

# Planning for and Addressing a Potential Coronavirus Outbreak in the Workplace

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# WHO's Summary of the Situation

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In today's coronavirus briefing, World Health Organization head Dr Tedros Adhanom Ghebreyesus said countries needed to take an "all-government approach" to the virus, and not leave the response to their health ministries.

"This epidemic can be pushed back but only with a collective, co-ordinated and comprehensive approach that engages the entire machinery of government," he said.

"We're calling on every country to act with speed, scale and clear-minded determination."

He warned that countries needed to take the outbreak seriously, adding: "This is not a drill. This is not the time to give up. This is not a time for excuses. This is the time for pulling out all the stops.

"Countries have been planning for scenarios like this for decades. Now is the time to act on those plans."

*March 5, 2020*

*World Health Organization*

*Dr. Tedros Adhanom*

*Ghebreyesus*



# Agenda

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1. What Should Employers Be Doing Now – Best Practices
2. OSHA Requirements and Safety Concerns
3. Medical Examinations and ADA Concerns
4. Layoffs and Downsizing Related to Economy
5. What Should Employers be Planning for Next?

# Government Resources for Businesses

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<https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>

[https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)

<https://www.osha.gov/Publications/OSHA3990.pdf>



# What Should Employers Be Doing Now?

## Big Picture Planning

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1. Identify possible work-related exposure and health risks to employees (i.e. healthcare workers).
2. Explore telecommuting and flexible hours (e.g. staggered shifts) to increase distance between employees and other members of the public and/or to decrease employee concentration in a single location.
3. Identify essential functions and plan for staffing if there is increased / prolonged absenteeism.
4. Set up procedures for activating a response plan to close or alter operations in an affected area, including transferring critical employees or business knowledge to other parts of the company.
5. Establish a process for communicating to employees in emergency situations.
6. Identify options for employees who have children where schools are closed.
7. Implement restrictions on employee business travel and access to employer facilities.

# What Should Employers Be Doing Now?

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Specific steps for employers:

1. Self reporting for employees who are traveling to affected areas or who have come into contact with those who have traveled into hot spots or been exposed/self quarantined.
2. Develop plan for handling paid sick leave under state and local laws and unpaid employee leave under FMLA/ADA.
3. Actively encourage sick employees to stay home (employees with respiratory illness and signs of a fever) and keep out of the workplace. Train managers to enforce.
4. Social distancing in the workplace.
5. Emphasize good hygiene at work and perform routine / increased environmental cleaning.

# What Should Employees Self-Report?

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1. Travel to countries with CDC Travel Advisory or domestic areas with wide community spread of COVID-19
2. Recent cruises
3. Anyone in the employee's immediate family or household who has engaged in "at-risk travel" listed above.
4. Respiratory illness or diagnosis of coronavirus; exposure to a person who has been diagnosed with coronavirus; or exposure to a person who has self-quarantined because of possible exposure.

**Best Practice:** Require self quarantine for at least 14 days if an employee falls into any of the above categories. Consider work from home arrangement where possible.



# Paid Sick Leave – Proposed Legislation

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1. Requires all employers to pay seven days of annual sick leave, immediately available in public health emergency like Covid-19
2. Requires all employers to provide an additional 14 days of emergency leave if a public health emergency is declared – businesses with less than 50 employees may be reimbursed by federal government
3. Creates new emergency leave benefit administered by Social Security Administration for workers required to take off more than 14 days – limited to two thirds of monthly wages up to \$4,000 per month.
4. Creates new civil cause of action entitling employee to double damages, fees and costs
5. Amends Family and Medical Leave Act to create new right to unpaid leave when public health emergency is declared for care of family member, quarantine etc.

# Emergency Leave Definition

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**Section 601. Definitions.** This section defines an “emergency leave day” as a day in which an individual is unable to work due to one of four qualifying reasons related to COVID-19:

- The worker has a current diagnosis of COVID-19.
- The worker is quarantined (including self-imposed quarantine), at the instruction of a health care provider, employer, or government official, to prevent the spread of COVID-19.
- The worker is caring for another person who has COVID-19 or who is under a quarantine related to COVID-19.
- The worker is caring for a child or other individual who is unable to care for themselves due to the COVID-19-related closing of their school, child care facility, or other care program.

