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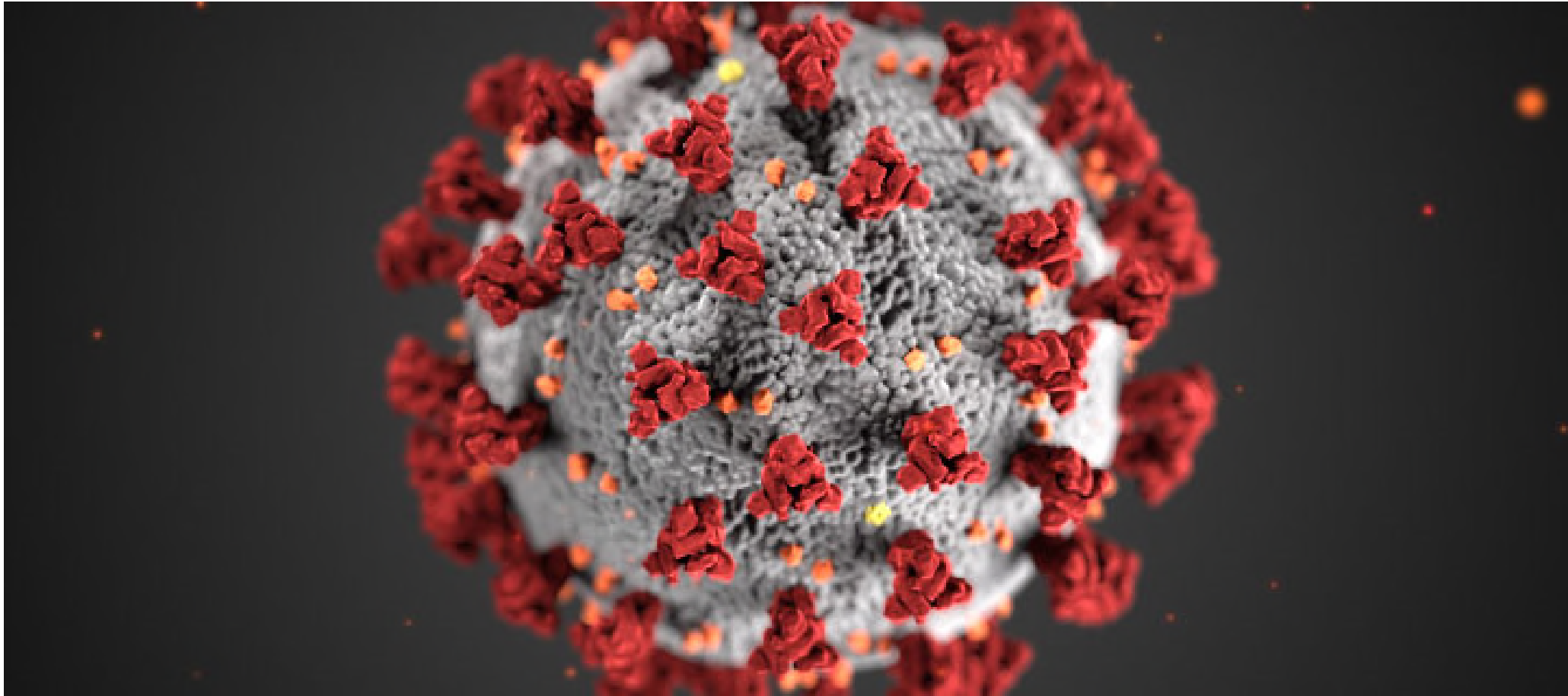


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# Preventing Pandemic Pandemonium: An Employer's Guide to Practical Strategies

Jeffrey D. Polsky  
San Francisco, CA

Steven K. Ludwig  
Philadelphia, PA



**SARS-CoV-2 ► COVID-19**



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# What Is COVID-19?

- Respiratory disease caused by a novel coronavirus
- Questions remain about how widely or quickly it has spread in the United States
- Situation is fluid – You need to stay current



# How Does a Person Get Infected?

- From others who have the virus
- Spread from person to person through small droplets from the nose or mouth that are spread when a person with COVID-19 coughs or exhales. Other people then catch COVID-19 by touching these objects or surfaces with droplets, then touching their eyes, nose or mouth.
- People also can catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets.



