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# Coronavirus: – New Employer Challenges

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Brent is co-chair of the firm's Workplace Safety & Environmental group and is a member of the firm's Air & Rail specialty group. He focuses his practice on defense matters involving individual and multiparty actions, trial and appellate practice, and handles environmental, OSHA, MSHA, tort and toxic tort, and employment litigation and compliance matters, including retaliation and whistleblower claims.

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Ellen is a trusted advisor for the both the high stakes and day-to-day employment issues facing her clients. Ellen is engaged in a broad-based employment law practice, with particular emphasis on federal and state court and administrative agency employment litigation. Ellen also has an extensive advice and counseling practice that focuses on avoiding litigation and includes an expertise on leave and accommodation issues.

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## **Jim Curtis**

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Jim provides boots-on-the-ground representation on occupational health and safety issues, and is equally comfortable in a slaughterhouse and in a courthouse. Jim assists clients dealing with all types of occupational safety and health issues, from responding to workplace catastrophes to addressing day-to-day regulatory compliance issues.

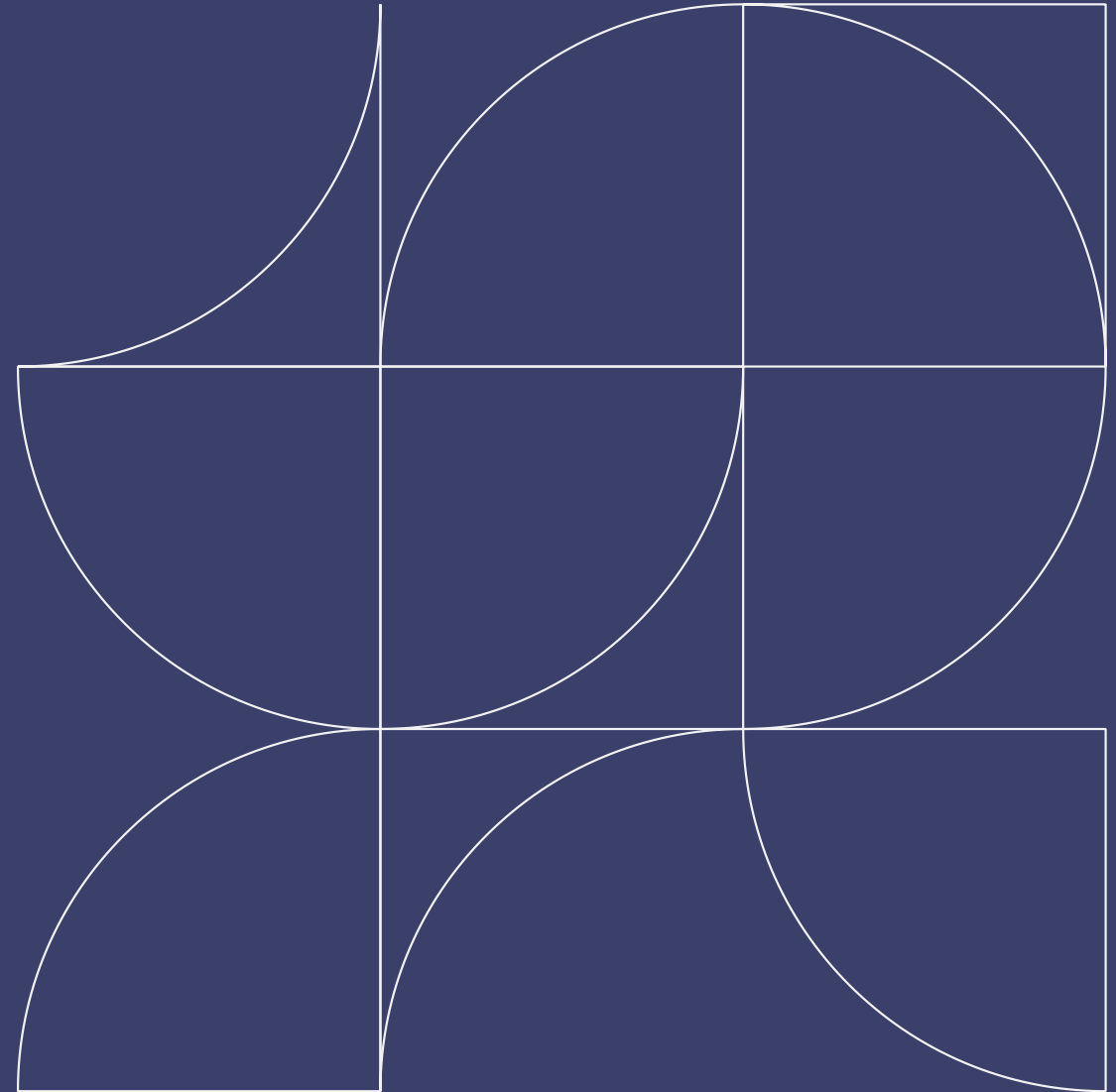
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# Objectives

