to provide an understanding of the legal issues involved, so that businesses looking to the future can develop a thoughtful plan for opening their doors and their lunchrooms.

Employer Legal Obligations – Old & New

Reopening the workplace has the potential to create a minefield of issues for employers who must navigate both old and new employment laws in an unprecedented situation. Employers are advised to consider each of the following obligations at every stage of the process.

Nondiscrimination: Employees (and in many cases, applicants) are protected by a number of nondiscrimination statutes, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). As employers plan to reopen, they must be careful not to make decisions that have a discriminatory impact, even in the name of safety. For example, while employers may be concerned about older employees, as age is currently associated with higher risk for COVID-19 complications, the ADEA prohibits singling out employees who are 40 or older for additional safety measures, such as restricting older employees' access to the workspace. Additionally, as employers police employee health and safety during the pandemic, they should be mindful of their obligation to make decisions in a nondiscriminatory manner and should carefully analyze and document the business or other reasons for employment decisions.

Workplace Safety: Under the Occupational Safety and Health Act, administered by the Occupational Safety and Health Administration (OSHA), employers have a general duty to keep the workplace free from recognized hazards or conditions that could lead to death or serious harm for employees. The Act prohibits retaliation or harassment against employees who report unsafe working conditions, and requires employers to record confirmed cases of COVID-19 if there is objective evidence, or evidence the employer should reasonably have been aware of, that the exposure was work-related. Practically, this means that employers should consider adopting the [Centers for Disease Control and Prevention \(CDC\)](#)- and [OSHA](#)-recommended precautions as their standard for keeping the workplace safe.

Wage & Hour: Employers need to be aware of how various scenarios might impact their liability under the Fair Labor Standards Act (FLSA) and state and local wage and hour laws. Companies that employ exempt workers under the FLSA, for example, must be mindful of how flexible schedules or salary changes might affect an employee's exempt status. FLSA exemption status is based on a combination of duties and a salary basis test. Regardless of duties, employees have to meet a minimum weekly salary (\$684/week under the FLSA, although some states have a higher threshold) in order to be exempt from overtime requirements. If an employer, for example, decides to institute temporary salary cuts during a phased reopening, that may impact the employee's exempt status.

The FFCRA: The Families First Coronavirus Response Act (FFCRA) is in effect until December 31, 2020. Under the FFCRA, employers with fewer than 500 employees must provide emergency paid sick leave and emergency paid family and medical leave for specific COVID-19-related reasons. Further, employers need to post the Secretary of Labor's notice about the Act ([available here](#)) in a central location in the workplace. Further guidance on the FFCRA is available [here](#) and [here](#).

Employee Privacy: Under the ADA, employers must keep all employee personal health information confidential and stored separately from regular personnel files. Employers can expect to come into possession of more of this type of information in the coming months as protocols are established to protect the workplace (such as temperature checks) and accommodations are requested during the transition. The pandemic does not preempt this obligation – employers must review their privacy obligations and have a system in place for compliance before reopening. At minimum, the ADA requires keeping medical information separate from any other employee personnel files, and those files must be kept in a locked cabinet or room (if hardcopy) or protected electronically with a password or similar system.

Considerations and Action Items Before Reopening

There are a number of unique issues that employers are now confronted with in bringing employees back to the workplace. The CDC's current [guidance](#) for reopening suggests that employers deciding whether (and when) to reopen consider the following issues: (i) whether the community the employer operates in is no longer requiring significant mitigation; (ii) whether the employer will be able to limit returning nonessential employees to those from the local geographic area; and (iii) whether the employer has protective measures for employees at higher risk (e.g., teleworking, tasks that minimize contact). According to the CDC, employers should only consider reopening if they can answer "yes" to each of these issues.

The decision of whether and how to reopen is very fact-specific and is best taken in consultation with counsel. That said, employers should consider the following actions now to best prepare for the eventuality that workplaces will reopen.

Conduct a Risk Assessment: Every employer considering reopening should conduct a risk assessment to determine what they can do to mitigate health risks to their employees. This assessment should consider the potential for COVID-19 exposure in the workplace, reasonable steps (such as office modifications) that could be taken to reduce that risk, and how the company is prepared to handle eventualities such as the need for flexible work arrangements or putting a plan in place in the event of workplace exposure. Part of this assessment should include a review of relevant state and local requirements specific to reopening the workforce and whether physical changes could be made to the workspace to reduce the spread of the virus, such as moving desks or adding kick pedals to doors. OSHA has created a helpful document that can be used to guide this assessment, available [here](#).

Develop Written Plans and Guidance: Employers are encouraged to develop written policies and procedures before reopening and to clearly communicate those policies to employees. While no one can predict every eventuality, at minimum every employer should have written guidance for maintaining a safe workplace (which should include social distancing measures consistent with state and CDC guidelines), the plan of action to implement if a worker tests positive for or is potentially exposed to COVID-19, a telework policy or flexible work arrangement policy, a health policy that includes guidelines for employees coming back to work, and clear guidance for employees to report suspected or known COVID-19 cases in a way that maintains privacy and confidentiality (such as designating a single human resources officer as the point of contact).

Consider Flexible Options: Employers should be prepared to offer flexible work arrangements such as continuing with remote work for some or all employees, staggered workweeks, or flexible time-off policies. The reality of this crisis is that even if workplaces are allowed to reopen, that does not mean every employee will be able to return full time. Schools have been closed for the remainder of the year, and certain jurisdictions are already considering whether schools can be operational after the summer. Likewise, summer camps that parents rely on for childcare are likely going to be closed or have significantly scaled back offerings. Many employees will be facing difficulty finding care for their children, but also many employees may be concerned about returning to work given that COVID-19 continues to spread. The FFCRA will be in place until December 31, 2020, but some employees may use (or already have used) their available paid leave under that Act. Thus, from the standpoint of employer-employee relations and a practical standpoint of needing a workforce, businesses need to prepare to be flexible.

Communicate Expectations with Employees: Employers should anticipate that employees may have concerns about returning to work. Indeed, even as the state and local governments move to reopen the economy, the true risk of returning to work is still an unknown due to the nature of COVID-19. Transparency is, therefore, more important than ever to help alleviate employee concerns and to bolster employer-employee relations. Employers are urged to communicate with their employees before

reopening so that expectations are clear from the first day back in the office. These communications should cover any flexible work arrangements the company is putting in place, how to request such an arrangement or an accommodation, safety precautions and procedures that can be expected, and employees' obligations to help maintain a safe workplace.