# Pay for Employee Leave – The Big Question

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- ❑ Review application of sick pay and PTO policies – weigh costs of workplace infection versus increased emergency sick pay
- ❑ Consider allowing temporary “negative” balances or advanced PTO
- ❑ Consider different policies for different scenarios – diagnosed Covid-19, self quarantine, anxious employees (waiver of absenteeism penalties as alternative to paid leave)
- ❑ Ensure compliance with state and local sick pay laws – is self quarantine a permissible use under such laws? Some local laws do not allow compelled use of sick pay.
- ❑ State temporary disability laws (California) or coverage under employer STD policies

# FMLA and Other Unpaid Leave

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- Covid 19 is a serious medical condition, therefore leave for an employee's sickness or to care for a covered family member would trigger potential coverage.
- Parental leave for employees with kids out of school would not trigger entitlement to leave, but providing care to a child who had a serious medical condition would be covered (but see new legislation which could add this entitlement)
- Gray area on protected leave status for self quarantine related to potential exposure or sickness – Best practice is to treat as if protected leave under the FMLA.
- Some states or local jurisdictions (like California or New York) may require unpaid leave for parents in the event of a school closure
- Consider policy treatment of employees who are “anxious” and request unpaid personal leaves of absence. Will these be excused or unexcused absences under disciplinary policies? Legal protections?

# Protections for Employees Who Refuse to Work

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1. **OSHA** – refusal to perform unsafe work (must be in good faith and reasonable). As of last week, OSHA stated it was investigating approximately 20 retaliation complaints.
2. **ADA** – disabled employee may refuse to perform certain work as part of reasonable accommodation request
3. **Texas Labor Code Chapter 22** – Protects employees from discrimination who are absent from work due to evacuation order during a disaster (including “epidemic”)
  - Is quarantine same or different from evacuation order? Statute is unclear but likely to be interpreted broadly.
4. **FMLA** – job protected leave to care for self or family members who are ill.
5. Other state laws, including limits on terminating employees in violation of public policy or for engaging in lawful off duty conduct
6. Possible new protections in proposed legislation.

# Social Distancing in the Workplace

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The CDC and many local health officials are recommending social distancing to limit exposure and minimize the impact of a quarantine. What does that look like in the workplace?

1. Limitations on business travel and limits on numbers allowed to travel together
2. Limits on number of participants in live meetings
3. Staggering of employee schedules on both a shift and work week basis
4. Limits on interactions between facilities, departments, or subdivisions of an organization or relocation of employees to less populated worksites
5. Working from home, tele-work, etc. (consider reimbursement requirements in California and other local jurisdictions)
6. Staggering of employee breaks to minimize social interaction
7. Tightening of restrictions on visitors or off-duty employees in workplace

# Hygiene and Environmental Safety

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Coronavirus is believed to spread mainly from person-to-person, including: between people who are in close contact with one another (within 6 feet) and through respiratory droplets produced when an infected person coughs or sneezes. Droplets can enter into mouth/noses of others nearby or possibly inhaled through lungs.

Infection may be possible by touching a surface or object and then touching mouth, nose, or eyes but not believed to be primary way the virus spreads.

Cleaning: removal of germs, dirt, and impurities from surfaces. Cleaning does not kill germs, but by removing them, it lowers their numbers and the risk of spreading infection.

Disinfecting: using chemicals to kill germs on surfaces. Process does not necessarily clean dirty surfaces or remove germs, but by killing germs on a surface *after* cleaning, it can further lower risk of spreading infection.

# Hygiene and Environmental Safety

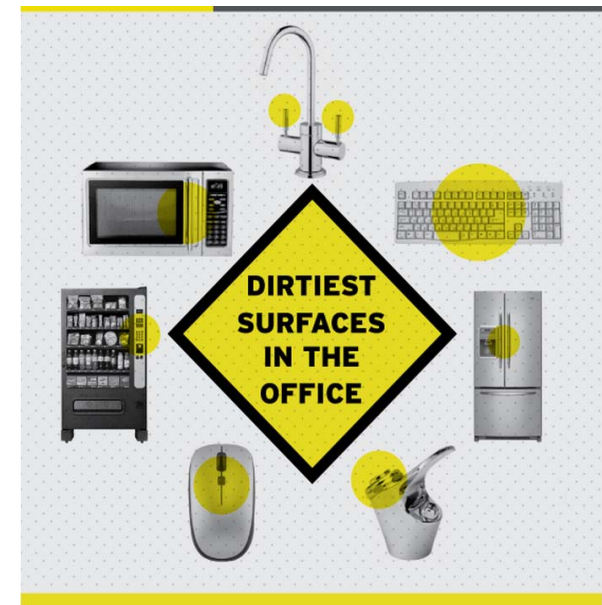
Cleaning of visibly dirty surfaces followed by disinfection is the best practice measure for prevention of COVID-19.