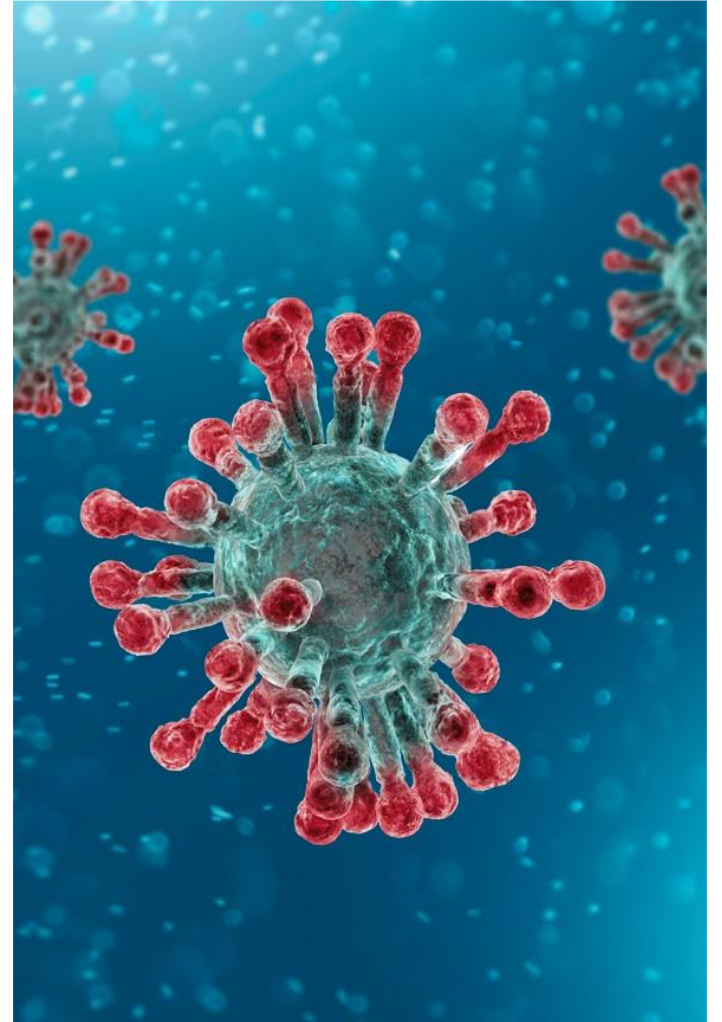
- 01** Understand the nature and scope of the hazard
- 02** Identify potential legal liabilities

**Understand the  
nature and scope of  
the hazard**



# Coronavirus (COVID-19)

- Infection through close contact through coughing and sneezing, as well as possibly through touching surfaces that has the virus on it
- Believed that it is most contagious when individuals are most symptomatic.
- Symptoms:
  - Fever;
  - Cough;
  - Shortness of breath;
  - Fatality rate is unclear but currently it is 3.4%. Elderly and individuals with compromised immune system most at risk.
- 2 to 14 day incubation period, majority is 3 to 6 days
- No current vaccination to prevent COVID-19. Anticipated vaccination in 12-18 months.





# Prevention tips for your workforce



- Employees with symptoms should stay home and contact their doctor.
- Employees at work who are symptomatic should be sent home.
- Practice good hygiene (cover coughs, avoid touching your eyes, nose, and mouth, wash hands with soap and water, use hand sanitizer)
- Frequently clean and disinfect surfaces with household cleaning spray or wipe
- Facemasks
  - CDC does not recommend that people who are well wear a facemask
  - Facemasks should be used by people who show symptoms to help stop the spread of the virus
  - Facemasks are crucial for health workers and people taking care of someone in close settings (home / health care facility)
- Social Distancing
  - To the extent possible, maintain six feet distance.

