

# CORONAVIRUS COVID-19

## Coronavirus: Workers' Compensation and OSHA Considerations

### Worker's Compensation

#### *Compensability*

Occupational disease law is written with the intent to cover diseases that *arise in the course and scope of employment and have an exposure that is elevated from the exposure of the general public*. An ailment does not become an occupational disease simply because it is contracted on the employer's premises. A common disease that the public is exposed to is generally not covered under the occupational disease category, such as the flu and common colds. Furthermore, the National Council on Compensation Insurance (NCCI) notes that many state workers' comp statutes exclude "ordinary diseases of life."

Therefore, in most situations, it would be difficult to prove that coronavirus resulted from a risk at work, as community spread has made the risk prevalent outside of the workplace and the incubation period can be anywhere from 2 to 14 days.

However, there are exceptions, notably healthcare providers and first responders caring for patients diagnosed with the coronavirus. Here employees are at a substantially greater risk of contracting coronavirus than the risk experienced by the general public.

Washington state, which operates a monopoly workers' comp system, issued a directive providing workers' compensation coverage for health care workers and first responders who are quarantined by a physician or public health officer. However, it also noted in most cases, exposure and/or contraction of COVID-19 is not considered to be an allowable, work-related condition, and will be reviewed on a case-by-case basis. North Dakota has issued a similar directive. Other states may follow suit, so it is important to stay up-to-date.

Of course, claims will still be filed and will be determined on a case-by-case basis. Claim adjusters will look to see if employees can prove that they contracted the virus after an exposure at work, the exposure was unique to the workplace, there are no alternative means of exposure, and they can provide medical evidence to support the claim.

The Workers' Compensation Insurance Rating Bureau of California is partnering with other work comp organizations around the country to create unique codes to identify COVID-19 claims. The new codes will allow the costs of the claims to be tracked, measured, and properly used for pure premium ratemaking and experience rating.

### ***On-Site Employees: Manufacturers, Construction, Retail***

Industries such as manufacturing, construction, and retail face the reality that employees must work onsite. The challenge to keep workers safe in these environments becomes more daunting every day. It's important to recognize that the uncertainty created by the spread of the virus is a major distraction and distractions can lead to accidents. Safety efforts must adapt to current realities and be the number one priority.

The CDC recommends that employers "actively encourage sick employees to stay home." To identify high-risk employees, some employers have instituted temperature screening upon entering work, which requires training and protecting the worker who is taking temperatures. Others have encouraged self-identification and relaxed paid leave policies to urge those with symptoms or those who live with individuals with symptoms to remain at home. Responsible employers have trained managers and supervisors to identify symptoms of possible infection in coworkers and encourage reporting, as well as train employees on responsible behavior, such as handwashing, social distancing, sharing cups, utensils, etc.

Staggering shifts, break and lunch times, adding night or weekend shifts to help with family obligations are other actions employers are taking to keep workers safe. Other steps include installing barriers or creating "zones" to limit employee interaction, cross-training employees, restricting visitors, increasing frequency of sanitizing effort, providing sanitary wipes throughout the facility, and urging employees to follow CDC guidance. Identifying key personnel and creating schedules to isolate them can help keep the facility open.

For construction, the Center for Construction Research and Training (CPWR) has released [guidance and offered resources](#) for employees and employers on safety protocols in both English and Spanish.

In retail, it's important to recognize that even "essential" shopping can endanger low-paid workers who are not trained in pandemic preparedness. Grocery stores are ramping up efforts at disease control, cleaning surfaces and carts more aggressively, providing hand sanitizers, encouraging frequent handwashing, and limiting occupancy and controlling access to checkout

lines to ensure social distancing. Some have lifted restrictions on wearing gloves and masks, reduced operating hours, installed sneeze guard barriers at checkout, and increased pay. Even with these efforts, the stores are often busy and understaffed, and employees feel anxious and vulnerable. Educating employees on how to stay safe and letting them know they are valued goes a long way.

The CDC has published an [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#) with helpful information on what to do if there is a confirmed or suspected case in the workplace.

### ***Telecommuting***

The increase in telecommuting opens up another exposure for employers who are not used to having their workers work from home. Even those telecommuters who already know the drill about ensuring safe workspaces are facing different situations with children at home. Everyone is in an environment that is emotionally stressful. It's good to periodically remind workers that they shouldn't be sitting on a soft couch working in an awkward posture all day...that they need to be focused on proper positioning of back, wrist, and feet, and that they shouldn't be plugging in power cords wherever they can and creating trip hazards. Tips on maintaining safe home workplaces are helpful.

