



COVID-19 policies and other considerations for employers as the pandemic evolves



June 10, 2021

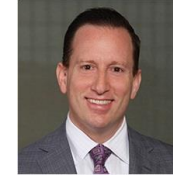


Agenda

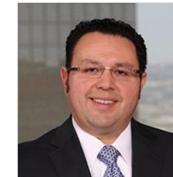
- Introduction
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 - Workplace safety issues
 - COVID-19 testing and screening
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- Remote work considerations
 - Remote safety risks
 - Workers' compensation and remote work
 - Reimbursement of remote work expenses
 - Policy issues
- Reasonable accommodations and employee leave
- Mental health and wellness
- Resources
- Q&A

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Where are we now?

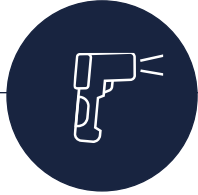


Return to office considerations

Workplace safety issues

- **Health and safety:** To supplement physical distance between employees, employers can implement various workplace controls, including:
 - Engineering controls
 - Administrative controls
 - Safe work practices
 - Personal protective equipment (PPE) (eg, masks, etc.)
- **Screening and testing protocols:** Determine whether and how employers will screen and/or test to maintain a safe workplace (per applicable EEOC, CDC and state/local guidance)
- **Exposure planning:** Follow CDC and other applicable guidance in dealing with symptomatic, COVID-19+ and potentially-exposed workers
- **Meetings and travel:** Revisit whether to permit non-essential in-person meetings and/or travel
- **Leave considerations:** Consider CDC guidance and potential obligations under the FFCRA and other federal, state and local laws that may require leave based on COVID-19-related circumstances
- **Policy changes:** Review employment policies to determine whether changes are needed based on new laws and regulations, ways of working, health and safety protocols, and litigation risks

COVID-19 testing and screening



Health screenings

- Permissible based on current CDC, OSHA and EEOC guidance
- Required by some states/localities
- Determine methods and protocols (eg, technologies, self-reported or employer-administered)



COVID-19 testing

- Permissible under ADA based on current EEOC guidance based on direct threat posed by COVID-19
- “Job related and consistent with business necessity” standard
- Consider state/local restrictions



Antibody testing

- CDC interim guidelines provide that results should not be used to make decisions
- Prohibited as a requirement for allowing employees to re-enter the workplace based on current EEOC guidance

COVID-19 vaccine issues

Mandatory vs. voluntary

- Employers can require employees to receive vaccinations against diseases that have been recognized as pandemics*
- OSHA and state laws require employers to have a safe workplace that is free from hazards
- Accordingly, employers have the right to establish legitimate health and safety standards, policies, and requirements if they are job-related and consistent with business necessity
- ADA regulates required medical examinations, but vaccinations are not a medical exam
- Other considerations: ADA confidentiality rules; GINA; other federal and state confidentiality and privacy requirements

*EEOC's COVID-19 and ADA Technical Assistance Questions and Answers, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

COVID-19 vaccine issues

What happens if an employee refuses an employer's mandate to take the COVID-19 vaccine?

- Employers are required to accommodate disabilities, unless there is a **direct threat**
 - Engage in the interactive process with employee and consider reasonable accommodations
 - Remote working during shutdown – either because of government mandate or reasonable safety pandemic precautions – is not dispositive of whether remote work constitutes a reasonable accommodation

COVID-19 vaccine issues

What happens if an employee refuses an employer's mandate to take the COVID-19 vaccine?

- Employers are also required to accommodate sincerely held religious belief, practice, or observance
 - Social, political and economic beliefs, and a general “anti-vaccine” viewpoint are not protected
- Employers should utilize an employee exemption form for employees to claim one of the above exemptions
- If no exemption is available, termination of employment may be necessary

COVID-19 vaccine issues

Additional considerations

- Availability of vaccine/nature of business or industry
- Union/bargaining issues
- Wage and hour issues
- Incentives for voluntary plan/wellness programs
- Applicants/contractors/part-time
- Workers' compensation coverage (where vaccination is a condition of employment)

Remote work evolves

Remote work safety risks

The OSH Act applies to work performed by an employee in any workplace within the United States, including a workplace located in the employee's home. All employers, including those which have entered into "work at home" agreements with employees, are responsible for complying with the OSH Act and with safety and health standards.