# Locations with Confirmed COVID-19 Cases – Global Map

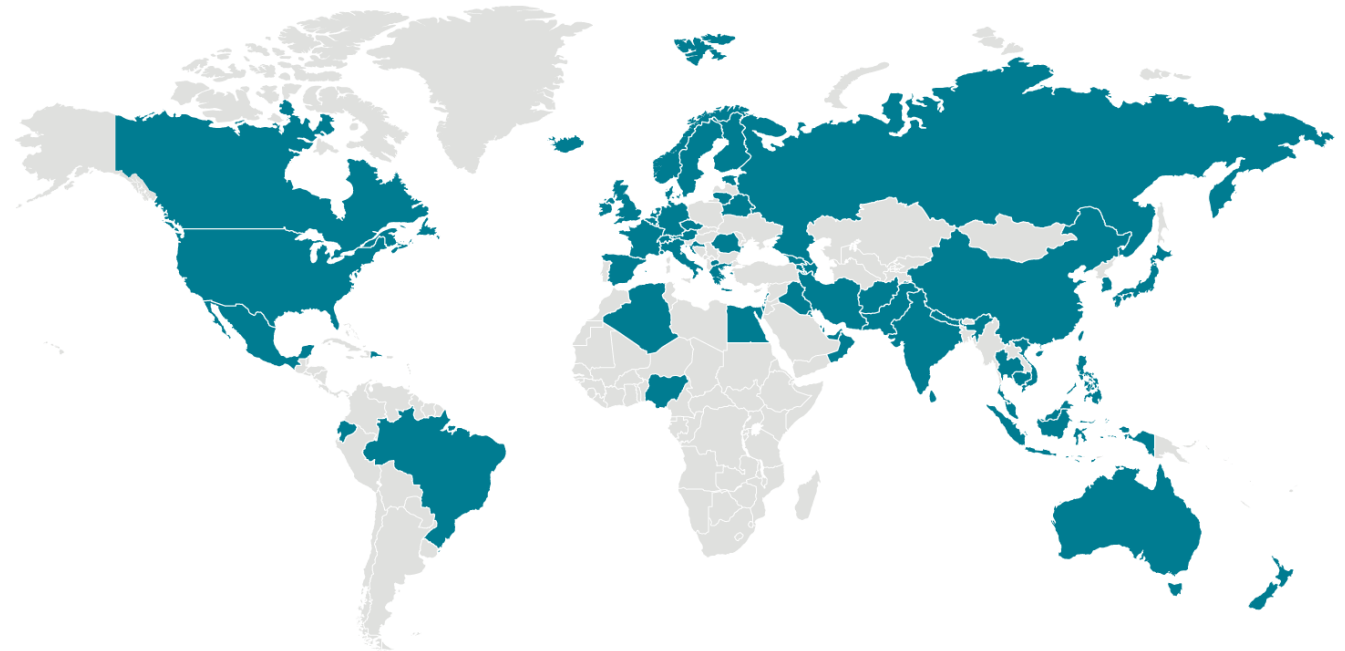
Very fast moving with numbers changing day to day.

According to the CDC, as of March 11, 2020, more than 118,799 confirmed cases worldwide, with 4,269 deaths. 65,105 people have recovered.

Vast majority of cases in China.

Virus has spread to six of seven continents –

China, Iran, Italy, South Korea, and Japan significantly impacted



Source: Centers for Disease Control (<https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html>) As of 3/2/2020

# Coronavirus Spread in the US

- First confirmed American infection on January 21, 2020
- According to CDC, as of March 11, 2020, there are more than 1,300 confirmed cases and 38 fatalities.

Confirmed or presumptive positive cases in 44 states. Current hotspots remain Washington, California and New York, but quickly spreading in other geographic areas.