Bringing Back Employees from Furlough or Layoffs: Many employers attempting to reopen will do so by re-engaging furloughed employees or rehiring employees who were laid off. Further, businesses may not be at full operation from day one, so even if an employer intends to bring back all employees, they may not be able to do so all at once. In this situation, employers need to be extremely careful that the hiring or rehiring decisions are made in a way that does not risk potential discrimination claims. The crisis cannot be used as a pretext for discriminatory decisions. Employers are also urged to be especially cautious not to make rehiring decisions based on perceived higher risk of COVID-19 complications, which has the potential to implicate the ADEA and the ADA, among other statutes and state laws.

After Reopening – Ongoing Concerns and Obligations

Once employees begin to return to physical worksites, employers should actively implement, monitor, and update their approaches to the following matters. Employers should provide training (available online or in written format from [OSHA](#)) on these measures to all employees, especially those returning to the worksite or client worksites.

Social Distancing: Reopening does not mean that the pandemic is over. It is important to be mindful that social distancing has been shown to be effective at slowing the spread of COVID-19. Both OSHA and the CDC recommend that workplaces adhere to the latest social distancing protocols. Employers should emphasize social distancing measures in the workplace, monitor the efficacy of those measures in terms of employee health, and distribute written policies that reflect current federal and state guidance or directives.

Use of Masks: The current CDC [guidance](#) recommends that all individuals wear masks when interacting with others. Employers can require that employees wear masks in the workplace, although it is important to check state law requirements for whether the employer is responsible for providing the masks or other personal protective equipment (PPE). Employers that require the use of masks should provide clear written policies explaining the requirements and the process for requesting an accommodation under the ADA if necessary.

Cleaning Protocols and Infection Control Processes: As COVID-19 is believed to be passed by respiratory droplets, employers must establish and adhere to protocols for cleaning common spaces, shared equipment, or any other surfaces or areas that may cause the virus to spread. There are also a number of infection control processes that can greatly reduce the risk of workplace exposure, such as frequent handwashing. The CDC has created a comprehensive guide for keeping workplaces clean, which is available [here](#).

Monitor Employee Health and Conduct: According to current CDC guidance, an individual who has COVID-19 symptoms associated with it should not be in the workplace. The U.S. Equal Employment Opportunity Commission (EEOC) has released [guidance](#) detailing what employers may do to keep their workplaces safe, including instituting testing for COVID-19, requiring sick employees to stay home, and inquiring about symptoms.

Importantly, employers need to stay vigilant and ensure that employees are following the safety guidance that has been put in place. Written policies are essential so that expectations are clearly communicated and the consequences for not following the policies are clear. Additionally, employers have the responsibility to keep their workplaces free from discriminatory behavior and harassment. Public discourse has not always been polite during this crisis, but all employees have a right to a workplace free from discriminatory conduct, even during a global pandemic.

Disclose and Record Confirmed or Suspected Cases of COVID-19: If an employee reports either a COVID-19 diagnosis or symptoms, employers should share information with their employees and non-employees (e.g., customers, vendors, and others with whom the employee may have come in contact while working) without revealing the infected individual's name or any other identifying information. To the extent that providing the name of the individual is deemed necessary to protect a co-worker who has worked directly with the infected individual, consent should be sought before making any such disclosure.

Provide Reasonable Accommodations: While an employer may require employees to wear PPE and observe infection control procedures, employers must also provide reasonable accommodations to employees under the ADA. The regular accommodation

request rules and processes continue to apply to requests made during the pandemic. Employers may ask questions and request documentation and are obligated to engage in the interactive process where they know or reasonably should know of an employee's need for accommodations.

Take Employee Concerns Seriously: Engaging with employees effectively during this time may be an employer's strongest defense for avoiding an outbreak of COVID-19 within the workplace and is also the strongest deterrent to potential legal claims. Employers should ensure that employees know how to file complaints, report concerns, and request reasonable accommodations. One way to streamline this process is to designate a specific individual to receive COVID-19-related inquiries and complaints and clearly communicate reporting instructions in written guidance.

Stay Informed: No one can predict how the reopening of American workplaces is going to unfold. Staying up to date on the latest guidance from federal, state, and local governments (including the [CDC](#), [OSHA](#), and the [EEOC](#)) will be as important as flexibility. The best practices for minimizing employer liability and maximizing employee productivity are staying informed of key developments, communicating clearly with employees, and regularly consulting with counsel at critical points along the way.

Looking to the Future

Employers have had to make many difficult decisions, often in a matter of days, during this pandemic, and they have been scrutinized perhaps more than ever for the choices they have made with respect to the treatment of their employees and their acceptance of government funds. This is the time to take a measured and thoughtful approach to reopening America that considers the present realities and the long-term ramifications of a given action.

* * * * *

Employment & Labor Practice Contacts

Contact information for members of Wiley's Employment & Labor Practice is outlined below. Please contact us with any questions or concerns. To learn about Wiley's Employment Capabilities Related to the COVID-19 Pandemic, please visit our [website](#).



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**Employment & Labor Guidance
Related to Coronavirus (COVID-19)**

COVID-19 Frequently Asked Questions for Employers

May 2020



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Table of Contents

GENERAL	1
Can employees refuse to come to work due to coronavirus?	1
Can employers restrict employees' personal travel during the pandemic?	1
Can employees refuse to travel as part of their job duties during the pandemic?	1
WARN ACT	1
What is the WARN Act?	1
Which states have enacted mini-WARN Acts?	2
What are an employer's notice requirements under the WARN Act?	2
What is a triggering event?	2
Are there any exceptions to the WARN Act requirements that may apply during the pandemic?	2
FAMILIES FIRST CORONAVIRUS RESPONSE ACT	2
General	2
What is the Families First Coronavirus Response Act (FFCRA)?	2
How does an employer know if its business is under the 500-employee threshold?	2
Does the FFCRA apply to businesses with fewer than 50 employees?	3
What documentation does an employer need to receive from its employee in order to obtain the tax credits?	3
Can an employee take intermittent leave under the FFCRA?	4
Emergency Paid Sick Leave (EPSL)	4
What are the qualifying reasons that would entitle an employee to EPSL?	4
When is an employee entitled to EPSL because of an isolation order?	4
When is an employee entitled to EPSL because the employee is caring for another individual?	5
How much must employees be paid while taking EPSL?	5
How many hours must employers provide employees in EPSL?	5
Can an employee use the sick leave to make up for working reduced hours?	5
If an employee uses the emergency sick leave, will the employee lose the ability to use existing PTO or other leave guaranteed by existing, non-emergency state law?	5
Does the emergency sick leave roll over?	5
Can employees use state-mandated paid sick leave in addition to the federal emergency sick leave?	6