- Accordingly, employers bear some responsibility over the conditions of a "work at home" arrangement. As such, employers should take the necessary steps to ensure that employees are not exposed to reasonably foreseeable hazards created by their at-home employment.
- Generally, telecommuting policies address an employee's obligations related safe workplace practices while working remotely.
- **Common remote work safety risks**
 - Ergonomics (furniture, equipment, etc.)
 - Slips, trips and falls (remove obstacles/hazards: cords, loose carpet, etc.)
 - Fire safety (inspect cords, working smoke detectors, etc.)
 - Stress/mental health (minimize overworking, regular contact, etc.)



Workers' compensation and remote work

In general, an employee injury or illness is compensable under workers' comp if it *“arises out of and in the course of employment,”* regardless of where the injury occurs.

- “Arising out of” relates to what the employee was doing at the time of the injury
- “In the course of” relates to when the injury happened

How does this work in the Remote Work context?

Employee's home as secondary job site

- If an employee is required to work at both the employer's premise and at home, the employee's home is considered a **secondary job site**. Since many employees are now required to work from home due to the pandemic, the employee's home becomes a secondary job site. So, for example, if a teleworker drives from their home to pick up materials or go to a workplace meeting and gets into a car accident, the injuries would likely be compensable since it is arguably within the course and scope of employment.

Personal comfort doctrine

- Another claim might occur when an employee is injured while getting coffee or going to the bathroom at home. Under the **personal comfort doctrine**, an injury is compensable if the employee was engaging in activities necessary for their personal comfort or welfare and part of “normal working conditions.”
- This personal comfort doctrine applies to employees who work from home, meaning that applicable activities can range from eating lunch, drinking water or coffee, going to the bathroom, and even taking a break for a smoke.

Because state laws differ when it comes to what's considered a “work-related injury,” it's important for employers to define each employee's normal working hours and specific job duties to help determine what is – *and what is not* – a work-related claim.

Reimbursing remote work expenses

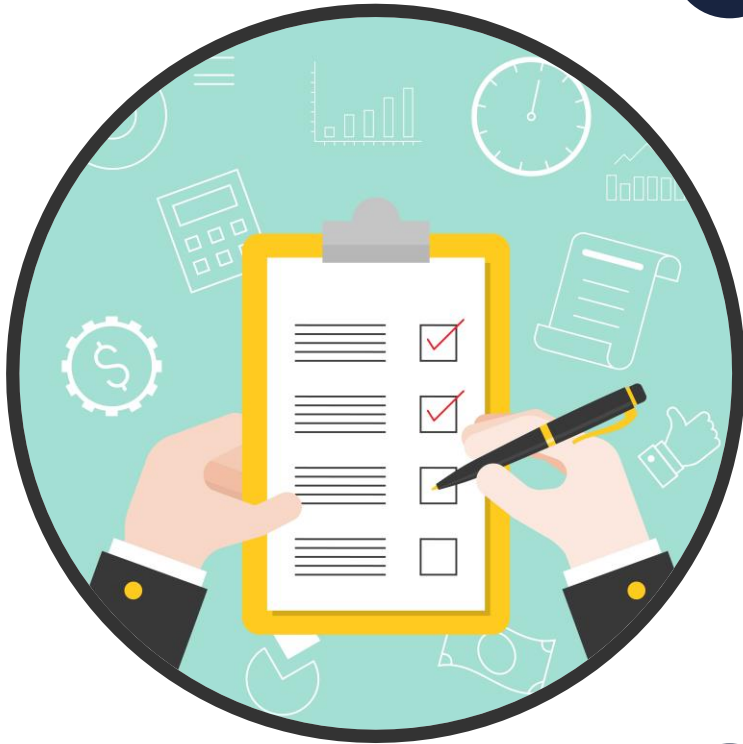
Is the employer required to reimburse employees for remote work expenses?