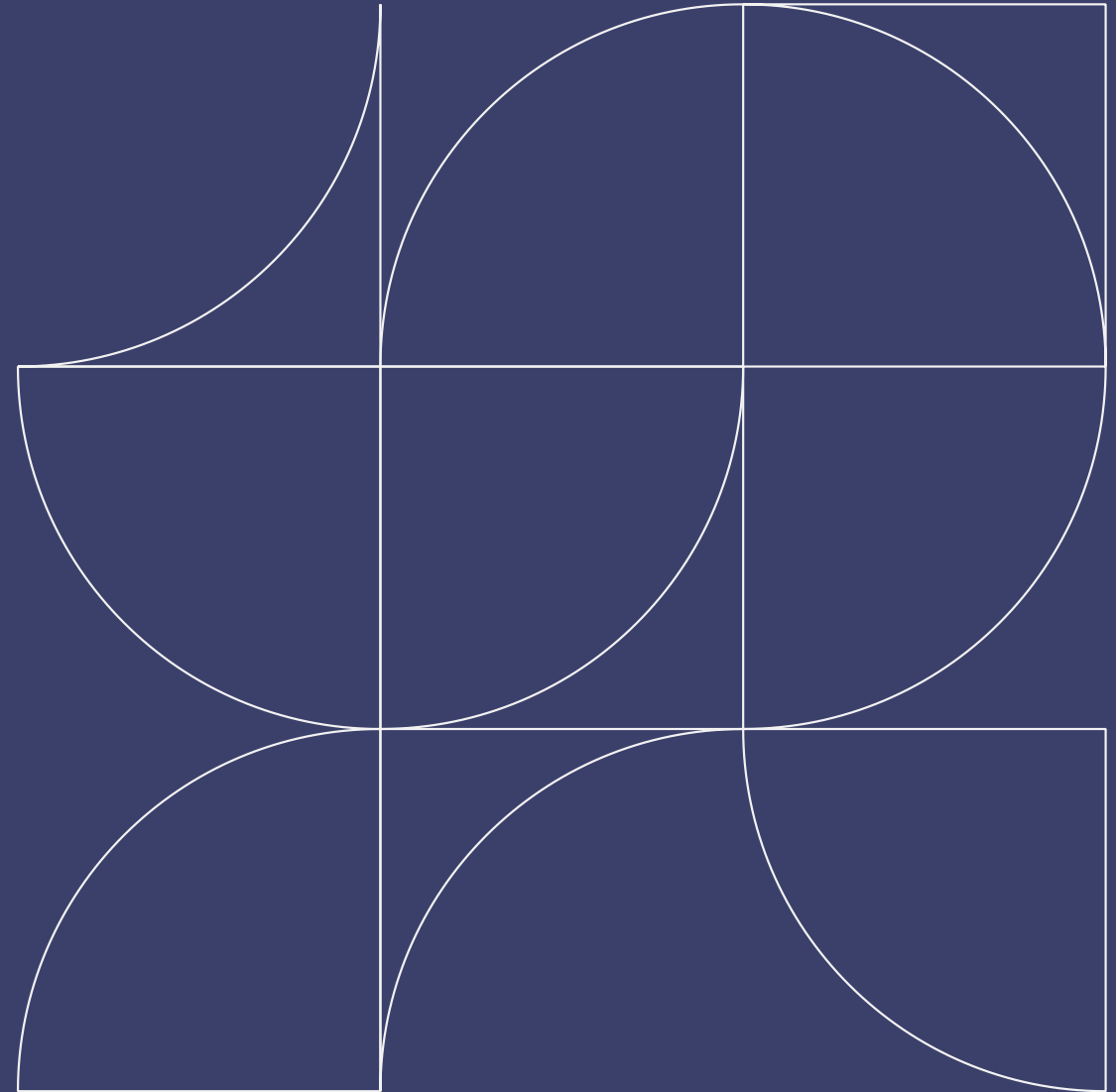


# Efforts to Stop Spread of COVID-19

- **“Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus”**
  - Issued January 31, 2020
- Suspends entry into the United States of **people who were physically present within the People’s Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their attempted entry into the United States**
  - March 11, 2020 – Trump Administration announced a 30 day ban on “all travel” to the U.S. from Europe.
  - Colleges and Universities across the nation are cancelling in-person classes and sending students home.
  - Professional and college sports are suspending games and banning fans from attending.



**Identify potential  
legal liabilities: legal  
and practical  
guidance**



## Family and Medical Leave Act (FMLA)

- Does FMLA apply to an eligible employee who has COVID-19 or who is caring for an eligible family member who has COVID-19?

*Almost always, “Yes”*

Follow usual FMLA process but realize HCP may be overwhelmed such that medical certifications might not be timely submitted

- Does FMLA apply to an eligible employee who has COVID-19 symptoms or who is caring for an eligible family member who has symptoms but there is no positive COVID-19 diagnosis?