## “Known Unknowns”

- How long is the incubation period for COVID-19?
- How long does the virus survive on surfaces?
- How likely is it to catch COVID-19? When are people infectious?
- What is the risk of developing severe illness?
- What is the case fatality rate? Differences by age groups?
- How long until a safe vaccine is available?



# World Health Organization Data

- As of 6 pm EDT, 3/12/2020 -
  - More than 125,000 cases worldwide
  - More than 1,215 confirmed cases reported in the US
  - More than 4,600 deaths (36 in the United States)
  - 118 countries, areas or territories with cases
  - 42 states and District of Columbia



# “You Say Epidemic, I Say Pandemic”

- Epidemic: An outbreak of disease that occurs suddenly in numbers significantly greater than normal, but that spreads only within communities, states or a limited number of countries
- Pandemic: A global “epidemic” with self-sustaining lines of infection in multiple countries and continents
- 5 influenza “-demics” in the last 102 years:
  - **“Spanish Flu” of 1918**
  - “Asian” and “Hong Kong” flus of the 1950s and 1960s
  - SARS outbreak in 2003
  - **H1N1 outbreak in 2009**
  - **COVID-19 in 2020**





# WHO Decides?



- The WHO classifies pandemic influenza
  - Describe how widely influenza is spreading around the world, but not the severity of the influenza symptoms
  - WHO's announcement on 3/11 that the world is in Pandemic Phase 6 (the highest phase) indicates that there is sustained human-to-human transmission worldwide and the virus is no longer contained in a few geographic areas



# What Should Employers Do To Prepare?

- Create an outbreak response plan to ensure continuity of operations
- Control business travel
- Review HR policies and practices



# What Should Employers Not Do?

- To prevent stigma and discrimination in the workplace, use only medical guidance to determine risk
- Do not make determinations of risk based on race or country of origin



# Employer Goals

- Reduce transmission among employees
  - Staffing agencies, too
- Protect people who are at higher risk for adverse health complications
- Maintain business operations
- Anticipate employee fear, anxiety, rumors and misinformation – and plan communications accordingly



# Create an Outbreak Response Plan

- Who is responsible for coordinating efforts and communicating with employees?
- Is contact information current?
- Do you have employees with disabilities who need assistance to receive communications?
- What can you do to ensure business continuity with absent employees?
  - Cross-training
  - Allow work from home
- Involve employees in the process



# Control Business Travel

- Limit non-essential business travel based upon CDC risk assessment
- Strongly encourage employees to limit non-essential personal travel to those countries
- What if an employee refuses to travel?
  - If there is no valid medical reason for the employee's position, you can treat it the same as any other refusal to perform assigned duties. But you risk a retaliation claim.



# Review HR Policies and Practices

- Do you know which laws apply?
  - Remember state and local laws, particularly requiring paid sick leave
- Do you have policies in place to comply with applicable laws?
- Do you have a telecommuting policy?
- Have you communicated your policies to employees?



# Telecommuting Issues

- Can the employee effectively work remotely?
  - If you need the employee in the office, you can require that
- Does the employer keep track of what company-owned equipment the employee has at home?
- Has the employee agreed to return that equipment upon request?
- Is the employee handling sensitive information that needs additional safeguards?
- Is the employee required to immediately notify the employer of unsafe work conditions or work-related injuries?
- Are non-exempt employees provided a way to accurately record and report all hours worked?