Emergency Family and Medical Leave (EFML)	6
Who is eligible for the EFML?.....	6
How does an employee request the EFML?.....	6
How many weeks of leave is an employee entitled to? How many of those weeks will be paid?	6
How much pay does an employee receive under the emergency FMLA?	6
CARES ACT	6
Paycheck Protection Program (PPP)	6
What is the Paycheck Protection Program?	6
How does a PPP loan affect an employer's obligations toward its employees?	6
How much of a PPP loan is eligible to be forgiven?	6
How will decreasing payroll or employee wages affect loan forgiveness?	7
Tax Relief	7
What should employers know about the refundable payroll tax provisions of the CARES Act?	7
When is a business partially suspended for the purposes of the Employee Retention Credit?	7
Can employers utilize both the tax credits provided for under the FFCRA and the CARES Act?	7
Against what employment taxes does the CARES Act tax credit apply?	7
What should employers know about the tax deferral provisions of the CARES Act?	7
DISCRIMINATION CONCERNS	8
May an employer ask only one employee questions to determine if they have COVID- 19, or require that this employee alone have their temperature taken?	8
May an employer single out employees based on national origin and exclude them from the workplace due to concerns about possible transmission of COVID-19?	8
EMPLOYEE PRIVACY AND HEALTH	8
Can employers require that its employees disclose all suspected or confirmed cases of COVID-19?.....	8
Can an employer ask employees if they have tested positive for or been exposed to coronavirus?	8
Can employers ask employees who have been exposed to or tested positive for coronavirus to stay home?	8
Can employers require employees with symptoms of COVID-19 (but no diagnosis) stay home?	8
Can employers require employees who are “high-risk” to stay home?	8

Can employers require that employees are tested for COVID-19 before returning to the workplace?	9
Can employers measure an employee's body temperature to determine if the employee has a fever?	9
Can employers ask employees who are displaying symptoms of COVID-19 to seek medical attention?	9
Can employers require that employees present proof of their fitness for duty before returning to work following COVID-19 exposure or a positive diagnosis?	9
What should employers do if an employee tests positive for COVID-19 or reports that they have been exposed to COVID-19?	9
Are employers required to notify the CDC of an employee's exposure or positive test?	9
Is COVID-19 a recordable event under the Occupational Safety and Health Act (OSH Act)?	9
What steps can employers who are hiring take to protect its existing workforce?	10
What information can employers share with employees or customers who may have been exposed to coronavirus?	10
Can an employee report to a manager that they know a co-worker has tested positive for COVID-19 or is exhibiting symptoms?	10
How should managers and supervisors keep medical information of employees confidential while working remotely?	10
What obligations does an employer have to provide reasonable accommodation if an employee says that they live in the same household as someone who due to a disability is a greater risk of severe illness if they contract COVID-19?	11
May an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?	11
May an employer require its employees to wear personal protective equipment (PPE) (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?	11
Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?	11
UNEMPLOYMENT	11
General	11
Are employees eligible for unemployment to make up for reduced hours?	11
Are employees eligible for unemployment if they have been furloughed?	11
CARES Act Expansion of Unemployment Insurance/Benefits	12
What does the expansion of unemployment insurance mean for employees?	12
How does this section of the CARES Act affect employers?	12

RETURN TO WORK.....	12
What is contact tracing and do employers need to do it?	12
Does an employer need to train its employees in health and safety protocols before they return to the worksite?	12
When is it appropriate to reopen the workplace?	13
Is an employer required to provide PPE to its employees?	13
Can an employer require that its employees wear PPE? What can an employer do if an employee refuses to do so?	13
Are phased returns appropriate? How should an employer stagger its employees?	13
Should employers make special concessions to employees who are considered vulnerable?	13
What can an employer do if an employee refuses to come to work?	14
An employee asked for an accommodation, but the employer cannot afford it due to the pandemic. Does that constitute an undue hardship?	14
Should an employer make changes to the physical layout of its workspace? Install push-pedals? Remove break room desks? Stop the practice of hot-desking?	14
What steps should an employer take if an employee tests positive for COVID-19?	15
How does an employer decide who to re-hire now that its business is open?	15
WILEY’S EMPLOYMENT & LABOR PRACTICE CONTACTS.....	16

Given the rapid developments in this area of law, it is important to consult with legal counsel to obtain the most up-to-date legal information and advice that is appropriate for your particular factual situation. These Frequently Asked Questions are for general informational purposes only and should not be construed as legal advice.

COVID-19 FAQs for Employers

GENERAL

Can employees refuse to come to work due to coronavirus?

Generally, no. If employees refuse to come to work due to concerns about COVID-19 they may be disciplined, up to and including, termination. That said, if an employee has an Americans with Disabilities Act (ADA) protected disability, the employer should consider whether working remotely is a reasonable accommodation. Employees also cannot be forced to work in unsafe conditions that put them in imminent danger but must engage with their employer about fixing perceived unsafe conditions before refusing to work. Imminent danger under the Occupational Safety and Health Act (OSH Act) means a danger that could reasonably be expected to cause death or serious bodily harm immediately. While it remains to be seen whether or not COVID-19 is considered an imminent danger, practically, employers should take steps to keep the workplace clean and follow federal, state, and local guidelines to prevent the spread of the virus.

Can employers restrict employees' personal travel during the pandemic?

Generally, an employer cannot prohibit otherwise legal activity, such as an employee's personal travel, including travel abroad. 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, the employer still could risk legal exposure, reduced employee morale, and negative publicity. However, employers can monitor those employees returning from travel to high-risk areas for signs of illness.

Can employees refuse to travel as part of their job duties during the pandemic?

While the answer to this question is generally no, there are factors an employer should consider before disciplining or reprimanding employees who refuse to travel as part of their job duties. First, employees may be covered under the Occupational Safety and Health Administration (OSHA) rule that employees cannot be forced to work in unsafe conditions or conditions that put them in imminent danger. To the extent that an employee is being asked to travel to a location that has been placed under a travel advisory, this rule may be implicated. Second, if the employee has a disability that places the employee at a greater risk of severe illness if they contract COVID-19 or is pregnant, then the employee may be entitled to a reasonable accommodation under the ADA. In this case, a reasonable accommodation may be not traveling and instead carrying out duties through other means, such as video conferences. Finally, practical considerations may advise against disciplining or terminating an employee who refuses to travel during the pandemic. Reprimanding or terminating an employee who does not want to travel given the numerous warnings may have a negative effect on employer-employee relations and general morale. Additionally, given the numerous travel restrictions, employees may have difficulty returning home after a trip. Thus, the employer may want to consider alternatives to travel during the pandemic.

WARN ACT

What is the WARN Act?

Generally, the Worker Adjustment and Retraining Notification Act (WARN Act) is intended to protect workers by providing them with advance notice of plant closings and mass lay-offs. Employers with 100 or more employees, not counting part-time employees who have worked less than six months in the last twelve (12) months or who work less than twenty (20) hours a week, are covered by the federal WARN Act and may also be covered by similar state mini-WARN Acts.

