

CORONAVIRUS

MITIGATING YOUR BUSINESS RISKS

In response to the increasing global attention given to the Coronavirus Disease 2019 (COVID-19), we have identified the following pertinent issues that most business owners need to consider. We have also addressed if/how insurance coverage may apply, what laws are implicated, and what steps you can take to minimize your risks.

In the midst of the fear caused by this outbreak, it is critical that business leaders take a careful approach about their sources of information and how the information is communicated to their employees and clients. We would recommend that you secure information from official sources of information related to the virus like the Centers for Disease Control and Prevention “CDC” and World Health Organization “WHO.” Effective communication and planning is vital in managing the potential risks associated with this type of virus.

Please feel free to contact us directly if you need additional advice, resources, or have other questions.

Employees

Be clear with your entire office staff that they need to stay home from work if they feel sick, especially if they have recently traveled overseas. Attached to this article is a sample memo that can be used and/or amended to fit your particular situation.

Additionally, consider telling employees returning from any restricted country (see <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>) that they should remain away from work for 14 days from their return. Also consider telling the employees to self-monitor for any symptoms of coronavirus. If any of these symptoms occur, employees should consider being evaluated by a health care provider. Further, even if not symptomatic, employees may also want to consult a health care provider to confirm that they are not infectious before returning to work.

Be sure to read through your employee manual closely to see how it addresses this situation, including paid leave and/or short-term disability payment obligations. If your organization does not provide paid sick leave, consider making an exception for anyone with coronavirus symptoms.

Restricting Travel Employers may consider restricting employee travel to the particular areas affected by the disease for business purposes. Employers may also consider requesting that employees inform them if they are traveling for personal reasons to a restricted country so the employer is aware of employees who may be exposed to the disease. Employees who travel to a restricted country and/or whose family member travels to a restricted country need to be informed that they may be quarantined upon their return. Employees should also be informed that there may not be adequate medical services available if they travel to a restricted country and become ill.

The Centers for Disease Control and Prevention published the following recommendations:

- Employers should actively encourage sick employees to stay home.
- Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants). Employees should notify their supervisor and stay home if they are sick.

- Employers should ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
- Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
- Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner.
- Employers should maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual.
- Employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).
- Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene at the entrance to your workplace and in other workplace areas where they are likely to be seen.
- Provide tissues and no-touch disposal receptacles for use by employees.
- Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol, or wash their hands with soap and water for at least 20 seconds. Soap and water should be used preferentially if hands are visibly dirty.
- Provide soap and water and alcohol-based hand rubs in the workplace. Ensure that adequate supplies are maintained. Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.

Note that while the ADA and Rehabilitation Act rules continue to apply, they do not interfere with or prevent employers from following the above guidelines and suggestions made by the CDC about steps employers should take regarding the Coronavirus.

The ADA The Department of Health and Human Services HHS advises employers to begin their pandemic planning by identifying a "pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning." When employers begin their pandemic planning, a common ADA-related question is whether they may survey the workforce to identify employees who may be more susceptible to complications from pandemic influenza than most people.

The short answer is "no." Before an influenza pandemic occurs, an ADA-covered employer may not ask an employee to disclose if he or she has a compromised immune system or chronic health condition that the CDC says could make him or her more susceptible to complications of influenza. Such a question is disability-related because the response is likely to disclose the existence of a disability. The ADA does not permit such an inquiry in the absence of objective evidence that pandemic symptoms will cause a direct threat. Such evidence is completely absent before a pandemic occurs.

There are, however, ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic. Employers may make inquiries that are not disability-related, such as those designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications). The inquiry should be

structured so that the employee gives one answer of “yes” or “no” to the whole question without specifying the factor(s) that apply to him. The answer need not be given anonymously.

For example, an employer may wish to pass around the following ADA-compliant survey to employees to anticipate absenteeism.

ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

Directions: Answer “yes” to the whole question without specifying the factor that applies to you. Simply check “yes” or “no” at the bottom of the page.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

1. If schools or day-care centers were closed, you would need to care for a child;
2. If other services were unavailable, you would need to care for other dependents;
3. If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
4. If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic coronavirus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES _____ NO _____

Workers' Compensation Workers' compensation insurance most likely will not apply if an employee contracts the coronavirus. Generally, workers' compensation insurance only applies to occupational illnesses and diseases; in other words, those which arise (i) in the course and scope of the employment, and (ii) from, or are caused by, conditions peculiar to the work. In other words, contracting the virus at work is not enough to trigger workers compensation insurance coverage. To be occupational, and therefore compensable, there must be something peculiar about the work that increases the likelihood of getting sick – this can be difficult to prove with most illnesses including the Coronavirus. It will be interesting to see how Workers' Compensation insurers and the courts address widespread infection within the healthcare industry as an example. If an employee is sickened in the workplace and it was obvious that the workplace was the place that they had become sick (i.e. healthcare provider treating an infected patient) workers compensation would respond.

FMLA Leave If the employer is subject to the Family and Medical Leave Act, coronavirus would qualify as a “serious health condition” under FMLA, allowing an employee to take FMLA leave if either the employee or an immediate family member contracts the disease. The employee would be entitled to job reinstatement as well. State law may provide additional leave benefits.