Another issue facing employers is how to handle requests by employees for equipment such as an office chair to be delivered to their home. The need to set up, properly train the employee on how to adjust the chair, consistent treatment of all employees, and what to do with the equipment when the worker returns to the office should be considered.

Further, if faced with telecommuting requests by employees with concerns of potential exposure when an office is still open or when offices reopen, it's important to assess whether such concern is reasonable before refusing this accommodation.

### ***Existing Workers' Compensation Claims***

Access to non-urgent medical care has been greatly affected during this crisis. Expect delays and longer recovery periods. Staying in touch with the injured employee and offering support is critical. Many workers compensation courts have suspended hearings and in-person meetings, while others are allowing virtual or telephone hearing options.

One positive note is the increased use of telemedicine, which the industry has been slow to adopt. Texas relaxed its rules regarding telemedicine and no longer requires patients to visit a

doctor's office before qualifying for telemedicine services and Ohio relaxed its rules that previously restricted the use of the home for video-based screening.

### ***Privacy***

Employers must be vigilant in complying with the various labor and employment laws implicated by the virus and be extremely cautious about sharing any health information related to 2019-nCoV diagnosis. Employers can notify managers, supervisors, and other employees who may have been exposed to an employee who contracted the virus but should not reveal the name of the employee, and discourage gossiping and presumptions.

Remind employees of applicable policies and procedures for reporting concerns and requesting leaves of absence and other accommodations. Train supervisors and managers on how to respond to such requests. Everyone should refrain from offering medical opinions, but can encourage employees to speak with their physician, local health department, and to use telemedicine.

If an employer opts to take temperatures of workers, it is still considered a medical exam and protected by the ADA. Information must be kept private and in a confidential medical file.

### ***Employee Relations***

This is a time of unprecedented anxiety and worry for everyone. Be patient with employees as they deal with the fear of being "essential" employees exposed to public interaction, learn "social distancing" at a manufacturing or construction site, adjust to working remotely, and worry about their economic future.

The fastest way to alienate employees is not to show respect for their safety. Anything employers can do to calm employees will help keep the operation going and build loyalty. Set clear, reasonable guidelines and expectations. Allow employees to openly discuss their questions and concerns without fear of reprisal. Provide daily guidance on key topics like self-care and staying safe. Tell the workforce what the company is doing, how you're doing it, and what is likely to happen next.

Employees want and need to feel valued and look to their executive team for confidence that there is a way forward. It will take their commitment and engagement to see the company through the crisis. The employer's actions now will leave an indelible mark on the attitude, retention, and loyalty of employees.

### ***Suggested Resources:***

CDC: [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)

Bain : [A CEO Plan for Coronavirus: Actions to Take Now](#)

Gallup: COVID-19: [What Employees Need From Leaders Right Now](#)

National Institutes of Health: [COVID-19 website](#) featuring health and safety resources for workers who may be at risk of exposure to COVID-19.

Center for Construction Research and Training (CPWR): [guidance and resources](#)  
[The Scary Times Success Manual](#)

### **OSHA**

#### ***Dedicated Webpage and Guidance Document***

OSHA issued guidance on preparing workplaces for COVID-19, in both [English](#) and [Spanish](#). It divides jobs into four risk exposure levels - very high, high, medium, and lower - and specifies what employers should do to protect workers based on their level of exposure. It also suggests employers review their procedures regarding contractors, visitors, and other third parties who access the workplace.

It also has a [webpage](#) providing information on hazard recognition, medical information, control and prevention, and additional resources.

#### ***Applicable Standards***

Although OSHA does not have a standard that covers the coronavirus (an infectious disease rule has languished for ten years), its [webpage](#) on COVID-19, notes that the General Duty Clause applies. This is a catchall the agency uses to cite employers where there is no standard that applies to the particular hazard. It 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." Failure to take steps to protect employees in accordance with OSHA and CDC guidelines can result in enforcement action.

The Personal Protective Equipment (PPE) standard, 29 CFR 1910.132, (in general industry), which requires using gloves, eye and face protection, and respiratory protection also comes into play as does Respiratory Protection, 29 CFR 1910.134.