Which states have enacted mini-WARN Acts?

The list of mini-WARN states includes California, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Wisconsin.

What are an employer's notice requirements under the WARN Act?

Under the WARN Act, employers are required to provide sixty (60) days advance notice to employees, unions, and government officials prior to a plant closing, mass layoff, or other triggering event.

Many of the states that have enacted mini-WARN Acts often have different notice requirements than the federal statute. Thus, employers should look at whether notice is required in each jurisdiction where layoffs may occur, as well as the federal requirements.

What is a triggering event?

Plant closings and mass layoffs are both triggering events under the WARN Act. Under the federal WARN Act, a temporary or permanent plant closing is the shutdown of a single site of employment or of one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss for 50 or more employees during any 30-day period. A mass layoff is a reduction in force which results in an employment loss at a single worksite during any 30-day period for at least 33% of full-time employees and at least 50 or more full-time employees.

The state mini-WARN Acts have different definitions of both plant closings and mass layoffs, so it is important to check both state and federal law when looking at the WARN Act requirements.

Are there any exceptions to the WARN Act requirements that may apply during the pandemic?

Yes, unforeseeable business circumstances and natural disasters are established exceptions to the WARN Act notice period. An unforeseeable business circumstance is a circumstance that is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. The U.S. Department of Labor (DOL) has interpreted such business circumstances to include a "government ordered closing of an employment site that occurs without prior notice." This would likely encompass many of the employers that are currently facing the difficult decision of what to do with their workforce during the COVID-19 crisis, but there has not yet been official guidance confirming that interpretation.

Even with this exception, the employer is still required to give as much notice as practical given the unforeseen circumstances. Furthermore, to the extent that any employer is providing shortened WARN Act notice to employees and government agencies, it should provide the reason for the shortened notice, such as being required to shut down under government order without notice.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

General

What is the Families First Coronavirus Response Act (FFCRA)?

The FFCRA is a federal act that was enacted on March 18, 2020 to provide relief to workers affected by COVID-19. The FFCRA mandates that employers with fewer than 500 employees provide emergency paid sick leave (EPSL) and emergency paid family and medical leave to employees that are unable to work or telework due to one of the statute's listed qualifying reasons through December 31, 2020. The DOL issued a temporary rule clarifying several of the FFCRA's provisions on April 1, 2020.

How does an employer know if its business is under the 500-employee threshold?

An employer has fewer than 500 employees if it employs fewer than 500 full-time and part-time employees within the United States, including employees on leave, temporary employees who are jointly employed by two employers, and

day laborers. The employer should not count independent contractors, employees that have been furloughed, or any employees outside of the United States.

The determination of whether an employer has 500 employees is dependent on the number of employees the employer has on the day the employee would take leave. DOL has clarified that this does mean some employees will be eligible for paid leave, while other employees at the same business may not be if the business grows in size between when the first employee takes leave and the second takes leave.

For employers who are part of a family of companies, the Family and Medical Leave Act's (FMLA) integrated employer test will determine whether those companies' employees should be counted together for both the emergency paid leave and emergency family leave provisions of the Act. This test balances four factors to determine if more than one entity is a single employer: whether there is common management; interrelation between operations; centralized control of labor relations; and the degree of common ownership or financial control.

Companies that share employees will also have to determine whether or not to count the shared employees when determining size under the FFCRA. The Federal Labor Standards Act (FLSA) joint-employer test applies to this determination, which is whether the employer can, and actually does, exercise direct or indirect control over a particular employee. If an employer is considered a joint employer of a particular employee, then that employee should be included in its headcount for purposes of whether it has 500 employees.

Does the FFCRA apply to businesses with fewer than 50 employees?

Yes, although there is a limited exception provided in the FFCRA and explained by the DOL's temporary rule. Employers with 50 or fewer employees may be exempted from the requirements of the FFCRA if providing paid leave under the act will "jeopardize the viability of the business as a going concern." This exception is limited in the following ways.

First, the exemption only applies the employees who are requesting emergency paid leave (either sick leave or medical and family leave) to care for a dependent. There is no such exemption for employees who are requesting emergency sick leave pursuant to one of the other qualifying reasons.

Second, employers with 50 or fewer employees may only take advantage of this exemption if providing such paid leave would jeopardize the viability of the business as a going concern. DOL has clarified this to mean that a small employer is exempt from the requirement to provide such leave when: (1) such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

Employers may deny paid emergency leave only to employees whose absence would cause one of these three scenarios, which means that leave may sometimes be denied non-uniformly. In this situation, employers are strongly urged to consult with counsel before making leave decisions so as not to unintentionally implicate non-discrimination laws.

To avail itself of this exemption, employers should carefully document the facts and circumstances of the denial and how it meets the criteria set forth above. These materials should not be sent to DOL, but rather retained in the employer's files.

What documentation does an employer need to receive from its employee in order to obtain the tax credits?

With regard to documentation to support a request for emergency sick leave, the IRS is specifically advising that the employer receive the following information contained in a written request in order to substantiate eligibility:

1. The employee's name;

2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is requesting leave.

If the employee wishes to take the emergency family and medical leave, the employer should stick with normal procedure for FMLA requests and ask for the documentation that would normally support such leave.

Can an employee take intermittent leave under the FFCRA?

The DOL temporary rule provides that employers do not have to permit intermittent use of paid sick or emergency FMLA leave but may agree to allow increments of intermittent leave in any amount. Intermittent leave cannot be used, however, when the employee is working at the employee's usual worksite (as opposed to teleworking) and is taking the emergency sick leave because of a quarantine or isolation order, because the employee is experiencing symptoms and is seeking a diagnosis, or if the employee is caring for another individual. In those circumstances, the employee must continue to take paid sick leave until the allotment of leave is exhausted or the reason for the leave is no longer in effect.

Emergency Paid Sick Leave (EPSL)

What are the qualifying reasons that would entitle an employee to EPSL?

- Employee is subject to a Federal, state, or local quarantine or isolation order related to COVID-19;
 - This may include employees that are subject to a shelter in place order.
- Employee has been advised by a health care provider to self-quarantine;
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Employee is caring for an individual who is subject to quarantine pursuant to first two qualifying reasons, above;
- Employee is caring for a child or children whose school or care provider is unavailable due to COVID-19;
- Employee is experiencing a "similar condition" as specified by the U.S. Department of Health and Human Services, Labor, or the Treasury.

When is an employee entitled to EPSL because of an isolation order?

