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**RESPONDING TO THE  
2019 NOVEL CORONAVIRUS  
TOP-OF-MIND QUESTIONS FOR EMPLOYERS**

March 12, 2020

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**LABOR AND EMPLOYMENT PRACTICE  
GROUP COVID-19 TEAM**

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# Presentation Overview

- Keeping your employees safe: before a diagnosis
- Keeping your employees safe: after a diagnosis
- Other legal issues
  - Leave & Pay
  - Workplace/HR Planning
  - HIPAA
  - Labor issues
- Q&A

*Reminder: This situation is fluid and changing rapidly.*

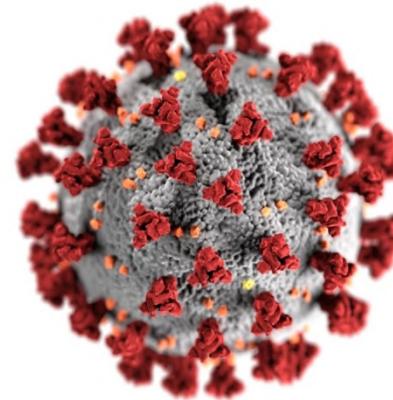
*Reminder: When in doubt, consult with in-house or outside counsel.*

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**KEEPING YOUR EMPLOYEES SAFE:  
BEFORE A DIAGNOSIS**

# COVID-19

- What is it?
  - COVID-19 is a novel coronavirus. It can cause a range of upper respiratory illnesses from cold-like symptoms to lung lesions and pneumonia.
- How is it transmitted?
  - Between people who are in close contact with one another (within about six feet).
  - Through respiratory droplets produced when an infected person coughs or sneezes.
- What are the symptoms?
  - Fever
  - Cough
  - Shortness of breath



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# Universal Precautions

- Stay home when you are sick.
- Avoid close contact with people who are sick.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash. Cough or sneeze into your elbow if a tissue is unavailable.
- Clean and disinfect frequently touched objects and surfaces using a regular household cleaning spray or wipe.
- Wash your hands often with soap and water for at least 20 seconds, especially after going to the bathroom; before eating; and after blowing your nose, coughing, or sneezing.
- If soap and water are not readily available, use an alcohol-based hand sanitizer with at least 60% alcohol.

# Universal Precautions

## Employers:

- Increase cleaning throughout
- Regularly disinfect door handles, counters, break rooms, meeting rooms, telephones and headsets
  - Provide disinfectant wipes for people to clean their own work areas.
- Make hand sanitizers readily available throughout offices and other workplaces (if possible)



## Masks, Gloves, and Other Protective Gear

- CDC does not recommend that people who are well wear a facemask to protect themselves from respiratory diseases, including COVID-19.
- The CDC only recommends masks for:
  - People who already have COVID-19
  - Medically compromised individuals
  - Healthcare providers
- Gloves and other protective gear:
  - No need other than healthcare workers

# Masks, Gloves, and Other Protective Gear

## What if an employee asks to wear a mask?

- Unless and until the CDC changes its guidance, employers may prohibit their employees from wearing facemasks.
- Employers may be required to let an employee with a health condition, such as a compromised immune system or a respiratory condition, wear a facemask as a reasonable accommodation under the ADA.
  - Exception: undue hardship

## OSHA & COVID-19

- Review guidance from OSHA as to recommended safety practices on the jobsite to reduce risk, such as social distancing, engineering controls, etc.
- General Duty Clause
  - OSHA always requires all employers in the United States to take reasonable steps to protect employees from recognized hazards
- PPE for certain industries
  - Example: facemasks for healthcare workers
- Bloodborne pathogens standard for guidance
- *More to come later on OSHA Reporting*

# Travel Policies

May prohibit all business travel (or non-essential business travel) period, or to:

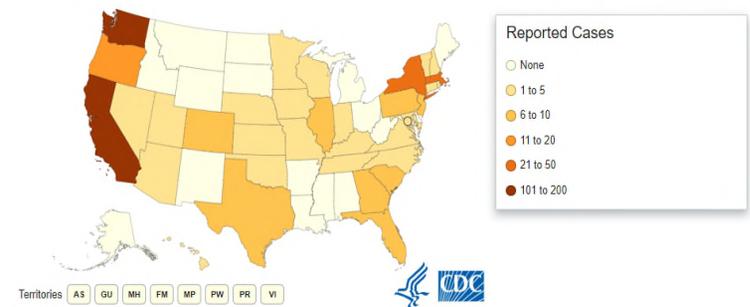
- Countries on the CDC travel list
- Countries outside the US (all international travel)
- Large business-related gatherings
- Locations with declared community spread (domestic and abroad)

May suggest (but not require) that employees not travel to hot spots, take cruises, etc.

- Consider requiring employees to report personal travel to high-risk areas

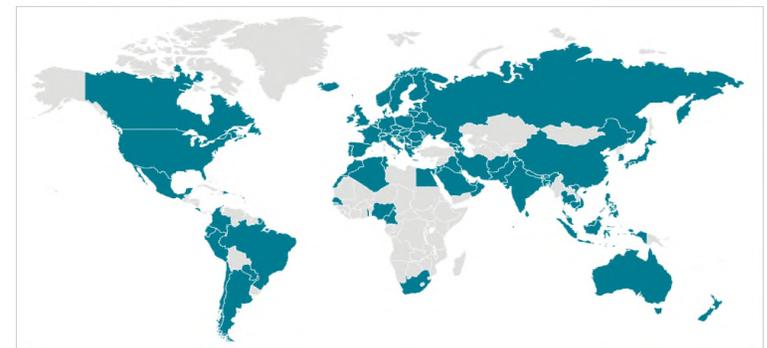
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States Reporting Cases of COVID-19 to CDC\*



Locations with Confirmed COVID-19 Cases  
Global Map

As of 12:00 p.m. ET March 9, 2020

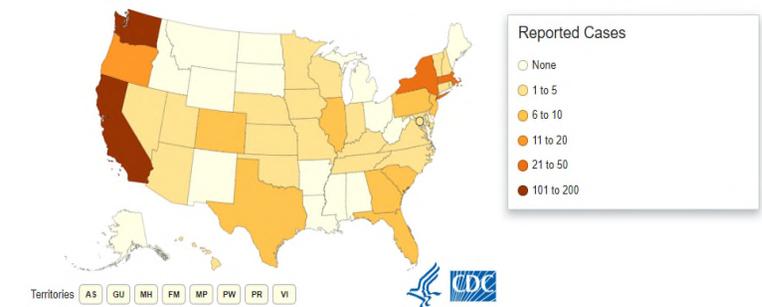


# Travel Alerts (As of 3/12/2020)

- CDC travel list currently includes
  - Level 3 Widespread sustained (ongoing) transmission. CDC recommends that travelers avoid all nonessential travel
    - China, Iran, Italy, South Korea
  - Level 2 Sustained (ongoing) community transmission. CDC recommends that older adults or those who have chronic medical conditions consider postponing travel
    - Japan
  - Level 1 Risk of limited community transmission. Travelers should practice usual precautions
    - Hong Kong
- Europe now listed as Level 3 (but not yet on travel index)
- On March 11, 2020, President Trump announced that all travel by foreign nationals from Europe (excluding the UK) to the US will be suspended for at least 30 days, beginning Friday, March 13, 2020.

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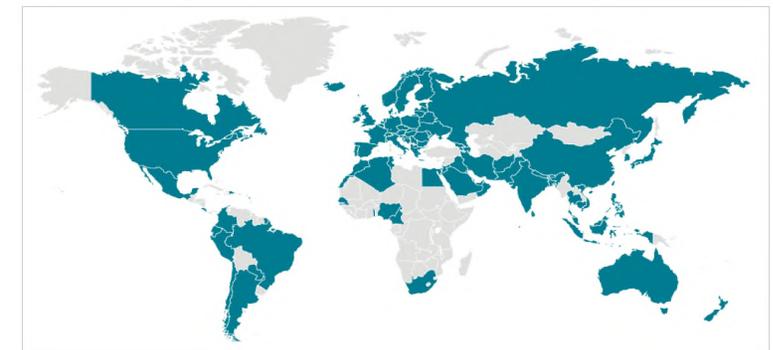
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Locations with Confirmed COVID-19 Cases