- **Federal requirements**
 - FLSA: **generally no**, unless the employee expenses would cause the employee to dip below minimum wage
 - ADA: **yes**, if the remote work is offered as a reasonable accommodation
- **State/local requirements**
 - Washington, DC
 - Title 7 Section 910.1 of the D.C. Municipal Regulations requires employers to pay **the cost of purchasing and maintaining any tools that the employee requires to perform the employer's business.**
 - California
 - Section 2802 of California's Labor Code requires employers to reimburse their employees for “**all necessary expenditures or losses incurred by the employee as a direct consequence of the discharge of his or her duties,**” or to comply with the directives of the employer
 - Illinois
 - Illinois Wage Payment and Collection Act requires employers with employees working in the state to reimburse their employees “**for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer**”



Revisiting remote work policies

Recognize risks of burnout, isolation and mental health challenges that can arise from remote work



Determine eligibility and set expectations

Know where your employees are located

Be conscious of equity issues and personal challenges

Address expectations of availability (and unavailability) and policies; re-evaluate performance management processes

Review reimbursement and incentive programs

Revise policies as needed – remain flexible; training should be ongoing

Address need for boundaries between home and work; encourage vacation; consider limits on email and meetings – “COVID Fridays”

Reasonable accommodation and employee leave

Reasonable accommodation

Is remote work now a right?

Can an employer refuse a request for remote work as reasonable accommodation post-pandemic if the employee has been working remotely during the pandemic?*

- **NO**, employer is not required to continue remote work automatically
- Look for other reasonable accommodations that effectively address the employee's need
 - Employer can deny the request because of undue hardship, eg, if employer excused certain essential functions and permitted telework during the pandemic, employer does **not** have to continue to do so forever
- **BUT** remote work during pandemic is a relevant factor when considering the post-pandemic request

Toughest questions tend to come up with non-exempt positions

- How much supervision does the job require?
- What if manager works remotely?

* EEOC Guidance on ADA, Rehabilitation Act, 29 CFR Part 1630

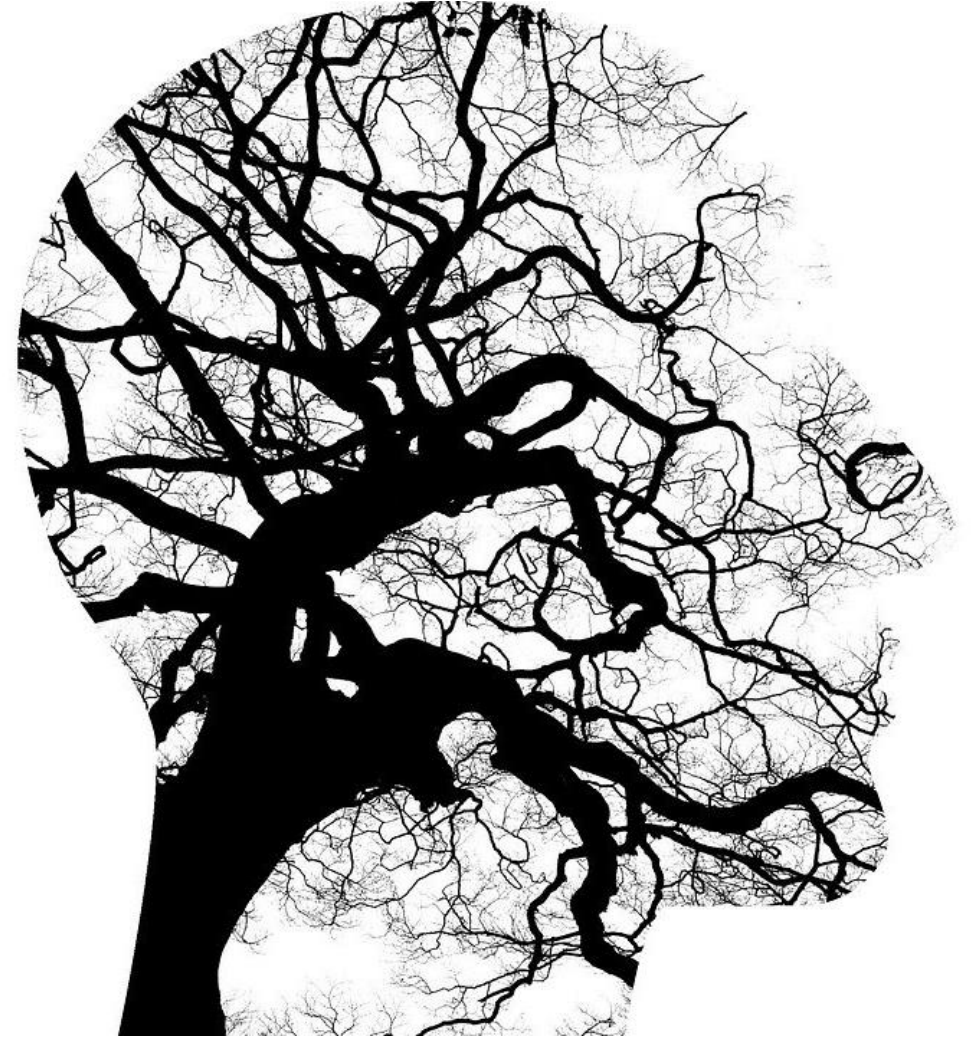


Reasonable accommodation

How does the ADA protect those with a mental health condition?