The FFCRA provides that an employee is entitled to the emergency paid sick leave if the employee is unable to work because of any one of six qualifying reasons. One of those qualifying reasons is if the employee is subject to a "Federal, State, or local COVID-19 quarantine or isolation order." The DOL temporary rule clarifies that the phrase "quarantine or isolation orders" can include a broad range of governmental orders, including shelter-in-place, stay at home, or quarantine orders. An employee may take paid sick leave if they are subject to one of these orders, but DOL provides that the test is whether the employee would be able to work or telework "but for" being required to comply with one of the aforementioned orders. Further, the employee can only take sick leave when the employer has work for the

employee to do. While there will still be scenarios where the facts are not wholly clear on whether or not an isolation is a but-for cause, the test still provides a guidepost for employers navigating this new legislation.

The temporary rule also clarifies that an employee who has tested positive for COVID-19 but is still able to telework due to mild symptoms or other ability, is not eligible for emergency sick leave under the FFCRA, if the employee is able to continue performing their work while self-quarantining. The guidance cites as an example an attorney who has tested positive for COVID-19, but whose symptoms are such that the attorney is still able to perform services by teleworking. This attorney would not be eligible for emergency sick leave under the FFCRA.

When is an employee entitled to EPSL because the employee is caring for another individual?

An employee is only eligible for paid sick leave if they have a genuine need to care for an individual and is actually prevented from working due to caring for that individual, who has been subject to a quarantine or has become ill due to COVID-19. Further, the individual must be someone with whom the employee has a personal relationship, *i.e.* a family member, roommate, or similar person. This excludes employees that do not want to come to work because they live with an immunocompromised or high-risk individual from eligibility, and those who are not acting in a caregiver capacity.

How much must employees be paid while taking EPSL?

- The normal rate of pay in these circumstances up to \$511/day:
 - Employee is subject to a Federal, state, or local quarantine or isolation order related to COVID-19;
 - Employee has been advised by a health care provider to self-quarantine; or
 - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- Two-thirds of the normal rate of pay in these circumstances up to \$200/day:
 - Employee is caring for an individual who is subject to quarantine;
 - Employee is caring for a child or children whose school or care provider is unavailable due to COVID-19;
 - Employee is experiencing a “similar condition” as specified by the U.S. Department of Health and Human Services, Labor, or the Treasury.

How many hours must employers provide employees in EPSL?

A full-time employee is entitled to 80 hours of EPSL. Part-time employees are entitled to leave for their average of work hours in a two-week period. If this is not reliable, the employer may use a six-month average to calculate the average daily hours.

Can an employee use the sick leave to make up for working reduced hours?

No, underemployment is not a qualifying reason to use sick pay.

If an employee uses the emergency sick leave, will the employee lose the ability to use existing PTO or other leave guaranteed by existing, non-emergency state law?

No. This leave is in addition to that leave and is only available until December 31, 2020.

Does the emergency sick leave roll over?

No.

Can employees use state-mandated paid sick leave in addition to the federal emergency sick leave?

Generally, no. This is state specific, but most state emergency sick leave laws provide additional sick leave only to the extent that the state leave provides for leave beyond the federal emergency paid sick leave mandate.

Emergency Family and Medical Leave (EFML)

Who is eligible for the EFML?

Employees are eligible for the EFML if they are unable to work or telework because they must care for a dependent whose school or place of care is closed due to COVID-19. An employee must have worked with the company for at least a month at the time of the leave request in order to be eligible.

How does an employee request the EFML?

Employers should maintain its normal processes for processing and approving family and medical leave requests, with the caveat that it should be considered and approved with some urgency. Employers should also request that employees seeking emergency family and medical leave provide the name of the school or care center that has been closed and documentation to support their request.

How many weeks of leave is an employee entitled to? How many of those weeks will be paid?

The employee can take twelve (12) weeks of leave, ten (10) of which must be paid by the employer pursuant to the legislation. If the employee wishes to use existing paid leave that is either guaranteed by company policy or by State law during the first ten days of their emergency leave, the employee may do so. The employee may also use the emergency sick leave to cover those ten days. It should be noted that the emergency medical and family leave is not provided in addition to regular family and medical leave, so any amounts of regular leave that the employee has already taken should be deducted from the amount provided for under the FFCRA.

How much pay does an employee receive under the emergency FMLA?

The employee is entitled to be paid two-thirds of their normal rate of pay with a limit of \$200 per day.

CARES ACT

Paycheck Protection Program (PPP)

What is the Paycheck Protection Program?

The PPP is a lending program designed to provide low-interest loans to small businesses through banks that are authorized to provide 7(a) Program small business loans. The program is regulated and guaranteed by the Small Business Administration (SBA).

How does a PPP loan affect an employer's obligations toward its employees?

While these loans do not affect an employer's obligations to its employees, the loans can only be used to pay for payroll, mortgages or rent, and utilities, and the loans are only forgivable if the employer maintains its payroll for the eight weeks following the origination of the loan. Thus, the actions the employer takes with respect to its employees will determine how much of the PPP loan is forgiven.

Employers should be aware that FFCRA leave payments cannot be paid with PPP loan monies.

How much of a PPP loan is eligible to be forgiven?

Loan proceeds that are used for the permitted expenses enumerated in the CARES Act and by the SBA (payroll costs, mortgage interest, rent, and utilities) over the 8-week period after the loan origination date are eligible to be forgiven.

The maximum forgiveness amount is the loan principal (interest is not forgiven), but 75% of the funds must be spent on payroll. Non-payroll costs in excess of 25% of the amount of the loan will not be forgiven.

How will decreasing payroll or employee wages affect loan forgiveness?

The forgiveness amount will be reduced on a proportionate basis if the number of the borrower's employees, or any employee's compensation, is reduced. This is based on either:

1. Average number of full-time equivalent (FTE) employees during the 8-week "covered period" vs the average number of FTE employees during either (i) February 15, 2019 – June 30, 2019 or (ii) January 1, 2020 – February 29, 2020.
2. Any employee whose salary is reduced by more than 25% (excluding employees with an annual salary of more than \$100,000).

Tax Relief

What should employers know about the refundable payroll tax provisions of the CARES Act?

The CARES Act provides a refundable payroll tax credit for 50% of wages paid by employers to employees during the COVID-19 crisis, up to \$10,000 per employee. The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related shut-down order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020. Employers who receive a PPP loan cannot take advantage of this tax credit.

When is a business partially suspended for the purposes of the Employee Retention Credit?

While there has been some guidance as to how this provision of the CARES Act will be interpreted, that issue will largely be a question of fact depending on the specifics of the business. That said, the IRS has stated that a business may be partially suspended if an appropriate governmental authority imposes restrictions upon the business' operations due to COVID-19 such that the operation can still continue to operate but not at "its normal capacity." It is expected that this will not be a difficult bar to hurdle, but guidance is evolving.

Can employers utilize both the tax credits provided for under the FFCRA and the CARES Act?