In California, 019-nCoV is covered by Cal/OSHA's [Aerosol Transmissible Diseases \(ATD\) standard](#), which requires employers to protect workers from diseases and pathogens

transmitted by aerosols and droplets and the agency recently issued [guidance](#) on the requirements to protect workers.

### **Recording and Reporting Requirements**

#### **Recording**

Although OSHA's recordkeeping rule exempts common colds and flu, it has explicitly stated that COVID-19 is a recordable illness when a worker is infected on the job. According to OSHA's [website](#) COVID-19 can be a recordable illness *if a worker is infected as a result of performing their work-related duties*. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

- The case is a confirmed case of COVID-19
- The case is work-related, as defined by 29 CFR 1904.5; and
- 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, days away from work).

With the exception of health care, it is going to be difficult to connect work-relatedness of individual cases as community spread has set in. It is going to be necessary to determine on a case-by-case basis, whether it is more likely than not that an event or exposure in the workplace caused or contributed to the illness. For example, if an employee diagnosed with coronavirus was in the workplace after exposure, and a cluster of employees he/she was in close contact came down with coronavirus, it may be work-related because if an exposure in the work environment caused or contributed to the illness, there is a presumption the illness is work related.

An employee reporting an illness to the employer and/or asserting it was contracted in the workplace does not make the case recordable. It is the employer's responsibility to determine work-relatedness and to document the decision. Further, if the exposure occurred while the employee was working outside the U.S. it is not recordable. "Injuries and illnesses which occur while the employee is traveling in places where OSHA does not have jurisdiction do not need to be recorded on the company OSHA log."

#### **Reporting**

The existing criteria for reporting severe injuries apply to COVID-19 cases, including work-relatedness. Employers must report any hospitalization of a worker if the employee is admitted to the in-patient service for treatment within 24 hours. Given the latency/incubation period

between exposure/contraction of the virus, and the time symptoms appear or are significant enough to result in an in-patient hospitalization, it's unlikely many hospitalization reports will be filed.

Employees must report a fatality to OSHA when it is work related, a confirmed diagnosis, and the employee succumbed to the illness within 30 days of the exposure that resulted in the COVID-19 diagnosis.

### ***Relief for Healthcare Respiratory Protection Annual Fit-Testing***

In an effort to preserve the supply of N95 filtering facepiece respirators during the COVID-19 pandemic, OSHA temporarily suspended its requirement for annual respirator fit testing in the health care industry. The [temporary enforcement guidance](#) will remain in place until further notice.

### ***Voluntary Use Respirators***

In many industries, employees are asking to wear respirators/masks. If employers permit "voluntary use" (not required by regulations), the employer still must meet [certain obligations set forth by OSHA](#). Employers are also permitted to decline to allow employees voluntary use respirators including N95 masks, if a respirator is not required because of exposures levels in the workplace.

### ***Telecommuting***

Regulation on telecommuting is lax and the due diligence is up to employers. OSHA has repeatedly said that it will not investigate the safety of home offices.

However, there is clear guidance on recording injuries while working from home in regulation 29 C.F.R. § 1904.5(b)(7): "*How do I decide if a case is work-related when the employee is working at home?* Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting."

The regulation gives a few examples:

- "If an employee drops a box of work documents and injures his or her foot, the case is considered work-related."
- "If an employee is injured because he or she trips on the family dog while rushing to answer a work phone call, the case is not considered work-related."

### **Meeting Regulatory Deadlines**

While it is anticipated that OSHA will cut some slack on enforcing regulatory deadlines, such as annual LOTO inspections and three-year PS audits, it's important to document why the deadline was missed and undertake interim or alternative measures where feasible. Simply saying, there was a pandemic is not enough.

### **Retaliation When Employees Refuse to Work**

Co-workers of sick employees who refuse to work may be protected by OSHA's anti-retaliation provisions. The worker must believe in good faith that there is an imminent danger in the workplace and insufficient time to eliminate the danger through regulatory enforcement. Experts suggest that when employees are being rotated into different positions and asked to do things they normally do not do with minimal training or when a group of employees feels their safety is threatened, the risk of successful retaliation suits is higher.

If the employer is following all recommended CDC guidance, communicating the practices may ease the anxiety. However, if the employee still refuses to work, termination could be a risk, if the fear is reasonable.

## **Making It All Work Together for You**