Those with a mental health condition may be entitled to reasonable accommodation under the ADA:

- Employees should be provided a reasonable accommodation for any mental health condition that would, if left untreated, “substantially limit” their ability to concentrate, interact with others, communicate, eat, sleep, care for themselves, regulate their thoughts or emotions, or do any other “major life activity.”
- The condition does **not** need to be permanent or severe to be “substantially limiting.”
- If an employee is being rejected for a job based on their condition, employer must have objective evidence that employee cannot perform the job duties or that employee would create a significant safety risk, even with a reasonable accommodation.



Leave – it keeps getting more complicated

Leave as a reasonable accommodation

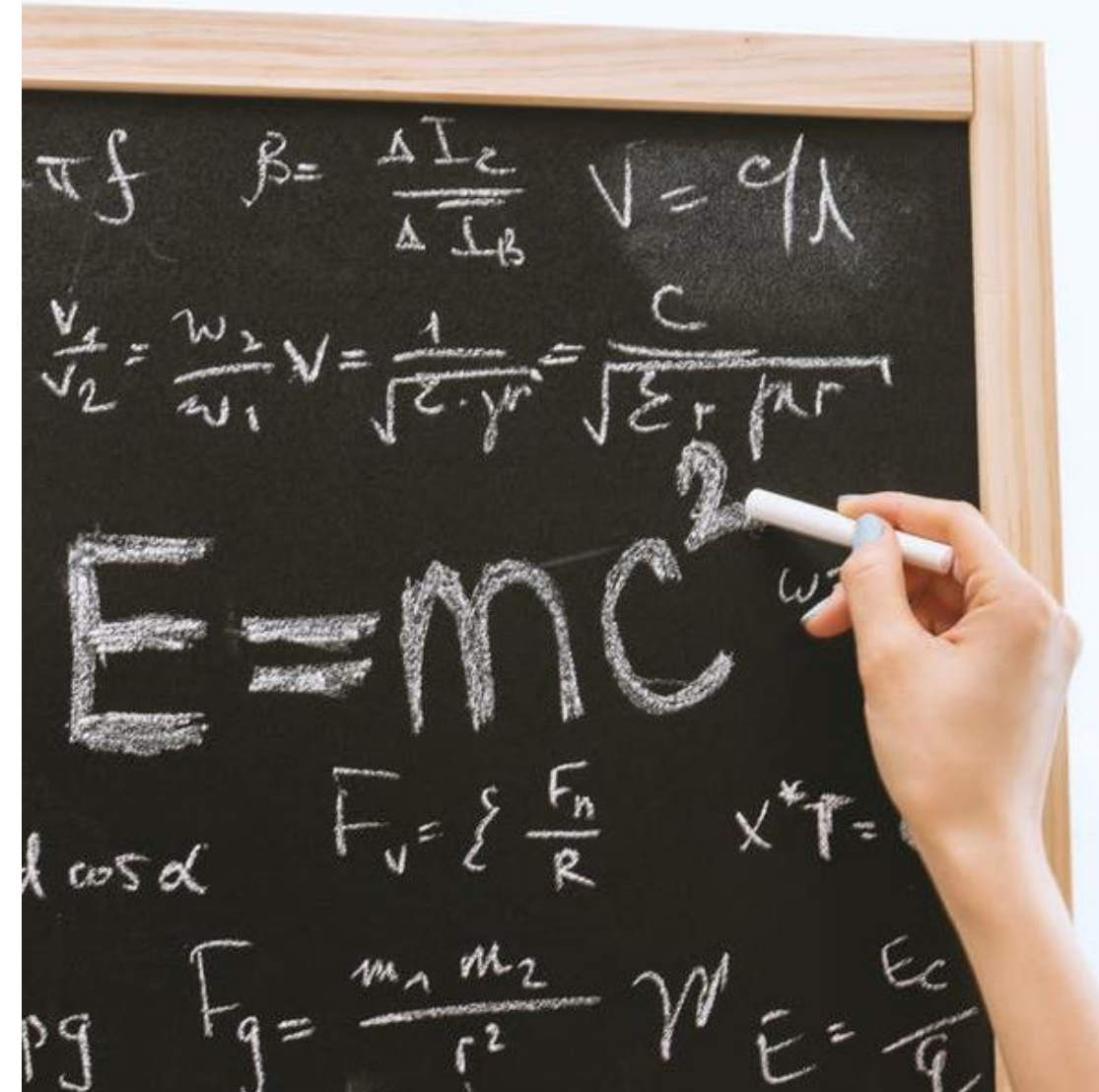
EEOC Guidance on the ADA*

If leave cannot be granted under any other program (eg, employer- or government-provided leave program, workers' compensation), then employer must engage in **an interactive process with the employee** to determine if leave can be provided as a **reasonable accommodation** for their disability **without undue hardship**.

Common scenarios during the pandemic

- Employee is afraid to return to work because they have an underlying condition
- Employee is concerned about returning to work because of co-workers' non-compliance with COVID-19 prevention measures (eg, wearing mask, social distancing)