Follow usual FMLA analysis; may be FMLA under absence plus treatment prong of SHC

## Family and Medical Leave Act (FMLA)

- Does FMLA apply to an eligible employee who is self-quarantining?
  - Again, follow usual FLMA analysis; most typically the answer is “No”
- State law may provide additional leave and time off benefits and rights
  - Unpaid State FML Laws
  - Paid State FML Laws
  - State and Local Paid Sick Leave Laws

# American with Disabilities Act (ADA)

- Qualified individual with a disability protected from discrimination
  - Is COVID-19 a disability under ADA?
- Employee may develop a disability from Coronavirus or aggravate a pre-existing disability
- Employee may be entitled to a reasonable accommodation, provided it does not cause an undue hardship or direct threat to health and safety
  - Possible accommodations
    - Work from home or telecommute
    - Leave
    - Reduced Schedule upon return to work
    - No travel
    - Document accommodation or non-accommodation is based on these exigent circumstances so in the future you may still be able to argue working from home etc. is not a reasonable accommodation



## American with Disabilities Act (ADA)

- What questions can you ask of your employees?
  - Have you been diagnosed with COVID-19?
  - Do you have any of the following symptoms? (List the symptoms)
  - Travel to Level 2 or 3 country and when?
  - Travel to state where there is a declared state of emergency and when?
  - Contact with anyone who has COVID-19 and when?
- Once you have the information ask:
  - What steps do we take given what we know?
  - Keep medical formation confidential
  - Treat employees consistently

## American with Disabilities Act (ADA)

- **Can an employer take employee temperatures as they arrive for work and send them home if they have a fever?**
- Taking an employee's temperature is a prohibited medical exam under the ADA unless it is considered job-related and consistent with business necessity. This standard may be met, for example, in the healthcare industry.
- However, now that the World Health Organization has declared COVID-19 a pandemic, the EEOC's 2009 Pandemic Influenza Guidance, which applies to COVID-19, changes the answer.  
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## American with Disabilities Act (ADA)

The Guidance states:

- *"If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature."*

What does this mean?

- Other laws that are implicated: HIPAA, general privacy concerns, NLRA duty to bargain, FLSA issues for waiting in line

It is important to keep in mind, though, that not all individuals infected with COVID-19 have a fever, or even show any symptoms at all. Thus, we do not recommend instituting a blanket policy of taking employee temperatures, but rather a measured approach that takes into account all of the relevant factors.

## American with Disabilities Act (ADA)

- Return to work note from HCP with no indication it's tied to COVID-19
  - Follow usual policies but be reasonable given potential stress on healthcare system
  - Apply consistently
- Return to work note following COVID-19, symptoms or self-quarantining due to possible exposure
  - Apply consistently

## American with Disabilities Act (ADA)

- Employees fear coming to work (and possibly refuse)
  - Any ADA implications?
    - Likely not unless underlying mental health issue, autoimmune disorder etc.
  - Try and address fears, provide work at home etc. rather than discipline
- What if a number of employees tell you they refuse to come to work?
  - What are the circumstances? General fear; working next to an employee who is coughing?
  - NLRA protected concerted activity issues

# Pay Issues When an Employee is on Leave

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1. Review employer policies, CBA and possible state laws; keep abreast of developing federal assistance
2. In the absence of accrued paid time, some statutory pay or a contract, an hourly employee is not guaranteed wages
3. Exempt employees cannot be docked or have their salary reduced in week they have performed work due to any action by their employer.
4. Thus, if an exempt employee is sent home for a partial week by the employer or performs any work in the week at home, the full salary must be paid for the week.
5. An exempt employee need not be paid their salary in any week that no work is performed, but extreme care should be taken to be sure no emails, text messages or voice mails are received, acted upon or sent.

# Pay Issues When an Employee is Furloughed

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If an employee is furloughed due to COVID-19 most state unemployment laws will provide UC benefits; keep abreast of developing federal law

# Occupational Safety and Health Act (OSHA)

On March 9, 2020, OSHA issues:

- “Guidance on Preparing Workplace for COVID-19.”
- Is not an enforcement document.
  - Does not indicate what, if any, enforcement activities OSHA intends to take regarding COVID-19 workplace hazards.



