

# WEBINAR

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## Coronavirus Updates 4/28/20: Planning Your Business's Post-Pandemic Operations

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# Today's Discussion

- Level Setting
  - What we know
  - What we don't know
  - What we don't have
- Federal and State OSHA
- Workplace Transmission and Potential Liability Considerations
- Testing Considerations
- Return-to-Work Staffing Considerations
- Hiring Considerations
- Additional considerations



# Level Setting

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# What do we know

- Highly transmissible novel coronavirus
- Most individuals who contract the virus appear to recover without long-term consequences
- But for many who contract the disease, may result in death or lasting negative health effects
- COVID-19 viral and antibody tests remain hard to obtain and mass testing for virus or antibodies appears weeks or months away
- Employer-sponsored plans are required to provide coverage for COVID-19 viral and antibody testing without cost-share

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# What don't we know

- Where we are on the curve, and when the numbers of new COVID-19 cases will actually begin decreasing (impossible to know without widespread testing)
- Whether the presence of antibodies indicates immunity from the virus (and if so, how long such immunity may last)
- Any seasonal effects (i.e., possibility of reduced transmission as weather gets warmer; possibility of “second wave” in autumn 2020)
- When and if a vaccine will be available for public use
- If and how employers could be held liable to third parties (such as employees and customers) for failing to take certain actions to maintain a safe workplace or retail establishment

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# What we don't have

- A clear consensus about when and how businesses should be allowed to re-open
- Clear rules about what employer must or even can do when it comes to establishing a safe place for employees and customers

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# Federal and State OSHA

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# Workplace Safety Standards

- Generally
  - Workplace safety standards are primarily governed at the federal level by OSHA; however states may apply additional protections
  - Under OSHA’s general duty clause, employers are required to furnish “employment and a place of employment ... free from recognized hazards ... likely to cause death or serious physical harm.”





# Workplace Safety Standards

- General Personal Protective Equipment (PPE) Standard
  - OSHA’s standard requires that employers provide PPE “for [the] eyes, face, [and] head” including “protective clothing, respiratory devices, and protective shields.”
  - Employers are required to provide PPE “wherever it is necessary by reason of hazards of ... environment ... encountered in a manner capable of causing injury or impairment ... Through absorption, inhalation or physical contact.”
  - If employees provide their own PPE in such circumstances, the employer is responsible “to assure its adequacy, including proper maintenance, and sanitation of such equipment.”



# Workplace Safety Standards

- Regarding COVID-19



## Standards

This section highlights OSHA standards and directives (instructions for compliance officers) and other related information that may apply to worker exposure to the novel coronavirus, SARS-CoV-2, that causes Coronavirus Disease 2019 (COVID-19).

OSHA requirements apply to preventing occupational exposure to SARS-CoV-2. Among the most relevant are:

- OSHA's Personal Protective Equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart I), which require using gloves, eye and face protection, and respiratory protection when job hazards warrant it.
  - When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134).
- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

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# Workplace Safety Standards

- Regarding COVID-19



Employers must also protect their workers from exposure to hazardous chemicals used for cleaning and disinfection. Employers should be aware that common sanitizers and sterilizers could contain hazardous chemicals. Where workers are exposed to hazardous chemicals, employers must comply with OSHA's Hazard Communication standard (in general industry, 29 CFR 1910.1200), Personal Protective Equipment standards (in general industry, 29 CFR 1910 Subpart I) and other applicable OSHA chemical standards. OSHA provides information about hazardous chemicals used in hospitals in the Housekeeping section of its Hospital eTool.

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# Workplace Safety Standards

- Regarding COVID-19
  - OSHA has numerous guidelines; however, they do not appear to apply directly to current pandemic
    - E.g.
      - Blood pathogen guidelines (not applicable because doesn't extend to respiratory secretions)
      - Respiratory protection guidelines (only pertains to “control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors



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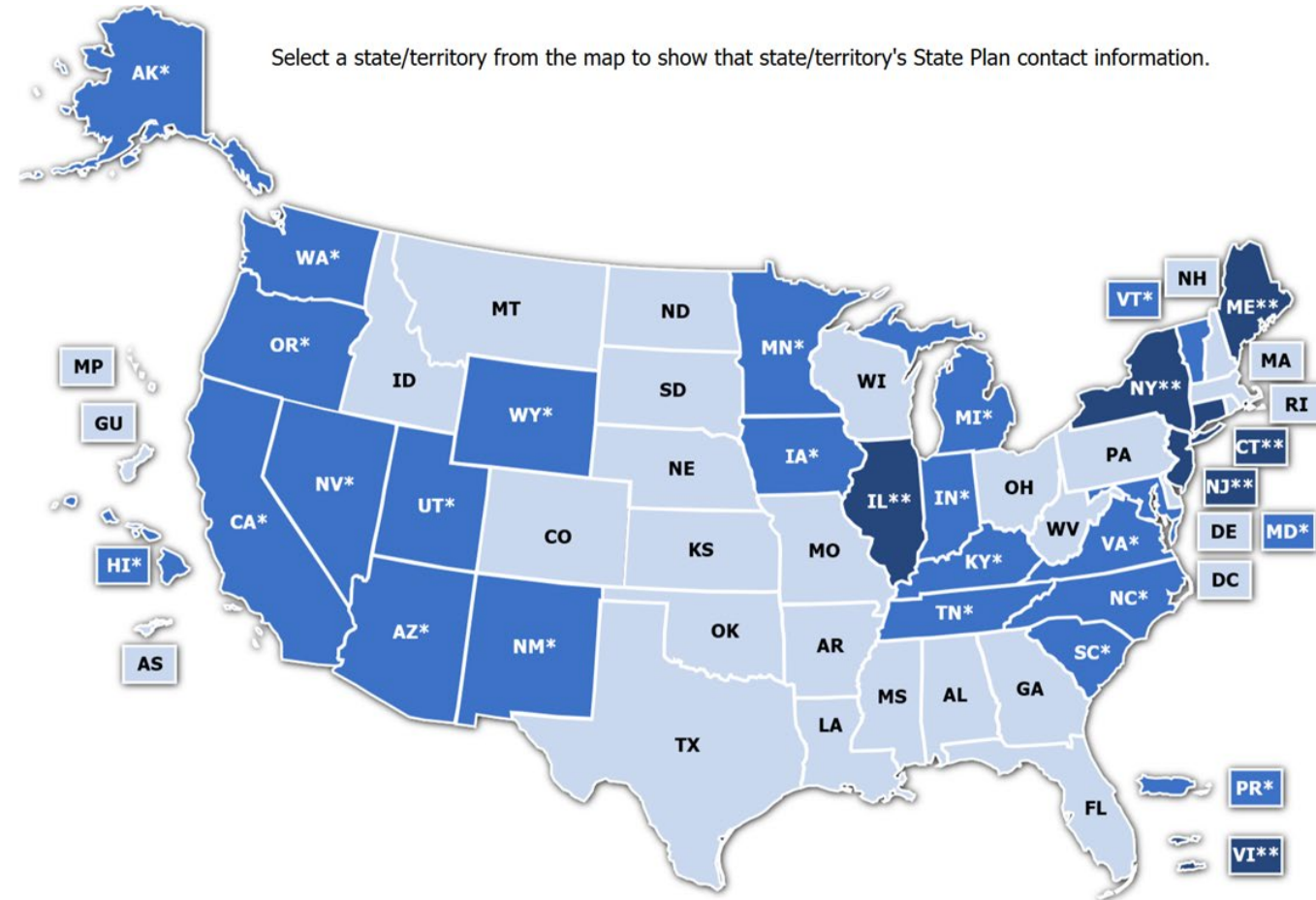


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# Workplace Safety Standards

- State OSHA Requirements
  - State Plans are required to have standards and enforcement programs that are at least as effective as OSHA's and may have different or more stringent requirements
  - 22 states have approved plans for public and private sectors
  - 6 states have state/local governmental plans



■ This state's OSHA-approved State Plan covers private and state/local government workplaces.  
■ This state's OSHA-approved State Plan covers state/local government workers only.  
■ This state (with no asterisk \*) is a federal OSHA state.