Medical Practices

Healthcare providers can and should ask patients focused questions to help identify whether or not they could potentially have the coronavirus. If suspected, the CDC recommends taking the following steps to protect yourself from contracting the virus from a patient:

- Assess and triage these patients with acute respiratory symptoms and risk factors for COVID-19 to minimize chances of exposure, including placing a facemask on the patient and isolating them in an Airborne Infection Isolation Room (AIIR), if available
- Use Standard Precautions, Contact Precautions, and Airborne Precautions and eye protection when caring for patients with confirmed or possible COVID-19
- Perform hand hygiene with alcohol-based hand rub before and after all patient contact, contact with potentially infectious material, and before putting on and upon removal of Personal Protective Equipment (PPE), including gloves. Use soap and water if hands are visibly soiled
- Practice how to properly put on, use, and remove PPE in a manner to prevent self-contamination
- Perform aerosol-generating procedures, including collection of diagnostic respiratory specimens, in an AIIR, while following appropriate infection prevention control (IPC) practices, including use of appropriate PPE

Note, based on what is currently known about COVID-19 and what is known about other coronaviruses, spread is thought to occur mostly from person-to-person via respiratory droplets among close contacts. Close contact can occur while caring for a patient, including:

- Being within approximately 6 feet (2 meters) of a patient with COVID-19 for a prolonged period of time.
- Having direct contact with infectious secretions from a patient with COVID-19 (including sputum, serum, blood, and respiratory droplets).

If close contact occurs while not wearing all recommended PPE, healthcare personnel may be at risk of infection.

On March 4, 2020, the Centers for Medicare and Medicaid Services (CMS) released the following guidelines for hospitals to screen visitors and patients for COVID-19 that medical practices may also choose to implement:

"Hospitals should identify visitors and patients at risk for having COVID-19 infection before or immediately upon arrival to the healthcare facility. They should ask patients about the following:

1. *Fever or symptoms of a respiratory infection, such as a cough and sore throat.*
2. *International travel within the last 14 days to restricted countries. For updated information on restricted countries visit: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>*
3. *Contact with someone with known or suspected COVID-19.*

For patients, implement respiratory hygiene and cough etiquette (i.e., placing a facemask over the patient's nose and mouth if that has not already been done) and isolate the patient in an examination room with the door closed. If the patient cannot be immediately moved to an examination room, ensure they are not allowed to wait among other patients seeking care. Identify a separate, well-ventilated space that allows waiting patients to be separated by 6 or more feet, with easy access to respiratory hygiene supplies. In some settings, medically-stable patients might opt to wait in a personal vehicle or outside the healthcare facility where they can be contacted by mobile phone when it is their turn to be evaluated.

Inform infection prevention and control services, local and state public health authorities, and other healthcare facility staff as appropriate about the presence of a person under investigation for COVID-19. Additional guidance for evaluating patients in U.S. for COVID-19 infection can be found on the CDC COVID-19 website.

Provide supplies for respiratory hygiene and cough etiquette, including 60%-95% alcohol-based hand sanitizer (ABHS), tissues, no touch receptacles for disposal, facemasks, and tissues at healthcare facility entrances, waiting rooms, patient check-ins, etc."

Additionally, CMS is suspending non-emergency inspections so its investigators can focus on addressing the spread of COVID-19. See <https://www.cms.gov/files/document/qso-20-12-allpdf.pdf-1> for more information.

Business Interruptions

Most companies maintain a Business Owners Policy ("BOP") or Commercial Package Policy ("CP") that includes business interruption coverage. Such coverage generally allows for the recovery of lost income (e.g., the reduction in gross earnings less charges and expenses that do not necessarily continue during the period of interruption) and related extra expenses (e.g., costs incurred to continue operations during the interruption). In many such policies, however, the coverage requires that the interruption result from "direct physical loss or damage" to insured property caused by a covered peril. Arguably, business losses from the coronavirus do not involve a "direct physical loss or damage" to insured property, and therefore, may not qualify for coverage. Additionally, most BOP/CP policies include exclusions for "pollutants" or bacteria and/or viruses.

Some BOP/CP policies may, however, include additional coverages for loss of business income and related extra expense when access to insured premises is prevented by order of a governmental authority. For example, if a business adjacent to yours is quarantined thereby preventing ingress/egress to your office, coverage may apply.

The Insurance Services Office (ISO) which promulgates standard policy language used by most insurance carriers has responded to the ongoing Coronavirus outbreak and its threat to business income by issuing two endorsements for use with commercial property forms that do not condition coverage upon direct physical loss or damage to property. The ISO forms provide limited business interruption coverage due to actions taken by civil authorities to avoid or limit infection or spread by or from the Coronavirus.

It is difficult to predict all risks to a business and thus each insurance policy will need to be evaluated for potential coverage based on the specifics of a potential loss. Typically, large limits of insurance have not historically been purchased by consumers specific to this exposure. As exposures are identified and claims arise, our team will assist our clients in evaluating their current policy(s) for potential coverage.

Cyber Security Unfortunately, cyber criminals use public fear to their advantage by preying on concerns about the virus to infiltrate an organization through malware that uses e-mails purporting to provide information. Best practice is to not engage with people or e-mails from people you do not know, and never open a link sent to you by email, even if it appears that the sender is someone you know or a legitimate organization.

In summary, as with all emerging risks, the Sterling Seacrest Partners team will continue to evaluate best practices for mitigating exposures presented by COVID-19. If you have any immediate questions or concerns, please feel free to contact us for assistance.