# Occupational Safety and Health Act (OSHA)

- OSHA Recommends Employers Develop an Infections Disease Preparedness and Response Plan.
- Plan Should Address:
  - Risk levels associated with various worksites.
  - The job tasks workers perform.
  - Potential sources of COVID-19 exposures (e.g. general public, customers, co-workers).
  - Workers individual risk factors (e.g., age, chronic medical conditions, pregnancy).
  - Controls necessary to address risks.

# Occupational Safety and Health Act (OSHA)

## Infectious Disease Response Plan

- Basic plan should address: communication with federal, state and local public health to stay abreast of developing recommendations.
- Basic hygiene measures.
- Anticipate worker absenteeism.
- Social distancing, staggered shifts, working from home and other options to prevent exposures.
- Options to continue essential operations with reduce staff.
- Interrupted supply chains.

# Occupational Safety and Health Act (OSHA)

## Infection Disease Response Plan

- Encourage sick employees to stay home.
- Develop policies and procedures for prompt identification and isolation of sick people.
- Encourage employees to self monitor if they believe they have been exposed.
- Develop policies for employees to report when they are sick or experiencing symptoms of COVID-19.
- Anticipate need for flexibility to allow employees to address sick family members.

# Occupational Safety and Health Act (OSHA)

## Infectious Disease Response Plan

- Where appropriate, OSHA recommends employers implement workplace controls
  - Engineering controls such as:
    - High-efficiency air filters.
    - Increasing ventilation rates.
    - Installation of physical barriers
  - Administrative Controls:
    - Minimizing worker contact.
    - Modifying work schedules.
    - Limiting work travel.
    - Provide employee training.
    - PPE (primarily in healthcare settings).

# Occupational Safety and Health Act (OSHA)

## Infectious Disease Response Plan

- There is no OSHA regulation specific to COVID-19, but employers should be aware of existing OSHA Standards
  - PPE
  - Bloodborne Pathogen
  - General Duty Clause 5(a)(1)

# Occupational Safety and Health Act (OSHA)

## Infectious Disease Response Plan

- Employers should evaluate their workforce by potential exposure to COVID-19.
  - Very High Risk:
    - Medical, morgue and laboratory workers
  - High Risk:
    - Healthcare, medical transport, mortuary workers
  - Medium Risk
  - Includes jobs that require frequent or close contact (within 6 feet) with people who may be infected. In areas without community spread – jobs with frequent contact with international travelers. Areas with community spread, jobs that involve close contact with the general public (schools, high density population work, high volume retail).
  - Low Risk:
    - Jobs that do not require contact with known or suspected cases or close contact with general public.

# Occupational Safety and Health Act (OSHA)

## Job Risk Classification Drives Hierarchy of Controls Needed to Prevent Exposure

- Most jobs in publishing industry are either low risk or medium risk.
  - Low Risk:
    - Engineering Controls – none.
    - Administrative Controls – Monitor public health recommendations and communicate with employees.
    - PPE required – none.