Global Map

As of 12:00 p.m. ET March 9, 2020



## Travel-Related Inquiries

- May ask:
  - Have you traveled in the last 14 days to or through specific high risk areas?
    - Consider referring to the CDC's COVID-19 Travel Index, State Department, WHO
  - Have you been in close contact with someone who has traveled in the last 14 days to or through high-risk areas?
- If yes, may require employee to self-quarantine for 14 days
- After 14 days, if asymptomatic, may return to work

# Medical Inquiries and Temperature Screens

- General rule: ADA limits an employer's ability to conduct disability-related inquiries and medical examinations of employees
  - Must be job related and consistent with job necessity; or
  - The employer must believe the employee poses a "direct threat."
- EEOC Guidance: if a pandemic is declared, employers may
  - Ask an employee if he or she has the illness or is experiencing symptoms
  - Conduct temperature screenings
- On March 11, 2020, WHO announced that "COVID-19 can be characterized as a **pandemic.**"
  - Employers now can ask these questions and conduct temperature screenings
- For both medical inquiries and temperature screens
  - Keep medical records confidential and separate from other personnel records (follow both federal and state law requirements).
  - Do not discriminate based on race, national origin, color or perceived disability.

# Medical Inquiries

- Based on EEOC guidance and WHO pandemic announcement, employers may ask:
  1. Have you been informed by public health officials or health care providers that you are suspected of or confirmed to have COVID19,
  2. Have you been in close contact with an individual who has been informed by public health officials or health care providers that he or she is suspected of or confirmed to have COVID-19, or
  3. Are you exhibiting symptoms of COVID-19 or the flu such as fever, cough, or shortness of breath?
- Based on responses:
  - If yes to any, employee should go home and seek medical attention.
  - If yes to 1 or 2, employee also should self-quarantine for 14 days.
    - Option: no return until medical clearance from healthcare provider.
  - If yes to 3, employee should contact HR, which can discuss whether there is any risk of COVID-19 exposure and next steps.
    - At minimum, stay home for 24 hours after symptoms subside based on CDC flu guidance, or until medical clearance.

# Temperature Screening

- Based on EEOC guidance and WHO pandemic announcement, employers may take employee temperatures
- Who? How?
  - Qualified medical personnel? Employee at front desk?
- As a reminder, keep records confidential and separate from personnel file (follow federal and state law requirements)

## Third Parties: Inquiries and Screens

### **What can I ask visitors before they enter my worksite?**

Title III of the ADA and Title II of CRA of 1964 may apply to contractors, customers, guests, and other third parties.

You can put up signs asking visitors, guests, and third parties not to enter if they:

- 1) Have traveled in the last 14 days to or through specific high-risk areas
- 2) Have been in close contact with someone who has traveled in the last 14 days to or through high-risk areas;
- 3) Have been informed by public health officials or healthcare providers that they are suspected of or confirmed to have COVID19;
- 4) Have been in close contact with an individual who has been informed by public health officials or healthcare providers that he or she is suspected of or confirmed to have COVID-19; or
- 5) Are exhibiting COVID19 or flu-like symptoms such as fever, cough, or shortness of breath.

Implementing this policy can be tricky. Do not discriminate based on race, national origin, color, or perceived disability.

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## Other Preventative Measures

- Social distancing
  - Split shifts
  - Staggered shifts
  - Limit group interactions/number of attendees
  - Virtual meetings
  - Permit telework
- No-handshake policies

# KEEPING YOUR EMPLOYEES SAFE: AFTER AN EMPLOYEE TESTS POSITIVE



## Step 1: Gather the Facts

- Best if completed by an HR professional aware of ADA and medical-privacy considerations:
  - Why does the employee think he or she has COVID-19? (Be cautious regarding privacy concerns)
  - Has the employee seen a healthcare provider?
  - When did the employee start experiencing symptoms?
  - With which employees has the employee come into close contact (within six feet) during the last 14 days?
  - Which customers/vendors/subcontractors has the employee come into close contact (within six feet) with during the last 14 days?
  - Which offices/welcome centers/company vehicles/other company facilities has the employee come into contact with?



