

# PATH FORWARD

Reopen • Reimagine • Recover

A webinar series by the Rochester Area Chamber

## Liability Concerns for Reopening Your Business

Thursday, April 30

# Liability Concerns for Reopening Your Business

Compliance Risks, Liability Risks under Current Regulations,  
and Enforcement of the COVID-19 Preparedness Plan

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# Areas of Potential Liability

- Failure to comply with government regulations
  - Government Executive Orders
  - MN Department of Health/CDC Guidelines
  - OSHA regulations
  - Paid leave laws
- Claims brought by employees
  - Not complying with new paid leave laws
  - ADA/Discrimination claims
  - Whistleblower/retaliation claims
  - Wage and hour claims
  - Privacy claims involving releasing employee health information
  - Workers' compensation
- Claims brought by third parties
  - Failure to take steps to protect customers and public

# Liability for Failure to Comply with Government Regulations

- Failure to comply with Government Executive Orders.
  - Failure to shut down
  - Failure to adopt reopening plan
  - Social distancing

# Liability for Failure to Comply with Government Regulations

- Government regulatory action may be taken for:
  - Failure to comply with DOH/CDC Guidelines.
  - Failure to comply with FFCRA Guidelines.
  - Failure to comply with wage and hour rules.



- General Duty Clause requires employers to establish a workplace “**free from recognized hazards that are causing or are likely to cause death or serious physical harm.**”
- Employers must take reasonable steps to abate or prevent known hazards – both the hazard and the steps to address it must be known.
- Exposure to coronavirus meets these requirements.

# OSHA Liability

- Guidance on Preparing Workplaces for COVID-19 found here:  
<https://www.osha.gov/Publications/OSHA3990.pdf>
- 10-Steps to Reduce Risk Poster found here:  
<https://www.osha.gov/Publications/OSHA3994.pdf>
- OSHA has divided job tasks into four risk exposure levels: very high, high, medium, and lower risk.
- Known as the “Occupational Risk Pyramid”.

## Worker Exposure Risk to COVID-19

### Classifying Worker Exposure to SARS-CoV-2

Worker risk of occupational exposure to SARS-CoV-2, the virus that causes COVID-19, during an outbreak may depend in part on the industry type and need for contact within 6 feet of people known to have, or suspected of having, COVID-19.

OSHA has divided job tasks into four risk exposure levels, as shown below. Most American workers will likely fall in the lower exposure risk (caution) or medium exposure risk levels.

### Occupational Risk Pyramid for COVID-19

#### VERY HIGH EXPOSURE RISK

Jobs with a high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures. Workers include:

- Healthcare and morgue workers performing aerosol-generating procedures on or collecting/handling specimens from potentially infectious patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.

#### HIGH EXPOSURE RISK

Jobs with a high potential for exposure to known or suspected sources of COVID-19. Workers in this category include:

- Healthcare delivery, healthcare support, medical transport, and mortuary workers exposed to known or suspected COVID-19 patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.

#### MEDIUM EXPOSURE RISK

Jobs that require frequent/close contact with people who may be infected, but who are not known or suspected patients. Workers in this category include:

- Those who may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings), including individuals returning from locations with widespread COVID-19 transmission.

#### LOWER EXPOSURE RISK (CAUTION)

Jobs that do not require contact with people known to be, or suspected of being, infected.

- Workers in this category have minimal occupational contact with the public and other coworkers.

For more information, see the [Guidance on Preparing Workplaces for COVID-19](#).



The four exposure risk levels represent probable distribution of risk.

# OSHA'S Occupational Risk Pyramid



# OSHA Liability

## Steps to Reduce Workers' Risk of Exposure

- Develop preparedness and response plan:  
[https://www.dli.mn.gov/sites/default/files/pdf/COVID\\_19\\_business\\_plan\\_template.pdf](https://www.dli.mn.gov/sites/default/files/pdf/COVID_19_business_plan_template.pdf)
- Prepare and implement basic infection prevention measures (hand washing, stay home if sick, cover coughs, etc.).
- Develop policies and procedures for prompt identification and isolation of sick people, if appropriate.
- Develop, implement and communicate about workplace flexibilities and protections.

# OSHA Liability – Recordkeeping

Incidents of employees contracting COVID-19 are recordable illnesses if:

- The case is confirmed as a COVID-19 illness;
- Employee exposure is work-related; and
- The case involves one or more of the general recording criteria (death, days away from work, medical treatment beyond first aid, diagnosed significant illness).