Employers can utilize both tax credits but cannot take credits for the same wages. Generally, the credits are related to different types of wages; the FFCRA provides for tax credits on employer-side Social Security payroll taxes the offset to costs of providing paid family and sick leave under the FFCRA, while the CARES Act tax credit is not dependent on employees taking qualified sick or family leave but can be taken against regular wages.

Against what employment taxes does the CARES Act tax credit apply?

The credit is allowed against the employer portion of social security taxes under section 3111(a) of the Internal Revenue Code, and the portion of taxes imposed on railroad employers under section 3221(a) of the Railroad Retirement Tax Act that corresponds to the social security taxes under section 3111(a) of the Code.

What should employers know about the tax deferral provisions of the CARES Act?

The CARES Act allows employers that have not taken a PPP loan to defer payment of the employer share of the Social Security tax that they would otherwise pay to the federal government. Instead, the employer could elect to defer that payment, but it must be paid over the following two years. This deferral is taken against the employer's portion of Social Security taxes and certain Railroad taxes.

DISCRIMINATION CONCERNS

May an employer ask only one employee questions to determine if they have COVID-19, or require that this employee alone have their temperature taken?

If an employer wishes to ask only a particular employee to answer such questions, or to have their temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. A reasonable belief should be based on objective evidence of known symptoms, such as a hacking cough, which is currently considered a symptom of COVID-19.

May an employer single out employees based on national origin and exclude them from the workplace due to concerns about possible transmission of COVID-19?

No. Title VII of the Civil Rights Act prohibits all employment discrimination based on national origin. It does not matter if it is linked to the current COVID-19 pandemic. Further, employers have a responsibility to keep their workplaces free from discriminatory conduct and harassment. It may be prudent to remind all employees that negative comments or adverse action taken based on national origin is not permitted and will not be tolerated in the workplace, even if the harassment or actions are due to fear related to the virus.

EMPLOYEE PRIVACY AND HEALTH

Can employers require that its employees disclose all suspected or confirmed cases of COVID-19?

Yes.

Can an employer ask employees if they have tested positive for or been exposed to coronavirus?

Yes, an employer may ask employees whether they have tested positive for COVID-19 or whether they have been exposed to the virus. Employers are advised to ask these questions broadly, rather than ask if the employee has been exposed to a family member who has tested positive both because specific questions about family members may run afoul of certain privacy laws and are generally underinclusive for determining whether an employee has been exposed to COVID-19.

Can employers ask employees who have been exposed to or tested positive for coronavirus to stay home?

Yes. The Equal Employment Opportunity Commission (EEOC) recently issued guidance confirming that requiring workers exhibiting symptoms to stay home or leave the workplace is permissible.

Can employers require employees with symptoms of COVID-19 (but no diagnosis) stay home?

Yes. Employers can and should continue to tell employees that if they have a cough, fever, runny nose or other cold or flu-like symptoms, or any of the other symptoms that the CDC has identified as indication of COVID-19, they should stay at home and not risk exposing others to illness. In some states, wage and hour laws may be implicated where employees who report to work are sent home.

Can employers require employees who are “high-risk” to stay home?

Generally, no. This is not permissible under the ADA absent a directive from CDC authorities that employers should take such measures. The EEOC has represented that the ADA does not prohibit employers from following CDC guidance. To the extent possible, it is important for employers to treat employees equally and apply policies non-discriminatorily, both during the pandemic and when the crisis is over, and the workplace returns to normal. If employers obtain any confidential medical information, they will need to keep it confidential.

Can employers require that employees are tested for COVID-19 before returning to the workplace?

Yes.

Can employers measure an employee's body temperature to determine if the employee has a fever?

Yes, both current and prospective employees who have received a conditional offer may be required to pass a temperature check before reporting to a workplace. It should be noted that this may not be an effective measure of determining whether an employee has COVID-19 as many people are asymptomatic.

Can employers ask employees who are displaying symptoms of COVID-19 to seek medical attention?

Yes, employers may ask employees to seek medical attention, to get tested for COVID-19, and to leave the workplace if they exhibit symptoms associated with COVID-19.

Can employers require that employees present proof of their fitness for duty before returning to work following COVID-19 exposure or a positive diagnosis?

Yes, the EEOC's recent guidance confirms that employers may require a doctor's note stating the employee is fit for duty before permitting the employee to return to work. Employers may also ask all employees to certify that they are symptom-free prior to returning to a workplace.

What should employers do if an employee tests positive for COVID-19 or reports that they have been exposed to COVID-19?

Employers should instruct employees who are exhibiting symptoms or who have been exposed to COVID-19 to leave the workplace and seek medical attention. Employers also have an obligation to inform other employees who may have been exposed to the virus through contact with the sick employee that they may have been exposed, but should not provide the name of the employee. Instead, employers should provide those employees who may have been exposed enough information for them to determine the extent of the potential exposure. If an employee has been working directly with the infected person, employers should consider seeking permission from the infected person to share their name with only the employee that has been working with the sick employee directly.

Are employers required to notify the CDC of an employee's exposure or positive test?

No.

Is COVID-19 a recordable event under the Occupational Safety and Health Act (OSH Act)?

Yes. COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if: (1) the case is a confirmed case of COVID-19, as defined by Centers for Disease Control and Prevention (CDC); (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.

In areas where there is ongoing community transmission, employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work. In light of those difficulties, OSHA exercised its enforcement discretion in order to provide certainty on April 10, 2020 with the following changes to the reporting requirements, which will be in force until the pandemic subsides:

Employers of workers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions must continue to make work-relatedness determinations pursuant to 29 CFR § 1904. Until further notice, however, OSHA will not enforce 29 CFR § 1904 to require other employers record the cases, except where:

1. There is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and
2. The evidence was reasonably available to the employer. For purposes of this memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

Practically, this means that employers (outside of the industries listed above) do not need to record every case of COVID-19 unless there is known or suspected evidence that the case is work-related.

What steps can employers who are hiring take to protect its existing workforce?

The EEOC has confirmed that employers may screen applicants for symptoms of the COVID-19 after extending a conditional job offer, so long as the company applies the practice uniformly. Employers may also take an applicant's temperature as part of a post-offer, pre-employment medical exam after extending a conditional offer of employment.

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

What information can employers share with employees or customers who may have been exposed to coronavirus?

The CDC's guidance explains that employers should inform fellow employees of potential workplace exposure, but only to the extent necessary to adequately inform them of their potential exposure. That means employers should share information with its employees without revealing the infected individual's name. Employers should communicate to employees generally that there has been a potential COVID-19 exposure, without sharing additional identifying information. Employers also may be able to communicate to affected non-employees (e.g., customers, vendors, and others with whom the employee may have come in contact while working) that there was a potential COVID-19 exposure.

It is important to remember that employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA which requires that the information be kept separately from other personnel files and in a secure manner.