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## Step 2: Contact the State and Local Public Health Agencies

- Ask them to notify any customers, vendors, or subcontractors (to the extent they can be identified) that were in close contact with someone who has been confirmed to have COVID-19.
- Take notes regarding this conversation (date, time, person, advice, and recommendations) and keep this record.
  - You may end up relying on this conversation as the basis for your decision-making later on.
- *Pro tip: as part of your emergency preparedness plan, gather telephone numbers of state and local health departments now.*

# Reporting Policy

- No clear obligation for employers to report disease to CDC or other public health officials
  - Employers should check with state officials; states may (or may already) require reporting.
  - Still, contacting local health department is often *beneficial* to employers, who can follow its advice.
- Federal OSHA
  - All employers must notify OSHA when an employee is killed on the job or suffers a work-related “in-patient” hospitalization (not just a visit to the ER), amputation, or loss of an eye.
  - A fatality must be reported within eight hours. An in-patient hospitalization, amputation, or eye loss must be reported within 24 hours.
  - However, you only have to report if the illness is *work-related*, i.e., you were exposed to the virus at work or through your job duties.
  - Based on all of this, we’d consider reporting a COVID19 illness that led to death or inpatient hospitalization if there’s evidence that the employee caught the virus at work.

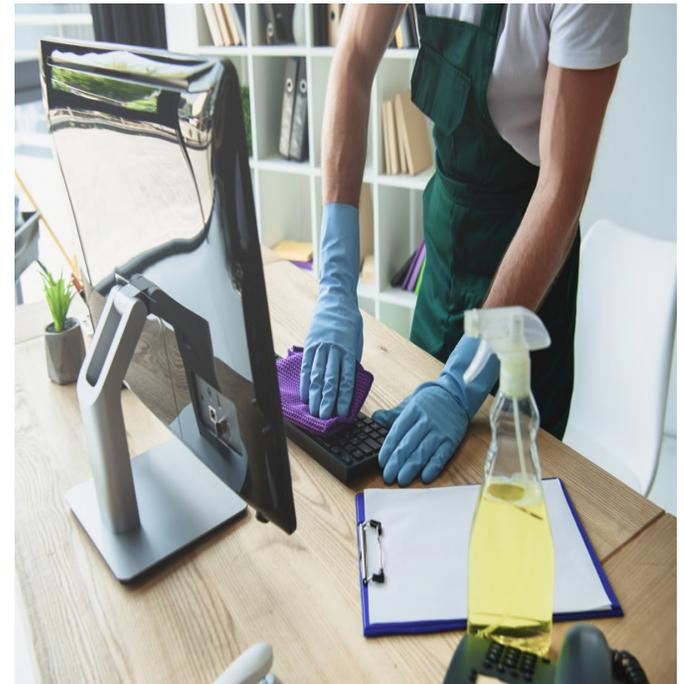
## Step 3: Inform Any Employees Who May Have Come into Close Contact with the Employee

- Be sure not to include any identifying information about the employee.
- Depending on advice from public health officials, consider telling employees to self-quarantine for 14 days.
- Telework if possible.
  - If not, explain what leave is available to them (PTO, FMLA, etc.)
  - State law and local paid-sick-leave ordinances may be applicable
- Advise the employees of the symptoms of COVID-19 (fever, cough, difficulty breathing).
  - Advise them to contact their healthcare providers immediately if they experience any such symptoms and to inform their health care providers that they have been exposed to COVID-19.



## Step 4: Deep Clean the Workplace

- Thoroughly clean all surfaces that an infected/potentially infected employee might have come into contact with.
  - These include workstations, computer keyboards, countertops, doorknobs, clipboards, work vehicles, and the like.
- According to the CDC, no special cleaning agents are necessary. More frequent cleaning, however, can help reduce exposure to disease.
- Consider workplace closure depending on guidance from public health officials.