# Workplace Safety Standards

- Regarding COVID-19
  - 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;
    2. The case is “**work-related**”; and
    3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment beyond first-aid, and days away from work)
  - Notes:
    - Per OSHA regulation 29 CFR 1904.5(a), an illness is work-related if “an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness.”
    - An illness is generally presumed to be work-related if it resulted from an exposure in the work environment (which includes physical locations and equipment used by the employee in the course of work)
    - **\*\* OSHA has recognized that it may be difficult to determine whether an event is “work-related” given community spread, thus OSHA is not requiring reporting unless (1) there is objective evidence that the illness was work-related, and (2) this objective evidence was reasonably available to the employer**



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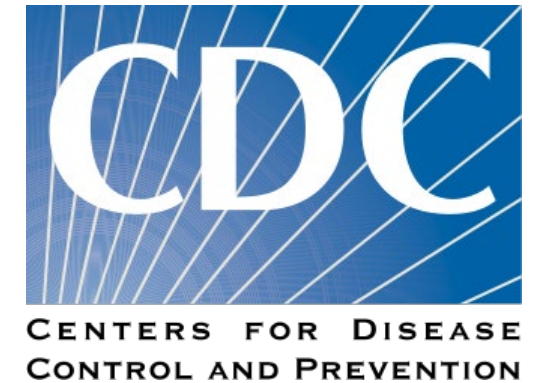
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# CDC Guidelines

- CDC has published “Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)”
  - Also industry-specific guidance published for airlines, ships, and healthcare settings
- Three primary focuses of guidelines:
  - Reduce transmission among employees
  - Maintain healthy business operations
  - Maintain a healthy work environment



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# Workplace Transmission and Potential Liability Considerations

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# Liability Considerations

- Co-worker transmission
  - Evidentiary issues
  - Lack of clear OSHA guidelines to use as defense/show of reasonableness
  - Role of workers compensation as exclusive remedy
    - But see: tort law exceptions, CA Unfair and Deceptive Trade Practice case law
- What about when a coworker contracts virus and transmits to family members?
- What about customers?
- What about visitors?

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# Liability Considerations

- Litigation beginning to test scope of WC as exclusive remedy
  - *Evans v. Walmart* (Case No. 2020L003938 (Ill. Cir. Ct. filed 4/6/20))
    - Estate of former employee, Wando Evans, sued Walmart for negligence, and willful and wanton misconduct after Evans “passed away due to complications of COVID-19”
    - Alleges that (1) decedent contracted COVID-19 at the store during working hours, (2) store management was aware that several employees were exhibiting symptoms consistent with COVID-19 but did little to protect employees from exposure, and (3) Ms. Evans then contracted COVID-19.
    - At base, alleges that Walmart failed to exercise reasonable care in “keeping the store in a safe and healthy environment and, in particular, to protect employees, customers and other individuals within the store from contracting COVID-19.”
    - Alleges that Walmart failed to (a) clean and sterilize the store, (b) implement and promote social distancing, (3) provide proper PPE to employees, (d) warn decedent that others were exhibiting COVID symptoms, (e) failed to follow OSHA and CDC guidelines, and (f) failed to train employees and implement health and safety protocols



# Use of Waivers

- Some have suggested that waivers of liability may be a means to manage risk
- More likely successful in use with customers and visitors than with employees
- Potential under existing state common laws for such waivers to be found unenforceable
- To the extent a business pursues use of waivers, they should be clearly written in large and obvious text (to increase argument that assent was knowing and voluntary)

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# Testing Considerations

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# Don't forget about ADA & related state laws

- With limited exceptions, the ADA generally prohibits an employer from requiring employees to answer disability-related inquiries or undertake a medical exam
  - Many state laws impose similar restrictions/prohibitions
- Generally asking about symptoms or taking an employee's temperature, or requiring employees to undergo a blood draw or swab to test for a virus or antibody will constitute a medical exam

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# Symptom Checks

- EEOC has made clear that employers may ask employees if they are experiencing COVID-19 symptoms, including symptoms such as fever, chills, shortness of breath
  - Notes:
    - Must maintain all information about any employee illness as a confidential medical record in compliance with the ADA
    - Don't forget about individual state law overlay

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# Temperature Checks

- EEOC has made clear that employers may engage in temperature checks of employees. However, the EEOC has also noted that individuals who have COVID-19 may be contagious but not, in fact, have a fever
  - Notes:
    - Ensure compliance with ADA confidentiality requirements
    - Don't forget about state law overlay

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# Viral Testing

- On Thursday of last week, the EEOC issued guidance making clear that employers may also test employees for *the COVID-19 virus*
  - Notes:
    - Ensure compliance with ADA confidentiality requirements
    - Don't forget about state law overlay