# How Can We Keep the Virus From Spreading to Our Workplace?

- Employers are obligated to provide a safe place to work
- Encourage employees who are sick to stay home and seek medical care
- If an employee comes to work displaying symptoms of respiratory illness, separate them from co-workers and send them home
  - For non-exempt employees, you may have to pay a portion of their wages as reporting-time or call-in pay



# How Can We Keep the Virus From Spreading to Our Workplace?

- Encourage good hygiene
  - Hand washing with soap and water
  - Covering coughs and sneezes with a tissue (or sleeve)
- Make alcohol-based sanitizers and cleansing wipes available
- Disinfect doorknobs, countertops and other frequently touched surfaces
- Workers in some industries (health care, laboratories, travel industry, those doing business in China) may require greater protections
  - Check OSHA guidance



# Equal Employment Opportunity Commission

- ADA: Prohibits discrimination on the basis of disability, perceived disability or association with a person with a disability
  - Rules about medical examinations and inquiries
- Requirement for reasonable accommodation provided it does not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding COVID-19



# EEOC Guidance

- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act
  - Issued 10/9/2009
  - “The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.”



## EEOC Guidance (cont.)

- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce?
- When may an employer take the body temperature of employees?
- Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?



# ADA Compliance Impact

- Protects applicants and employees from disability discrimination
- Regulates employers' disability-related inquiries and medical examinations for all applicants and employees
- Prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat” (i.e., a significant risk of substantial harm even with reasonable accommodation)
- Requires reasonable accommodations for individuals with disabilities (absent undue hardship)



# Direct Threat Under ADA

- A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation
- Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, “not on subjective perceptions ... [or] irrational fears”
- Four factors:
  1. Duration of the risk
  2. Nature and severity of the potential harm
  3. Likelihood that potential harm will occur
  4. Imminence of the potential harm



# Pandemic Designation – EEOC’s View

- Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness
- If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations
- By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat





# What Can You Ask Employees?

- Would you be able to come to work if:
  - Schools or day care centers were closed?
  - Public transportation was interrupted or unavailable?
- Are you experiencing symptoms of COVID-19 (fever, cough, shortness of breath)?
  - Keep confidential
    - Except**, you should inform employees of their possible exposure to the virus
  - You can send employees home
  - Contact your local health department if one of your employees has been diagnosed with COVID-19
- Have you been to an area where the virus is widespread?
  - If “yes,” you can send employee home and require doctor’s note to return



# What Can't You Ask?

- You generally cannot ask employees to disclose whether they have a compromised immune system or chronic health condition that makes them susceptible to the virus
  - Pandemic designation may change this
- If an employee volunteers that information
  - Keep it confidential
    - Keep medical documentation confidential and separate from employee's personnel file
  - Ask the employee what type of assistance they may need



# Could This Advice Change Since There Is a Pandemic Designation?

- If an influenza pandemic becomes more severe or serious according to the assessment of public health officials, employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza
- Only in this circumstance may employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications



# Can an Employer Ask Whether Employees Are More Likely To Be Unavailable for Work Since There is a Pandemic?

- Yes
- Employers may make an omnibus inquiry
  - Since pandemic declaration, disability-related inquiry may be permissible
- The answer need not be given anonymously



# May an Employer Require Applicants To Have a Post-Offer Medical Examination To Determine Their General Health Status?

- Yes, if:
  - All entering employees in the same job category are required to undergo the medical examination and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record



# May an Employer Rescind a Job Offer Made to an Applicant Based on the Results of a Post-Offer Medical Examination If It Reveals That the Applicant Has a Medical Condition That Puts Her at Increased Risk of Complications From Influenza?

- No, unless the applicant would pose a direct threat
- A finding of “direct threat” must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence
- The finding must be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job, after considering, among other things, the imminence of the risk; the severity of the harm; and the availability of reasonable accommodations to reduce the risk



# Can We Require Employees To Present a Doctor's Note To Show They're Cleared To Return?

- Probably
- Some state and local leave laws let employers require employees to present a doctor's note after an absence of three or more consecutive workdays
- If FMLA leave, you can require certification
- If ADA accommodation, can require medical documentation
  - Is it a direct threat to employee or co-workers?
- You can require a note for an employee who has traveled to a CDC-designated country where the number of infections is high



# Pandemic Problems

- What if the health care system is overstressed?
  - Impracticable to provide care?
- Large portion of human population will become infected
  - Not necessarily ill
  - half, 2/3, 70%?
  - Watch for case fatality rate





# During a Pandemic, May an ADA-Covered Employer Take Employee Temperatures To Determine Whether They Have a Fever?

- Measuring an employee's body temperature is a medical examination
  - If COVID-19 becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature
- Assess the type of workplace (e.g., nursing home, prison)
- However, employers should be aware that some people with COVID-19 do not have a fever or are entirely asymptomatic



# Can We Prevent Employees From Wearing Masks or Respirators?

- Unclear
- In most situations, yes, especially since widespread use of masks isn't considered necessary at this point
- If the employee has a disability, you may be required to allow the use of protective gear as an accommodation



# Can We Require Employees To Wear Personal Protective Gear (Masks, Gloves, etc.) Designed To Reduce the Risk of Exposure?