## Step 5: Consider Facility-wide Communication

- Consider informing facility or organization that an employee has tested positive.
  - Whether to do so depends on advice from health department.
  - Not just a legal matter, failure to communicate can lead to false rumors and anxiety.
- Do not identify the employee.
- Assure employees that the company is taking the issue seriously and has been in touch with local public health authorities and has thoroughly cleaned the facility.
- Remind all employees of CDC preventative measures.
- ***Throughout, communicate with the employee who tested positive.***  
Ensure that he or she is contacted before any office/companywide emails go out.

# Return-to-Work Certification

- Medical certification
  - Given concerns related to COVID-19, employers may wish to require that the employee obtain medical clearance prior to returning to work.
  - Note: In California, employers may have to pay for the medical certification (release to return-to-work).
- CDC & OSHA Guidelines
  - ***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 way



## To Close or Not to Close?

- Unless workplaces are ordered to close by a government authority, this question remains a business decision.
- Factors to consider separate from profit or loss are:
  - Whether there have been COVID-19 cases reported in the community near the workplace,
  - Whether employees or visitors/guests at a location have been diagnosed with COVID-19, and
  - State and local announcements regarding the spread of COVID-19.
    - Example: declaration of a state of emergency

*We encourage employers to reach out to the local health department for advice on specific circumstances whenever possible.*

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# OTHER LEGAL ISSUES

## Leave & Pay

### **Are employers required to pay employees on leave due to COVID-19?**

- Although there may be no clear legal requirement to pay an employee who does not qualify for a paid leave under state or local law, many employers are paying employees (or paying them a certain percentage of wages) while on leave if possible to
  - (1) Encourage reporting of symptoms,
  - (2) Support their workers, and
  - (3) Mitigate potential claims from employees who may otherwise argue that being sent home without pay was discriminatory.
- Ultimately, this is a business decision depending on the circumstances and degree of spread of COVID-19.

## Leave & Pay

- Employee has COVID-19/COVID-19 symptoms
  - Sick leave, PTO
  - Obligations under state and local sick leave laws
  - FMLA
- COVID-19-related absence where employee is not sick
  - Telework (if possible)
  - If not, paid leave (if possible)
    - PTO, vacation
    - FMLA if caretaking
    - CBA review
  - Different considerations for hourly and exempt employees
  - Other state law requirements and protected unpaid time off (i.e. CA - school closures)



## Leave & Pay

- Keep in mind, pay and quarantine decisions may have a snowball effect. For example:
  - Keeping an exempt employee out too long may impact exempt-salaried basis test.
  - If unpaid, salaries may fall below prevailing wage-rate levels for H-1B Visa employees.
- Consider any notice requirements in executive contracts.



## Leave & Pay

- Food for thought:
  - Coverage for absent employees/overtime for others
  - Flexible leave policies
  - Impact on employee incentive programs—bonus, pay match, variable compensation
  - Paying incentives during outbreak (to ensure continuance of your operations)
  - How much vacation may be used under an unlimited vacation policy
- If an employee is infected at work, he or she may be eligible for workers' compensation benefits during leave.

# HIPAA Privacy Rule

HIPAA Privacy Rule still applies during COVID-19 outbreak

- Are all employers subject to HIPAA?
  - HIPAA-covered entities
  - Employer-sponsored group health plans/on-site health facilities
- What information is protected under HIPAA?
  - Employment records vs. medical/health plan records
- In what contexts could HIPAA apply to employers generally?
  - Employer-sponsored health plans/COVID-19 test results
  - Employer-administered COVID-19 testing
  - Third-party-administered COVID-19 testing
  - Employer requests for medical records/COVID-19 test results

# HIPAA Permitted Disclosures

- Friends and Family
  - To identify, locate, and notify family members, guardians, and others persons responsible for that employee's care
- Fellow Employees
  - If information is protected under HIPAA, then it cannot be disclosed
  - Beware employee snooping
- Media
  - No disclosure allowed without employee authorization
- Public Health Authorities
  - Disclosure permitted to the CDC and state and local health departments

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# WORKFORCE PLANNING

# Important Workforce/HR Planning

- Determine best steps to maintain business continuity in the event of an COVID-19 outbreak
  - Backup plans
  - Flexible work plans
  - Identify essential jobs or roles
  - Identify essential business operations or supply chains
  - Ensure enough software licenses for telework
- Cross-training of your employees—ensure you can substitute for your ill employees
- Office closures/shift operations