# Occupational Safety and Health Act (OSHA)

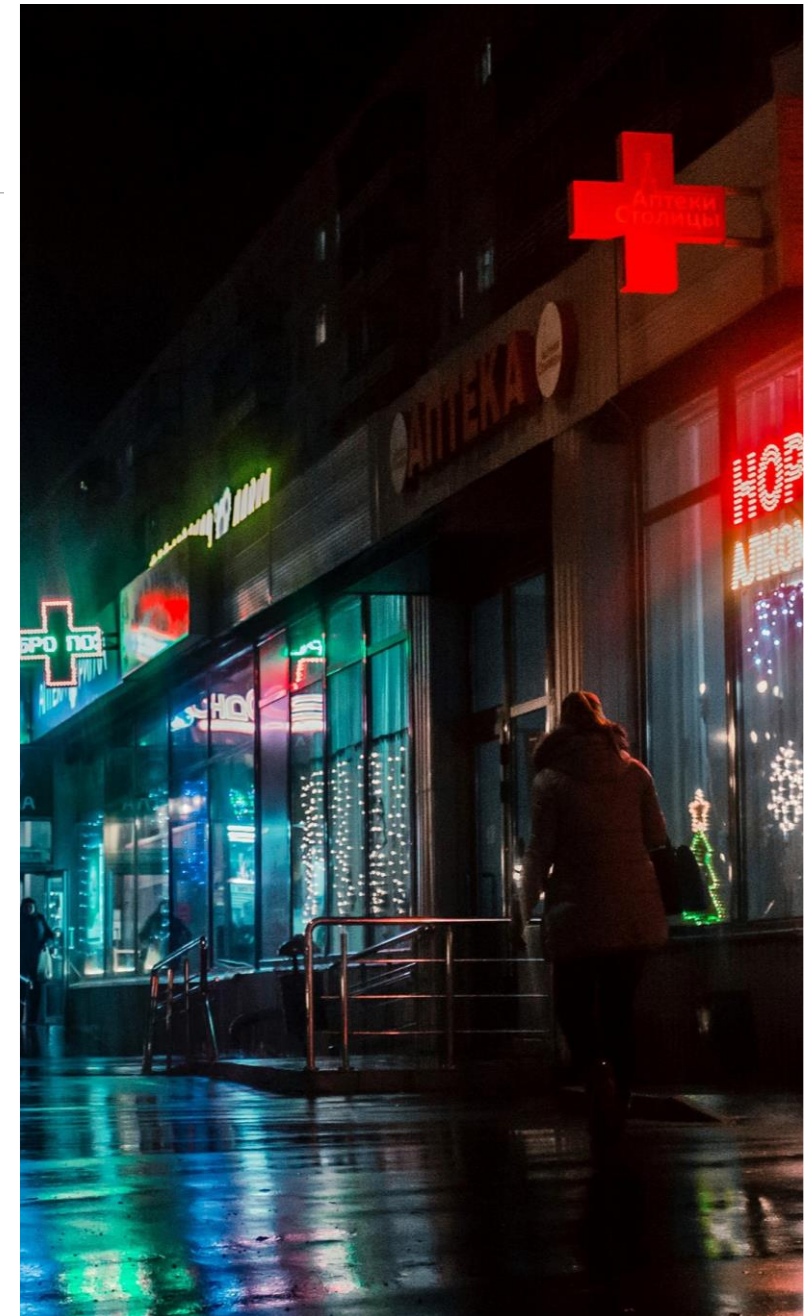
## Job Risk Classification Drives Hierarchy of Controls Needed to Prevent Exposure

- Medium Risk
  - Engineering controls – where appropriate, install physical barriers such as clear plastic sneeze guards.
  - Administrative controls:
    - Offer masks to ill employees and customers.
    - Inform customers/vendors/visitors of COVID-19 symptoms and request that sick individuals not enter facility.
    - Where appropriate limit public's access to the facility.
    - Minimize close contact (e.g., video conferences and telework).
- PPE
  - Consider whether some form of PPE is appropriate (e.g., gloves, gown, face masks).