Employers should also evaluate any applicable state privacy law or state "mini-ADA" laws to ensure they do not contain different or additional requirements or provisions. For example, if the company does business in the State of California (e.g., it has one or more locations, employees, customers, suppliers, etc. in the state), and the business is subject to the California Consumer Privacy Act (CCPA), then the employer must provide employees a CCPA-compliant notice prior to or at the same time as the information is collected.

Can an employee report to a manager that they know a co-worker has tested positive for COVID-19 or is exhibiting symptoms?

Yes. ADA confidentiality does not prevent an employee from reporting to the employee's manager that another co-worker has COVID-19 or is exhibiting symptoms. Once the manager learns about the situation, the manager should report that information to the appropriate person within the organization. Employers are advised to create clear guidance regarding this kind of reporting and clearly communicating that guidance with employees.

How should managers and supervisors keep medical information of employees confidential while working remotely?

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other

medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can see them. Similarly, documentation must not be stored electronically where others would have access.

What obligations does an employer have to provide reasonable accommodation if an employee says that they live in the same household as someone who due to a disability is a greater risk of severe illness if they contract COVID-19?

The employee only has a right to reasonable accommodation for the employee's own disability. In the situation being raised here, the employee does not have a disability, only a member of the employee's household. Employers are advised to develop a policy to specifically address this situation, and then apply it uniformly to all employees.

May an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

May an employer require its employees to wear personal protective equipment (PPE) (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear PPE during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

Yes, employers may make inquiries that are not disability related. An inquiry is not disability-related if it is designed in such a way that both potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) and medical reasons that might make an individual high-risk are presented together in such a way that the employee can answer yes or no without having to state that they have a medical condition. For example, an employer could ask the following question: Do you expect that the coronavirus pandemic will impact your availability to work, either due to practical concerns such as inability to access public transport or medical concerns? Please answer yes or no.

UNEMPLOYMENT

General

Are employees eligible for unemployment to make up for reduced hours?

While state rules differ, and it depends on how large an income loss is, most states provide partial unemployment benefits. Generally, if the lost pay exceeds what the employee would receive in unemployment benefits, then the employee may be eligible for benefits.

Are employees eligible for unemployment if they have been furloughed?

Potentially, depending on the state. DOL has authorized the states to make unemployment benefits available to people who are quarantined, who are furloughed, or who had to leave work to care for a family member. That said, sick leave pay is included in the calculation of whether an individual is receiving an income, so the individual would not be able to take unemployment if they are receiving sick pay (emergency or otherwise).

CARES Act Expansion of Unemployment Insurance/Benefits

What does the expansion of unemployment insurance mean for employees?

The CARES Act creates a temporary Pandemic Unemployment Assistance program through December 31, 2020 to provide payment to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others) who are unable to work as a direct result of the coronavirus public health emergency.

The CARES Act will also increase unemployment insurance by \$600 per week for four months. This money is in addition to what states pay as a base unemployment salary. This benefit would extend to gig economy workers, freelancers, and furloughed workers who are still getting health insurance from their employers but are not receiving a paycheck.

Finally, the Act provides for an additional thirteen (13) weeks of unemployment benefits through December 31, 2020, for those who remain unemployed. These benefits would be paid by the federal government after state unemployment benefits have been exhausted. It is not yet clear how this program will be administered.

How does this section of the CARES Act affect employers?

The Act also provides funding to support “short-time compensation” programs, where employers reduce employees’ hours instead of laying off workers and the employees with reduced hours receive a pro-rated unemployment benefit. This provision would pay 100 percent of the costs the employer incurs in providing short-time compensation through December 31, 2020. It is not yet clear how this program will be administered.

RETURN TO WORK

What is contact tracing and do employers need to do it?

Contact tracing is essentially working backwards to identify all of the people an individual infected with COVID-19 has recently been in contact with in an effort to warn those individuals of their potential exposure.

Contact tracing in the public health sense is a specialized skill conducted by trained health professionals. However, employers can and should employ contact tracing as a workplace safety measure. Employers who learn that an employee has a positive or presumptive positive COVID-19 diagnosis should immediately conduct an investigation to determine the employee’s work locations and close workplace contacts within the last 14 days.

Once employers have identified potentially exposed work areas and employees, they should clean the affected areas, isolate the potentially exposed employees, and communicate to the identified employees that they have potentially been exposed to COVID-19, while maintaining the affected employee’s confidentiality. Employers should take particular care to avoid disclosing the names of employees who have disclosed a positive or presumptive positive COVID-19 diagnosis.

Employers should also direct potentially exposed employees to relevant CDC [guidance](#). It may also be helpful to review the CDC’s guidance concerning [cleaning](#) and [disinfecting](#) workspaces.

Does an employer need to train its employees in health and safety protocols before they return to the worksite?

An essential part of curbing the spread of COVID-19 within the workplace is training employees concerning new employer health and safety protocols before they return to work. Employers should provide copies of new health and safety policies or protocols (including social distancing, cleaning, handwashing, or other relevant policies) before employees return to the workplace. Employers should also be sure to provide employees with contact information for the person or team responsible for responding to questions or complaints as well as the person or team responsible for tracking the application of the policies and protocols.

Signage about protocols or policies posted at key locations and pre-shift or mid-shift check-ins are also valuable training tools that employers may utilize.

When is it appropriate to reopen the workplace?

Knowing when to reopen the physical workplace is a fact intensive analysis that should be guided by employers' review of orders and recommendations issued by state or local governments and health departments. Employers should also review federal guidance on the matter, including, but not limited to, the CDC's recent [guidance](#) addressed to assisting employers in making decisions regarding reopening.

Is an employer required to provide PPE to its employees?

The answer to this question hinges on the applicability of a patchwork of state and local laws and orders to a given employer. New Jersey, New York, Michigan, and Rhode Island have issued executive orders that require covered businesses to offer employees face coverings at the employer's expense. In Connecticut, all employees (with limited exceptions) are now required to wear a face covering at all times, and employers are required to provide masks, face coverings, or materials and CDC instructions for creating masks or face coverings to employees. California's pre-COVID-19 wage and hour laws prohibit employers from requiring employees to pay for business expenses, which likely means that California employers who require their employees to wear PPE are required to provide the equipment or reimburse employees for purchasing it at their expense.

In jurisdictions where employers are not required by law or executive order to provide employees with PPE, employers should consider the extent to which masks or other PPE are needed to limit transmission of COVID-19 exposure in the workplace.

Employers should also be mindful of their potential obligations under the OSH Act. Because certain industries or jobs put workers at increased risk of injury due to the nature of the work, the standards set by OSHA may require employers to provide and pay for PPE.

Regardless of any legal obligations, we recommend that employers who require employees to wear PPE while performing services on the employer's behalf either provide the required PPE to their employees or reimburse employees for expenses related to the purchase of approved PPE.