Perform routine environmental cleaning on all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. Use cleaning agents that are usually used in these areas and follow directions on the label. Provide disposable wipes so that commonly used surfaces can be wiped down by employees before each use.

CDC – No additional disinfection beyond routine cleaning is recommended at this time.

Products with EPA-approved emerging viral pathogens claims are expected to be effective against COVID-10 based on data for harder to kill viruses. Following manufacturer's instructions for all cleaning and disinfection products, e.g., concentration, application method, contact time, etc.

[https://www.epa.gov/sites/production/files/2020-03/documents/sars-cov-2-list\\_03-03-2020.pdf](https://www.epa.gov/sites/production/files/2020-03/documents/sars-cov-2-list_03-03-2020.pdf)





# OSHA Requirements and Safety Concerns

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There is no specific federal OSHA standard covering COVID-19, but there may be other standards that generally apply:

- The General Duty Clause, [Section 5\(a\)\(1\)](#) of the [Occupational Safety and Health \(OSH\) Act of 1970](#), 29 USC 654(a)(1), 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.”
- The Personal Protective Equipment (PPE) standards (in general industry, [29 CFR 1910 Subpart I](#)), which require using gloves, eye and face protection, and respiratory protection. When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard ([29 CFR 1910.134](#)).

OSHA is currently directing employers to the CDC’s guidance, based on industry, for health care workers ([Interim Healthcare Infection Prevention and Control Recommendations](#)), as well as the WHO’s [Interim Guidance](#))

# OSHA Requirements and Safety Concerns

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## Classifying Worker Risk Level Based on Job Tasks: Very High, High, Medium, Lower

Level of risk depends, among other things, industry type, need for contact within 6 feet of people known to be, or suspected of being, infected or requirement for repeated or extended contact with persons known to be, or suspected of being infected. Most employees will likely fall in the lower exposure risk (caution) or medium exposure risk levels.

Very High: Healthcare workers, e.g., doctors, nurses, EMTs, performing aerosol-generating procedures, e.g., intubation, cough induction procedures, etc.

High: High potential for exposure to known or suspected sources, e.g., healthcare delivery and support staff, medical transport workers, mortuary workers.

Medium: Frequent or close contact with people who may be infected but who are not known or suspected COVID-19 patients, e.g., in areas with ongoing community transmission, contact with travelers who may return from international locations with widespread transmission.

Low: Jobs that do not require contact with people known to be, or suspected of being infected nor frequent close contact with them.

# OSHA Requirements and Safety Concerns

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Engineering Controls: Isolating employees from work-related hazards. These type of controls reduce exposure to hazards without relying on worker behavior and can be cost-effective solutions.

- Installing high-efficiency air filters
- Increasing ventilation rates in the work environment
- Installing physical barriers such as clear plastic sneeze guards
- Installing drive-through window for customer service
- Specialized negative pressure ventilation in some settings such as for aerosol generating procedures, e.g., airborne infection isolation rooms in healthcare settings and specialized autopsy suites in mortuary settings

# OSHA Requirements and Safety Concerns

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Administrative Controls: Requires action by employee or employer. Administrative controls are typically changes in work policy or procedures to reduce or minimize exposure to a hazard.

- Encouraging sick employees to stay at home
- Minimizing contact among workers, clients and customers by replacing face-to-face meeting with virtual communications
- Establishing alternating or extra shifts to reduce total number of employees at facility at any given time
- Discontinuing nonessential travel in affected areas
- Emergency communication plans
- Providing employees with up-to-date education and training on risk factors and protective behaviors
- Training employees who need to use protecting clothing and equipment

Safe Work Practices: Promoting personal hygiene, e.g., providing tissues, no touch trash cans, hand soap, no touch alcohol based hand rubs with at least 60% alcohol, post handwashing signs in restrooms.

# OSHA Requirements and Safety Concerns

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Personal Protective Equipment (PPE): Gloves, goggles, face shields, face masks, respiratory protection when appropriate.

Recommended PPE requirements during an outbreak of an infectious disease may change depending on geographic location, updated risk assessments for employees and information on PPE effectiveness in preventing spread of COVID-19. Continue to monitor OSHA and CDC websites for recommended PPE.