- Employee not comfortable returning to work because they are pregnant

* ADA, Rehabilitation Act, 29 CFR Part 1630



Leave – it keeps getting more complicated

COVID-specific leave requirements

Federal

- Biden Administration's American Rescue Plan
 - Does not extend mandate to provide FFCRA leave but extends tax credits through September 30, 2021
 - Resets bank of emergency paid sick leave (as of April 1, 2021)
 - Expands types of leave under FFCRA
 - Must be offered to all current employees (eg, newly hired and part-time)
 - Changes to EFMLA paid leave (all 12 weeks)

State and local requirements

- COVID-19 specific leave requirements
 - Workers' compensation benefits may be available for those who are infected with COVID-19 at work
 - Paid sick leave laws may require that employees be permitted to use accrued sick leave for COVID-19 related reasons (eg, quarantine as directed by health authorities)
 - State and local COVID-19 specific paid sick leave laws (eg, California)
- Wage replacement programs (eg, state disability insurance, paid family leave) are available to those unable to work for COVID-related reasons

Mental health and wellness

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Mental health and wellness

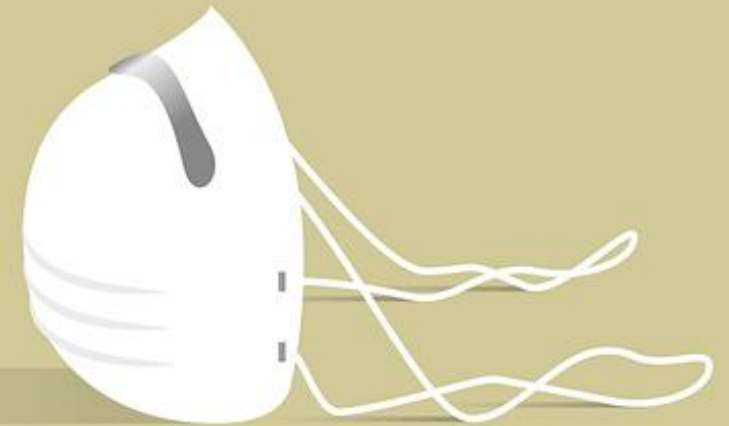
Potential mental health pandemic

A CDC survey found that more than **40% of Americans** have struggled with behavioral or mental health during the COVID-19 pandemic