Can an employer require that its employees wear PPE? What can an employer do if an employee refuses to do so?

Employers may require the use of masks or other PPE in the workplace in light of the COVID-19 pandemic. If an employee refuses to wear a PPE or has an underlying medical condition that restricts their ability to wear PPE, the employer should not assign the employee to work in areas that would require the employee to wear PPE. Employers should also be mindful of EEOC [guidance](#) explaining that, absent undue hardship, employers are obligated to explore and provide reasonable accommodations for employees who are restricted from wearing PPE due to a disability under the ADA.

Are phased returns appropriate? How should an employer stagger its employees?

The National Guidelines for Opening Up America Again confirm that phased returns are both appropriate and encouraged as local conditions improve. Employers considering a phased return to work should consider how best to maximize telework for eligible employees while ensuring that essential functions are completed; the identity of groups or departments necessary to perform in-person tasks that are essential to the business; the capacity of their workspaces; and their ability to put into place social distancing, cleaning, or other relevant protocols or policies. Employers should balance those considerations and local conditions and directives against the specific operational needs of their business. The timeframe between each department or group's return to the workplace may be based on need and the continued health of employees. Employers should be certain to document the legitimate business reasons for their selection process.

Should employers make special concessions to employees who are considered vulnerable?

Employers are generally not required to make concessions or accommodations for employees in a vulnerable category based on the employee's (or the employer's) subjective fear that the employee may be susceptible to a severe reaction to COVID-19.

That said, vulnerable employees may be eligible for benefits under the FFCRA depending on the specifics of their situation or if they have been advised by a medical professional to self-quarantine due to concerns about COVID-19.

Additionally, mental or emotional disorders such as anxiety could create an obligation to provide a reasonable accommodation.

If there are no FFCRA or other disability concerns, employers may find themselves in a position where they must choose between instructing vulnerable employees to work despite their concerns or terminating them. We believe that employers should be sensitive to requests by vulnerable employees and should give careful consideration to how such employees may be reintegrated into the workplace. That approach is supported by the National Guidelines for Opening Up America Again, which advises (but does not require) employers to “strongly consider” special accommodations for personnel who are members of vulnerable populations.

Ultimately, there is no one-size-fits-all answer to this question, and we advise employers work closely with their counsel to devise solutions that are suitable for each specific factual circumstance.

What can an employer do if an employee refuses to come to work?

An employer's options in this situation depends on the reason for the employee's refusal. Employees are entitled to refuse to work if they believe they are in imminent danger based on a “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.” Employers should consult counsel and guidance issued by the CDC and OSHA to determine whether an employee's refusal to work is permissible under the OSH Act.

Additionally, employees who engage in concerted activity related to their working conditions, such as protesting a lack of employer policies addressed to worker safety, may be protected from adverse employment action such as termination under Section 7 of the National Labor Relations Act (NLRA). Importantly, the NLRA applies in such instances whether or not an employer's workforce is unionized.

Absent any state or local law to the contrary, employers are otherwise authorized to enforce their policies as they would in any other instance where an employee either fails to appear for a scheduled shift or refuses to do so. That said, we strongly advise collaboration with counsel to determine the best approach in a given factual circumstance.

An employee asked for an accommodation, but the employer cannot afford it due to the pandemic. Does that constitute an undue hardship?

Employers should address accommodation requests on a case-by-case basis to determine the existence of viable accommodations by engaging in the interactive process mandated by the ADA. Employers are not required to grant accommodation requests that constitute an undue hardship in the form of a significant difficulty or expense.

Before the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). The EEOC has issued [guidance](#) explaining that the factors that demonstrate the existence of an undue hardship are necessarily flexible in light of the COVID-19 pandemic. Specifically, the EEOC's guidance counsel's that employers' sudden loss of revenue streams have created an environment where analysis of available discretionary funds, business expenses, and the effects that state or local restrictions have on both could give rise to an employer's decision to reject an accommodation based on cost.

Notwithstanding the EEOC's guidance, employers should carefully consider the viability of an accommodation request as well as potential alternative accommodations rather than rejecting accommodation requests out-of-hand.

Should an employer make changes to the physical layout of its workspace? Install push-pedals? Remove break room desks? Stop the practice of hot-desking?

It depends, but probably yes. Every employer should analyze its space and its plans with respect to returning the workforce (including the number of employees who will return and occupy a given space) to determine whether particular workplace modifications are necessary or helpful to maintaining social distancing, compliance with employer created workplace safety protocols, or compliance with government-issued orders or guidelines.

If certain employees work in areas that are within 6 feet of each other, employers should develop plans to reassign those employees to other areas or to align the space to ensure minimum distancing. That could mean reconfiguring or removing furniture, especially in shared spaces like break rooms.

What steps should an employer take if an employee tests positive for COVID-19?

Employers who learn of a confirmed or presumptive positive COVID-19 diagnosis should: (i) isolate the infected employee(s); (ii) identify and isolate employees who worked closely with the affected employee within the past 14 days; (iii) identify and clean potentially affected workspaces; and (iv) confidentially communicate with employees concerning the identification of a presumptive positive COVID-19 diagnosis and the steps the employer has taken to address any concerns related to exposure in the workplace.

Employers may require employees who reported a confirmed or presumptive positive COVID-19 diagnosis to provide a medical certification or otherwise certify that they are fit to return based on the CDC's guidelines.

How does an employer decide who to re-hire now that its business is open?

Employers should make decisions about who to hire or re-hire and when to do so based on consideration of relevant federal, state, and local guidance concerning current conditions as well as their careful analysis of the legitimate business bases for hiring or re-hiring a given individual at a given time.

This issue, perhaps more than the many other difficult issues the COVID-19 pandemic has created, is ripe for potential claims related to the violation of federal, state, or local employment discrimination laws. Even decisions concerning which employees will work onsite and when to bring those employees back are subject to scrutiny under federal, state, or local anti-discrimination laws because those decisions could be considered adverse employment actions (i.e. employer decisions that negatively affect the terms and conditions of an individual's employment such as pay, hours, or employment status).

Accordingly, employers should be mindful of their obligation to make decisions without regard for employees' protected traits and should carefully analyze and document the business reasons for employment decisions.

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Given the rapid developments in this area of law, it is important to consult with legal counsel to obtain the most up-to-date legal information and advice that is appropriate for your particular factual situation. These Frequently Asked Questions are for general informational purposes only and should not be construed as legal advice.

Employment & Labor Practice Contacts

Contact information for members of Wiley's Employment & Labor Practice is outlined below. Please contact us with any questions or concerns. To learn about Wiley's Employment Capabilities Related to the COVID-19 Pandemic, please visit our [website](#).



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