All PPE must be:

- Selected based on hazard to employee

- Properly fitted and periodically refitted as applicable

- Consistently and properly worn when required

- Regularly inspected, maintained and replaced when necessary

- Properly removed, cleaned, and store or disposed of, to avoid contamination of self, others or the environment

# OSHA Requirements and Safety Concerns

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## Lower Exposure Risk:

- Follow “Steps All Employers Can Take to Reduce Workers’ Risk of Exposure to SARS-coV 2.”
- No additional engineering controls recommended
- Administrative controls: Monitor public health communications recommendations and ensure employees have access to information
- Collaborate with workers to designate effective means of communication lines
- No additional PPE recommended. Note: Surgical face masks are recommended for source containment only.

# OSHA Requirements and Safety Concerns

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## Medium Exposure Risk:

- Install physical barriers such as clear plastic sneeze guards when feasible
- Administrative controls: Considering offering face masks to ill employees and customers to contain respiratory secretions until they can leave the workplace. In event of mask shortage, a reusable face shield that can be decontaminated may be acceptable. CDC/NIOSH guidance: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/respirators-strategy/index>
- Keep customers informed about symptoms and ask them to minimize contact with workers until healthy again, e.g., posting signs about COVID-19 where sick customers may visit such as pharmacies
- Limit customers' and public's access to worksite or restrict access to only certain areas
- Consider strategies to minimize face-to-face contact
- Communicate availability of medical screening other worker health resources, e.g., on-site nurse, telemedicine services

# State Occupational Safety and Health Laws

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There are twenty-eight State occupational safety and health plans, which may have different or more stringent requirements. For example:

- The California Division of Occupational Safety and Health (Cal/OSHA) [Aerosol Transmissible Diseases \(ATD\)](#) standard is aimed at preventing worker illness from infectious diseases that can be transmitted by inhaling air that contains viruses (including COVID-19), bacteria or other disease-causing organisms. While the Cal/OSHA ATD standard is only mandatory for certain healthcare employers in California, it can provide useful guidance.

OSHA and most state programs prohibit employers from retaliating against workers for raising concerns about safety and health conditions.





# Medical Exams and ADA Concerns

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Both the CDC and EEOC confirm that employers may request relevant medical information from employees during a pandemic. This may include asking employees to disclose the reasons for an absence, asking if they or their family members have symptoms, and requiring temperature checks at facilities.

Any of the above measures must be based on legitimate business circumstances and reasonable in light of the current health situation. Employers cannot discriminate against employees based on national origin, race or any other protected class.

For example, an employer could lawfully require temperature checks for all employees, but not single out Asian employees, older workers, or those with underlying medical issues.

# Temperature Checks



One measure that has been implemented internationally is temperature checks to screen persons with a fever. Many property owners and employers are considering such measures in the United States.

1. Who would perform the checks? Security guards? Company nurse? Are they trained?
2. If you hire a contract medical provider, consider the potential HIPAA issues if the health care provider shares personal health information - an authorization is recommended.
3. What are the practical issues? To be effective, screening must include all visitors and vendors - not just employees.
4. Consider the wide availability of over the counter medications that lower fever, diminishing the benefit of the screening.
5. Consider potential arguments that examination time/delays may be compensable time or violate state biometric screening laws absent authorization.
6. Consider legal issues related to refusals to cooperate, including protected concerted activity, accommodation of disability or religious requests, and applicable CBA requirements

# “Direct Threat” Exception to ADA Claims

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A “**direct threat**” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>(20)</sup> If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, “not on subjective perceptions . . . [or] irrational fears” about a specific disability or disabilities.<sup>(21)</sup> The EEOC’s regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.<sup>(22)</sup>

# “Direct Threat” Exception to ADA Claims

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## DIRECT THREAT AND PANDEMIC INFLUENZA

**Direct threat** is an important ADA concept during an influenza pandemic.

Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

# Reasonable Accommodation under ADA

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Employees with underlying health issues may be entitled to reasonable accommodations during a pandemic.

## Consider:

- What if an employee with an immune system deficiency asked to temporarily avoid international travel?
- What if an employee with severe asthma asked to wear a mask at work?
- What if an employee and cancer patient requests to work from home to avoid risk of infection?

# What About Employee Privacy?

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Can an employer advise employees of possible exposure to a coworker who reports a positive test result? Is there any legal **obligation** to warn employees in such cases?

**Best Practice:** Yes, an employer can and should advise employees of possible exposure in the workplace. Local health officials may investigate contacts and also require self quarantine in such instances for persons in close contact.

Infected employees should not be identified by name and the ADA requires that medical information be kept confidential.

# *EEOC v. STME, LLC, 938 F.3d 1305 (11th Cir. 2019)*

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The Court of Appeals for the Eleventh Circuit held that the EEOC could not pursue a disability discrimination/bias claim on behalf of a massage therapist who was fired for refusing to cancel a trip to Ghana because her employer feared she would contract the Ebola virus.