# OSHA Liability – Recordkeeping

Difficult to determine whether employees contracted COVID-19 from workplace. Therefore, OSHA will not enforce its recordkeeping requirements for COVID-19 cases, **except where:**

(1) There is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and

(2) The evidence was reasonably available to the employer, which includes information given to the employer by employees, and information an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

➤ **OSHA will take into consideration employer's good faith efforts to comply with requirements.**

# FFCRA Liability

- Not complying with FFCRA paid leave laws.
  - 10 days paid sick leave up to max of \$511 per day (\$5,110 max):
    - Quarantine or isolation order.
    - Advised to self-quarantine.
    - Experiencing symptoms/seeking diagnosis.
    - In order to care for (2/3 \$200 per day).
    - School/care closure (2/3 \$200 per day).

# FFCRA Liability

- Not complying with FFCRA paid leave laws.
  - Expanded FMLA. 12 weeks paid leave for employees who cannot work because their minor child's school or child care service is closed due to a public health emergency.
  - 10 weeks must be paid 2/3 capped at \$200/day (\$10,000 aggregate).

# FMLA Liability

- Not complying with the FMLA.
  - FMLA applies to employers with 50+ employees.
  - 12 weeks unpaid leave for serious health condition.
  - Not every illness is serious health condition.
  - Choosing to stay home out of fear does not qualify.
  - Choosing to stay home for child care does not qualify.

# Liability for Employee Claims

- ADA
  - An employer may need to provide reasonable accommodations for individuals who, due to a preexisting disability, are at a higher risk from COVID-19
  - Fear vs. mental illness
- Discrimination Claims
  - As companies address the need for layoffs and furloughs, the disparate impact of decisions on who is retained and who is terminated will face scrutiny, opening the door to possible claims for age discrimination.

# Liability for Employee Claims

- Regarding a layoff or furlough, know the answers to these questions:
  - Why is it needed?
  - What criteria am I going to use as to who gets laid off and furloughed?
  - Why was each laid off/furloughed employee included?



# Liability for Employee Claims

- Regarding return to work, know the answers to these questions:
  - Why are you ready to bring people back?
  - What criteria are you going to use?
  - Why was each employee included?

# Liability for Employee Claims

- Retaliation/ whistleblower claims.
  - Unlawful to retaliate for asserting rights.
  - Unlawful to retaliate against employees who assert good faith complaints of laws or rules.

# Liability for Employee Claims

- Wage and hour claims
  - Not paying employees for all hours worked.
  - Not paying overtime.
- Most likely related to remote work and not properly tracking employee time.

# Liability for Employee Claims

- Invasion of privacy claims/releasing employee health information.
  - Maintain privacy of employee records.
  - Maintain privacy of what you learn of employee health information.
  - Limit disclosure to management employees who need to know.

# Workers' Compensation Liability

- Workers' compensation claims.
  - Must be work-related.
  - Must be causally connected to work.
  - Illness usually excluded.
  - Different rule for certain employees such as first responders – law assumes work related.

## Liability for Third-Party Claims

- Claims related to exposure at your business.
- Claims related to exposure by you/your employees in public, at other workplaces, and private homes.
  - Negligence or failure to use reasonable care.
    - Having no plan, not screening, not following government recommendations or industry standards.

# Avoidance of Third-Party Liability

- Adopt and enforce policies
  - Screening of employees/customers?
  - Remove customers?
- Follow your preparedness plan
  - Cleaning/sanitizing
  - Social distancing
- Comply with Executive Orders, DOH/CDC
- Follow best practices for your industry
- <https://mn.gov/deed/newscenter/social-media/deed-developments/?id=430270>

## Limits on Potential Liability?

- Federal Limitations:
  - No certainty on what limitations, if any, will be enacted
  - Shaping up to be a political battle:
    - Adopting broad liability to protect employers OR tort reform tactic
- State Limitations:
  - For employees – workers' compensation?



## FAQs Regarding Preparedness Plan Enforcement

- Can we ask an employee to stay home or leave work if they exhibit symptoms of COVID-19 or the flu?
- Can I take an employee's temperature at work to determine whether they might be infected?
- How should I properly take temperatures and screen employees/customers?
- What should I do if an employee tests positive?
- What should I do if an employee has a suspected, but unconfirmed case?
- Can we require an employee to notify the company if they have been exposed, have symptoms, and/or have tested positive for COVID-19?

# QUESTIONS?

**For more information, please contact Dunlap & Seeger attorneys:**

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