# Important Workforce/HR Planning

- Update plans to continue benefits in the event of COVID-19 outbreak:
  - Health/medical
  - Counseling
  - Employees with disabilities
    - Accommodation?
  - Other support
  - Other benefits

# Important Workforce/HR Planning

- Take steps to ensure pay administration during any COVID-19 outbreak.
  - Create management structure and necessary backup plans to ensure you have sufficient staff to administer pay.
  - How should you pay your employees?
    - Direct deposit? (consider state requirements regarding voluntariness and final pay issues)
    - Other?
  - Remote or off-site payroll?
  - Impact of absenteeism on banks and government financial institutions
  - Consider predictive scheduling requirements and exceptions for shutdowns
- Shutdown and furlough issues

# Flexible-Work Arrangements

Review your flexible-work policy:

- Who will authorize working from home?
- Is there adequate equipment/IT infrastructure for home work?
- Who pays for this equipment? Who pays for internet, electricity, rent?
  - Example: in California, employers must reimburse all necessary and reasonable business expenses.
- Consider security, intellectual property, and proprietary information concerns.
- Are alternative hours feasible for your business? Who will supervise?



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# Flexible-Work Arrangements

- How will these policies impact the visa status of foreign employees on work-from-home?
  - May require amendment of an H-1B worker's petition.
  - "Benching" an employee without pay can affect his or her status.
- Will working from home be voluntary or optional?
- Consider how non-exempt employees will record their hours worked and meal breaks.
- Consider how supervisors will control overtime work.

# Office Closures and Multiple Locations

- Consider impacts of closures, including on pay issues, potential WARN (or CA WARN) issues.
  - Is there applicable law in the location?
  - Is there a RIF/redundancy policy?
  - Will severance be given for extended office closure?
- Plan to shift operations to alternate locations as necessary.
  - Consider whether the Company should pay for longer commutes under applicable state law.
- Conduct tests or table-top exercises to consider the best strategy for office closures and business continuity.



## NLRA Implications

- **Section 7 of the NLRA** gives employees (whether unionized or not) rights to engage in **protected concerted activity**. The NLRA may protect employees who refuse to work in an unsafe environment if they are engaging in protected concerted activity.
- Protected concerted activity here could be employees individually (expressing a group concern) or as a group raise objective workplace safety issues.
- **Example: Employees refuse to come to work for fear of coronavirus.**
  - Depending on the circumstances, refusing to come to work based on a safety concern may be considered protected concerted activity.
  - Recommend consulting with counsel prior to any discipline, and recommend erring on the side of not disciplining employees who are refusing to work due to COVID-19 concerns.

# Union-Represented Employees

- Review the CBA
  - The CBA may not address these issues directly, but will address obligations related to things like schedule changes, leaves of absence, paid time off, wages, management rights clauses, health-related issues, shut-downs (temporary or otherwise).
- Obligation to bargain
  - Changes affecting wages, hours, and terms and conditions of employment may require notice and opportunity to bargain: policy or procedure changes regarding working from home, furloughs, leaves of absence (paid or unpaid), sick time, schedule changes, and facility or work location shut-downs are all actions that may require notice to the union and opportunity to bargain.
  - Work-related safety issues = occupational exposures to COVID-19
  - Open lines of communication early
- Information requests
  - Employers must provide plans upon request



## Other COVID-19 Considerations

- Force Majeure
  - Consider contract clauses if you are canceling due to COVID-19
- Lawsuits
  - Workers' compensation bar for employees, depending on jurisdiction
  - Third-party claims: negligence, negligent misrepresentation, failure to warn, premises liability
- Privacy
  - California Constitutional Right to Privacy