- Yes, if there is a legitimate basis
- If an employee with a disability needs an accommodation, you may need to provide it



# If a Client Asks If Any of Our Employees Are Infected, What Can We Say?

- You must protect employees' confidential medical information
- You can disclose whether any employees recently traveled to a CDC-designated area or have been diagnosed with COVID-19 (without naming the employee)
- You can also disclose what steps you're taking to minimize the risk of transmission



# If a Vaccine Becomes Available, Can We Require Employees To Get It?

- Not necessarily
- If the employee has a disability or a sincerely held religious belief, they may be entitled to an exemption
- Check state law
- Practical consideration of whether enough vaccines are available



# Do We Need To Pay Employees Who Are Home Sick, Quarantined or Caring for an Ill Family Member?

- Yes, if the employee is using vacation/PTO or paid sick leave, you must pay them
- Yes, if required by a collective bargaining agreement
- If the employee is exempt, you must pay them for the workweek if they performed any work
- Generally, you need only pay non-exempt employees the actual hours they work
- If you are covered by the Family and Medical Leave Act (or similar state laws), you must provide up to 12 weeks of unpaid time off for eligible employees dealing with their own serious health condition or a close relative with a serious health condition
- Whether FMLA or similar state laws apply, the Americans With Disabilities Act or state or local leave laws may require unpaid leave



# What Else Can Employers Do To Reduce Their Liability?

- Guard against harassment or discrimination
- Don't terminate or take other adverse action against an employee for health reasons
- Base decisions on the facts and current medical guidelines
- Remember plant closing/mass layoff laws (WARN and mini-WARN laws)



# Operational Strategies

- Limit visitors
- “Social distancing”
  - No more hugs
  - Flex time
- Report all travel plans, including personal travel
- Avoid in-person meetings
- Cross Training





# OSHA – Recordkeeping Requirements

- OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA log
- While recording of the common cold and flu is exempt, **COVID-19 is a recordable illness** when a worker is infected **on the job**



# OSHA Standards and Directives

- There is no specific OSHA standard covering COVID-19
- However, some OSHA requirements may apply to preventing occupational exposure to COVID-19:
  - The General Duty Clause 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”
  - 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, Personal Protective Equipment standards (which require using gloves, eye and face protection and respiratory protection) and other applicable OSHA chemical standards



## State Law Can Be Stricter

- There are 28 OSHA-approved state plans that may have different or more stringent requirements
- The California Division of Occupational Safety and Health (Cal/OSHA) Aerosol Transmissible Diseases (ATD) standard is aimed at preventing worker illness from infectious diseases that can be transmitted by inhaling air that contains viruses (including COVID-19), bacteria or other disease-causing organisms





## Quarantine and Isolation Laws



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# Where Can We Get Additional Information?

- Resources:
  - CDC coronavirus guidance: [www.cdc.gov/coronavirus/](http://www.cdc.gov/coronavirus/)
  - OSHA coronavirus guidance: [www.osha.gov/SLTC/covid-19/](http://www.osha.gov/SLTC/covid-19/)
  - WHO: [www.who.int/health-topics/coronavirus](http://www.who.int/health-topics/coronavirus)



**Jeffrey D. Polsky**

415.364.5563

[Jpolsky@foxrothschild.com](mailto:jpolsky@foxrothschild.com)

**Steven K. Ludwig**

215.299.2164

[Sludwig@foxrothschild.com](mailto:Sludwig@foxrothschild.com)



**Fox Rothschild** LLP  
ATTORNEYS AT LAW