1/3 of respondents reported feelings of anxiety and/or depression

Increased risk of employee burnout

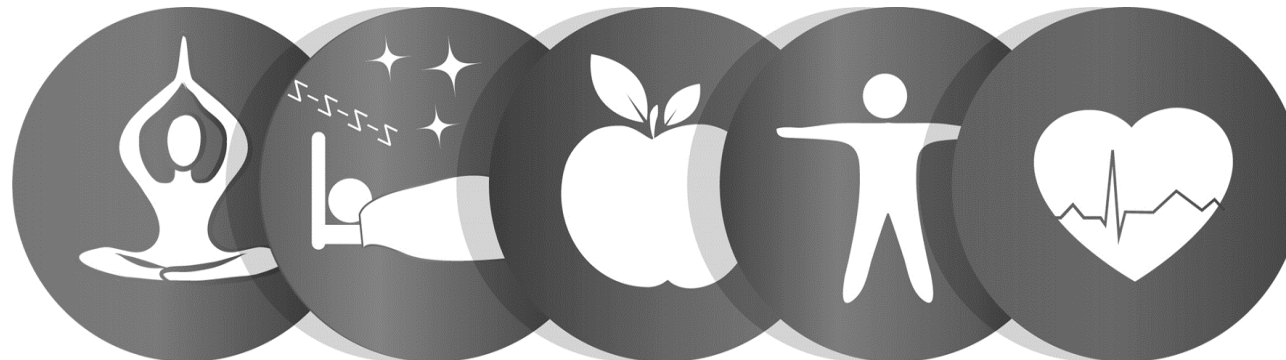
- Employees who work from home tend to work longer hours, putting them at greater risk of burnout
- According to *The Economist*, since the pandemic began, workers in the US are working an **extra 32 minutes per day (or nearly 3 hours extra per week)**



Mental health and wellness

Employer response

- Increased employee support (EAPs, mindfulness courses, increased/improved communications)
- Provision of additional benefits (expanded leave options, financial wellness programs, etc.)
- Appointment of senior executives/leaders to steer company wellness strategy
- *Adaptation is the only path forward*



DLA Piper resources

DLA Piper resources

GENIE
www.dlapipergenie.com

DLA Piper Coronavirus Resource Center
www.dlapiper.com

The image displays three overlapping screenshots of DLA Piper's digital resources. The top-left screenshot shows the GENIE (Global Employment News, Insights & Events) website, featuring a header with the GENIE logo and a navigation bar. The main content area includes sections for 'Explore employment laws around the world' and 'Latest' news, with a sidebar for 'Related services' and 'Related sectors'. The top-right screenshot shows the DLA Piper Coronavirus Resource Center, with a header featuring the DLA Piper logo and a navigation bar. The main content area includes a section for 'Coronavirus COVID-19' and a sidebar for 'Related services' and 'Related sectors'. The bottom-center screenshot shows a detailed view of the 'Coronavirus COVID-19' section, featuring a large red and black graphic with the text 'Coronavirus COVID-19' and a list of 'Latest Coronavirus COVID-19 news and articles'.

GENIE
Global Employment News, Insights & Events

Explore employment laws around the world

Access employment, labor and pensions law guides covering a wide range of topics for 60+ countries across Europe, the Middle East, Asia Pacific, Africa and the Americas. View single country reports or compare topics across two or more countries. **Subscribers** can choose from our list of 60+ countries. [Log-in here](#). **Non-subscribers** can view one of our 5 sample reports or [request a subscription](#).

View country reports

Select a country to view employment, labor and pensions law information for that country.

Select Regions & Countries

Compare countries

Compare topics across multiple countries.

Latest

All Regions & Countries

Spain: New month
27 Jan 2020

Poland: Deadline as holiday allowance
27 Jan 2020

US: NLRB reverses
24 Jan 2020

Coronavirus COVID-19

Latest Coronavirus COVID-19 news and articles

Coronavirus COVID-19: Webinar on the global employment law issues
05 Mar 2020
This free webinar will explore the main employment law and workforce issues raised by the coronavirus COVID-19 outbreak around the world. Our speakers will share practical advice on dealing with quarantine, ...

Global: Roundup of developments for February 2020
27 Feb 2020

Singapore: An update on the impact of the coronavirus on business
26 Feb 2020

China: Special rules due to Coronavirus on work permits, social security and suspension of business
12 Feb 2020

Related services

- Corporate
- Employment
- Litigation, Arbitration and Investigations

Related sectors

- Hospitality and Leisure
- Industrials
- Consumer Goods, Food and Retail

perspective

may arise from a UK real estate perspective and provide flux, so it is important to keep up to date with advice by agencies, particularly if the virus itself mutates, a real experience of similar outbreaks.

Additional resource links

- Centers for Disease Control: <https://www.cdc.gov/>
- US Government: <https://www.usa.gov/coronavirus>
- DOL: <https://www.dol.gov/agencies/whd/flsa/pandemic>
- EEOC: https://www.eeoc.gov/facts/pandemic_flu.html
- OSHA: <https://www.osha.gov/SLTC/covid-19/>
- SEC: <https://www.sec.gov/news/press-release/2020-53>
- World Health Organization: <https://www.who.int/health-topics/coronavirus>
- State Department: <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages.html>

Q&A and discussion

Thank you

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