# Worker's Compensation

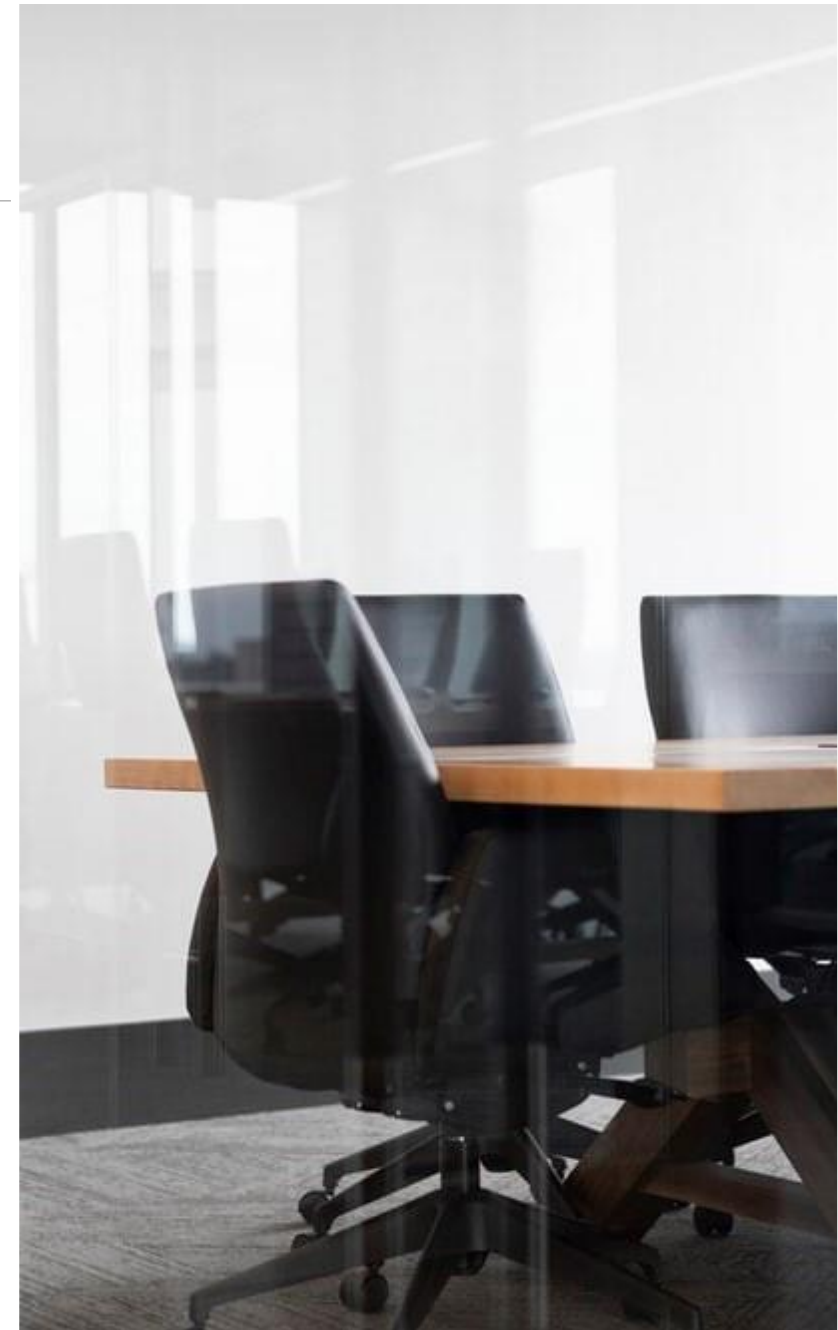
- Worker's compensation if “arising out of and in course of employment”
- Reasonable and necessary medical care
- Temporary total disability benefits
- Permanent disability, if any
- Engage competent medical professional (infectious disease) to advise



# Premises Liability

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- Landowner/employer duty to protect visitors to premises from hazards which are not “open and obvious”
- Potential health hazard in building, e.g., ventilation system, washroom facilities, cafeteria, etc.
- May require notice to tenants, visitors of known infection events
- Review leases and related agreements (e.g., sanitation, building maintenance)



# COVID-19 Links

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- Seyfarth Coronavirus (COVID-19) Page (<https://www.seyfarth.com/trends/coronavirus-covid-19.html>)
- CDC Coronavirus Disease 2019 (<https://www.cdc.gov/coronavirus/2019-ncov/index.html>)
- WHO Coronavirus Disease (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>)
- OSHA Guidance on Preparing Workplaces for COVID-19 ([https://lnks.gd/l/eyJhbGciOiJIUzI1NiJ9.eyJidWxsZXRpbl9saW5rX2lkIjoxMDEsInVyaSI6ImJwMjpbGjIjoiMjI1bGxldGluX2lkIjoiaWJyMDAzMTAuMTg1MDM2NTEiLCJ1cmwiOiJodHRwczovL3d3dy5vc2hhLmdvdi9QdWJsaWNhdGlvbnMvT1NIQTM5OTAucGRmIn0.imAGYIR3PRPBE9gLCqaRebCeKkHiwWrF\\_yzeAJRUoEM/br/75929885983-l](https://lnks.gd/l/eyJhbGciOiJIUzI1NiJ9.eyJidWxsZXRpbl9saW5rX2lkIjoxMDEsInVyaSI6ImJwMjpbGjIjoiMjI1bGxldGluX2lkIjoiaWJyMDAzMTAuMTg1MDM2NTEiLCJ1cmwiOiJodHRwczovL3d3dy5vc2hhLmdvdi9QdWJsaWNhdGlvbnMvT1NIQTM5OTAucGRmIn0.imAGYIR3PRPBE9gLCqaRebCeKkHiwWrF_yzeAJRUoEM/br/75929885983-l))
- EEOC PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE ADA ([https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html))

**thank  
you**

## **CONTACT INFORMATION**

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