# COVID-19 Key Resources

- Morgan Lewis, Responding to the 2019 Novel Coronavirus, <https://www.morganlewis.com/topics/responding-to-the-2019-novel-coronavirus>
- CDC COVID-19 Webpage, <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- OSHA/HHS Guidance on Preparing Workplaces for COVID-19, <https://www.osha.gov/Publications/OSHA3990.pdf>
- WHO Webpage on COVID-19, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- EEOC Guidance on Pandemic Preparedness, [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
- State Public Health Agencies, <https://www.cste.org/page/EpiOnCall>
- Local Public Health Departments, <https://www.naccho.org/membership/lhd-directory>
- CA Labor Commissioner's Guidance on COVID-19 (Sick Leave), <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>
- Information from EDD that employees actually exposed to COVID-19 can file for SDI (even if just quarantined), [https://www.edd.ca.gov/about\\_edd/coronavirus-2019.htm](https://www.edd.ca.gov/about_edd/coronavirus-2019.htm)
- Information from EDD on payroll, [https://www.edd.ca.gov/payroll\\_taxes/emergency\\_and\\_disaster\\_assistance\\_for\\_employers.htm](https://www.edd.ca.gov/payroll_taxes/emergency_and_disaster_assistance_for_employers.htm)

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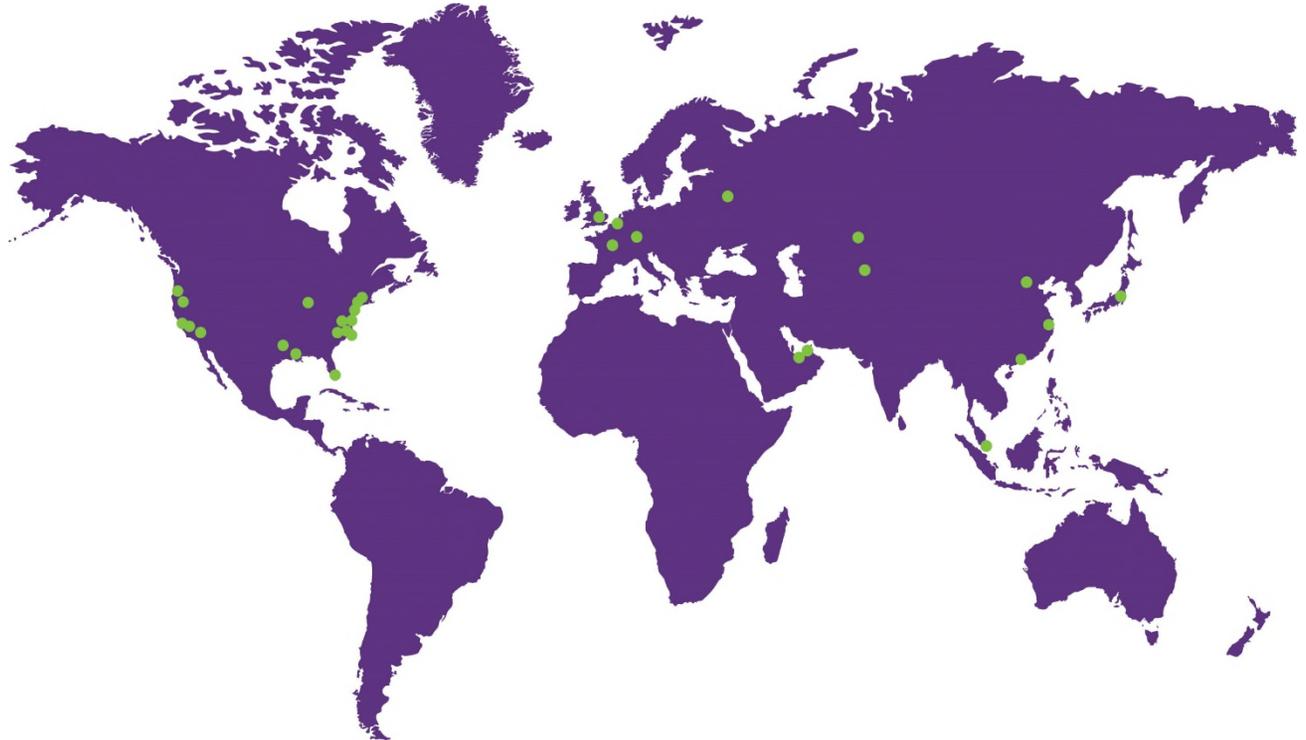
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