The Court held that the Americans with Disabilities Act does not protect against discrimination on the basis of a potential future disability.

The Court rejected the EEOC's argument that firing the employee for a potential disease was akin to treating her as being "regarded as having such an impairment."

"The terms of the ADA protect persons who experience discrimination because of a current, past, or perceived disability – not because of a potential future disability that a healthy person may experience later."

This case stands for the idea that Courts have provided some latitude to employers in hiring and firing workers on the basis of potential disability in an attempt to adhere to the tenets of the Occupational Safety and Health Act that requires employers to provide a safe workplace.

# 5. Supply Chain and Economic Disruption

FINANCE • FORTUNE 1000

## 94% of the Fortune 1000 are seeing coronavirus supply chain disruptions: Report

BY ERIK SHERMAN

February 21, 2020 11:39 AM EST

### China set to lose out on production of 1M vehicles as coronavirus closes car plants

China exports about \$70 billion worth of car parts and accessories globally, with roughly 20 percent going to the U.S.

## MARKETS

Dow -7.79%

23,851.02 / -2013.76

Nasdaq -7.29%

7,950.68 / -624.94

S&P -7.60%

2,746.56 / -225.81





# Refresher on Layoffs and Furloughs

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1. WARN Act notice requirements
2. Legality of reductions in pay or scheduled hours
3. Collective bargaining obligations for unionized workplaces

# WARN Act

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1. Requires 60 day notice of employment loss – including layoff of more than 6 months or those who have hours reduced by more than 50% for 6 months.
2. Triggered if (a) employment loss of 50 or more employees at a site of employment (up to 90 day window for calculation); or (b) employment loss of 500 or more workers and 33% of workforce.
3. Allows exceptions for unforeseeable circumstances, faltering company, and natural disasters. Even if unforeseeable, an employer must provide notice as soon as practicable.

# Reductions in Pay

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- Non-exempt employees typically only get paid if they work – therefore no legal restriction on scheduling less hours or reducing pay as long as you pay minimum wage and overtime.
- Exempt salaried employees must be paid minimum salary to remain exempt – current federal minimum is \$684 per week or \$35,568 annually.
  - Lawful to change salary based on business circumstances (like a lack of supplies or demand) but cannot change salary based on quality or quantity of work.
  - Changes to salary should not be routine. Best practice is to change no more than 2 or 3 times per year
  - Permissible to move exempt employees to non-exempt pay status temporarily, especially if not enough work to justify full time schedule. Any changes should be well-documented and clearly communicated to employees.

# Duty to Bargain with Union?

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In the *Seaport Printing* case, 351 NLRB 1269 (2007), the NLRB found that the employer did not violate the Act during Hurricane Rita by failing to bargain over a plant shutdown and layoff.

Consider whether other temporary emergency safety or security measures may fall under a management rights clause.

Decision versus effects bargaining.

Applying the foregoing analysis, we find that the hurricane was an unforeseen event, having drastic economic effects on the Respondent. The impending hurricane caused the mayor to order an immediate, mandatory, citywide evacuation. The Respondent was thus compelled to take "prompt action" to respond to the hurricane and the evacuation order, necessitating the closure of its facility. At that time, all employees were out of work and it was not clear if or when they would return. The unexpected shutdown of the facility, precipitated by the impending hurricane, resulted in the forced layoff. This was an economic exigency like that described in *RBE Electronics of S.D.*, supra. Accordingly, without regard to its prior withdrawal of recognition from the Union, the Respondent's failure to bargain over the lay-off decision was not unlawful.

# What Should Employers be Planning for Next?

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- Begin contingency planning for operation and supply-chain disruptions that may occur due to high absenteeism and travel restrictions.
- Train staff to reallocate tasks from those unable to work or who choose to work remotely.
- Shift to telecommuting if feasible – plan by ensuring remote access to critical IT systems. Consider an employee survey to determine if employees are prepared to work remotely.
- Understand the financial impact of any disruptions in the supply chain. For example, is there any insurance for business disruption and if so, know what triggers coverage. Do any of your agreements contain “force majeure” clauses and if so, how is it defined?

# What Should Employers be Planning for Next?

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- Develop a procedure to identify and address employees demonstrating symptoms of the coronavirus at work
- Determine how your organization will handle employees who refuse certain assignments for fear of contracting the coronavirus.
- Monitor and stay up to date with recommendations from the CDC, WHO and local public health authorities.
- Keep your workforce educated and informed.

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