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# Antibody Testing

- It is unclear the extent to which an employer can test employees for antibodies for COVID-19
  - Presumably okay under similar analysis used by EEOC to permit viral testing; however, it is interesting that last Thursday's guidance did not also address antibody testing

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# Testing Related Issues

- Keeping related information confidential
  - ADA requires that all medical information about a particular employee be stored *separately* from the employee's file
  - Employer should limit access to an employee's medical information
  - May disclose the name of an employee to a public health agency if the employer learns that an employee has COVID-19
  - A temporary staffing agency or contractor that places an employee in an employer's workplace may disclose the name of the employee to such employer

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# Testing Related Issues

- Reporting
  - Federal OSHA – Not required under OSHA’s 4/10 nonenforcement guidance unless (1) there is objective evidence “that a COVID-19 case *may be* work-related,” and (2) the evidence of (1) is reasonably available to the employer
  - State OSHA – Individual state law determinations required
  - State and federal public health agencies – Permissible under federal law; likely to be okay under state laws



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# Return-to-Work Staffing Considerations

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# Return to Work/Staffing Considerations

- *Can employers tell an employee with (or suspected of having) COVID-19 to go/stay home?*
  - Yes. An employer may tell an employee to go/stay home if they test positive for COVID-19 or otherwise have symptoms of COVID-19
- *Can employers tell older workers not to come to work for their safety?*
  - No. An employer **cannot** prohibit older employees from coming to work (consider whether garden leave is permitted)
- *Can employers tell “higher risk” workers not to come to work for their safety?*
  - No. However, the employer may allow for telework
- *What can/may employers do if an employee is afraid to come back to work?*
  - It depends. The employer will need to evaluate whether employee has a legal basis for staying home. If none, it becomes an employee relations issue.

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# Hiring Considerations

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# DHS I-9 Verification

- DHS has relaxed certain I-9 verification requirements....
  - Employers operating remotely can perform inspections of “Section 2” documents remotely
    - Must obtain, inspect, and retain copies of the Section 2 documents within three business days of hire
    - Must enter “COVID-19” in the Additional Information field
    - **A physical inspection must take place after normal operations resume**
  - Once normal operations resume, employees who were onboarded remotely must report to the employer within **three business days** for in-person verification of identity and employment eligibility documentation
  - Reverification can also be done remotely.

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# May an employer screen applicants for COVID-19?

- Yes, as to symptoms or actual COVID-19 viral test
- HOWEVER, EEOC guidance indicates this must be done “*after making a conditional job offer*” and must be done equally for all entering employees in the same type of job
- Notes:
  - Unclear whether antibody test may be imposed
  - Ensure compliance with ACA’s confidentiality requirements
  - Consider state law overlay

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# May an employer withdraw a job offer if the individual has COVID-19 or symptoms?

- Yes, if immediate employment is needed. (EEOC answer suggests that you cannot withdraw the offer if immediate employment is *not* needed)
- Notes:
  - Ensure compliance with ACA's confidentiality requirements
  - Consider state law overlay



## May an employer postpone the start date or withdraw an offer because the individual is 65 years old or pregnant?

- No. “[B]eing at a greater risk does not justify unilaterally postponing the start date or withdrawing a job offer”
- But, an employer may choose to allow telework or discuss whether the employee would like to postpone their start date

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# Additional Considerations

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# ERISA/ACA implications regarding testing

- Is this an ERISA-governed benefit “plan”?
- Could it be an employee assistance program (EAP) or group health plan (GHP)?

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# FFCRA paid leave implications

- Re-openings are likely to give rise to leave requests
  - E.g.,
    - If employee has child whose school or day care is remaining closed
    - If employee contracts COVID-19 or needs to quarantine

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# Potential for “COVID-19 4.0” Legislation

- Expected to include:
  - COBRA subsidies
  - More UI
  - Hazard pay
  - Pension funding relief
- Stakeholders also working to include:
  - Employer liability relief
  - Cafeteria plan relief
  - Mandated COVID-19 treatment without cost-share

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# Employers should consider

- Using soft re-opening policies
- Potential for extended teleworking
- If possible, allowing employees to choose when they return
- Implementing social distancing in the workplace as well as taking steps to implement CDC and OSHA recommended guidelines
- Reality that different states (and even municipalities) may have different rules
- Implications for UI eligibility and paid leave/FMLA depending on employment and B2B actions taken

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# Questions?

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