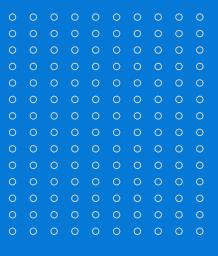


#### **Notice of Disclaimer**

The information herein is intended to be educational only and is based on information that is generally available.

HUB International makes no representation or warranty as to its accuracy and is not obligated to update the information should it change in the future. The information is not intended to be legal or tax advice.

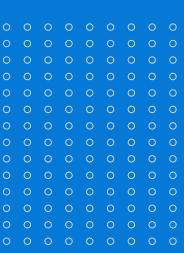
Consult your attorney and/or professional advisor as to your organization's specific circumstances and legal, tax or other requirements.





# Moderated By: Guy Gioino

Senior Vice President, Risk Services Leader Risk Services, HUB International





#### Carrie Cherveny, Esq

Senior Vice President, Strategic Solutions Risk Services, HUB International



#### **Tina Computzzi**

Assistant Vice President Workforce Absence Management Risk Services, HUB International



**Scott Fouts** 

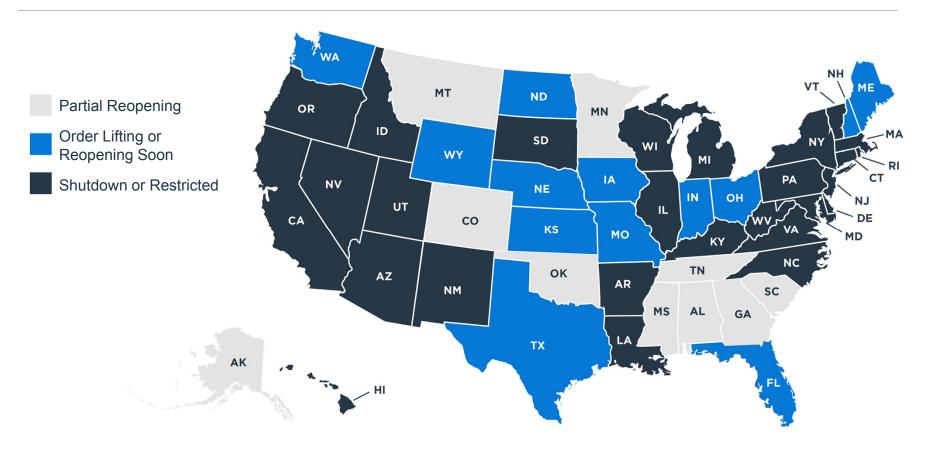
Vice President, HUB South Region, Risk Services, HUB International

# Agenda

- 1 Managing Employee Risk in the Workplace
- 2 Employee Relations
- 3 Absence Management
- 4 Reasonable Accommodations Under the ADA
- 5 Employers' Obligations and Liability for Safety
- 6 Q&A

# Status of the United States as April 30, 2020





Source: The New York Times

## Opening America: Phase One



Individuals	Employers	Specific Types of Employers
continue to shelter in place.  Members of households with vulnerable residents should be aware that they may bring the virus home. Precautions should be taken to isolate from the vulnerable.  All individuals, when in public should maximize physical distance from others. Social settings of more than 10 people, where appropriate distancing may not be practical, should be avoided	<ul> <li>Continue to encourage telework when possible.</li> <li>Return to work in phases if possible.</li> <li>Close common areas where personnel are likely to congregate, or enforce strict social distancing protocols.</li> <li>Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel.</li> <li>Consider special accommodations for vulnerable personnel.</li> </ul>	<ul> <li>Schools and organized youth activities that are currently closed should remain closed.</li> <li>Visits to senior living facilities and hospitals should be prohibited. Those who interact with residents and patients must adhere to strict hygiene protocols.</li> <li>Large venues (e.g., sit-down dining, movie theaters, sporting venues, places of worship) can operate under strict physical distancing protocols.</li> <li>Elective surgeries can resume, as clinically appropriate, on an outpatient basis at facilities that adhere to CMS guidelines.</li> <li>Gyms can open if they adhere to strict physical distancing &amp; sanitation protocols.</li> <li>Bars should remain closed.</li> </ul>

## Opening America: Phase Two



Indiv	viduals	Er	nployers	S	pecific Types of Employers
CC	ulnerable individuals should ontinue to shelter in place. Members	0	Continue to encourage telework when possible.	0	Schools and organized youth activities can reopen.
sh vir	households with vulnerable residents nould be aware that they may bring the rus home. Precautions should be taken isolate from the vulnerable.	0	Close common areas where personnel are likely to congregate, or enforce moderate social distancing protocols.	0	Visits to senior living facilities and hospitals should be prohibited. Those who interact with residents and patients must adhere to strict hygiene protocols.
<b>m</b> <b>ot</b> 50	Il individuals, when in public, should aximize physical distance from thers. Social settings of more than people, where appropriate distancing ay not be practical, should be	0	Consider special accommodations for vulnerable personnel.	0	Large venues (e.g., sit-down dining, movie theaters, sporting venues, places of worship) can operate under moderate physical distancing protocols.
	voided unless precautionary easures are observed.			0	Elective surgeries can resume, as clinically appropriate, on an outpatient
。 <b>N</b>	on-essential travel can resume.				and in-patient basis at facilities that adhere to CMS guidelines.
				0	<b>Gyms can remain open</b> if they adhere to strict physical distancing and sanitation protocols.
				0	Bars may operate with diminished standing-room occupancy.

Source: https://www.whitehouse.gov/openingamerica/

## Opening America: Phase Three



In	dividuals	Employers	Specific Types of Employers
0	Vulnerable individuals can resume public interactions, but should practice physical distancing, minimizing exposure to social settings where distancing may	<ul> <li>Resume unrestricted staffing of worksites.</li> </ul>	<ul> <li>Visits to senior care facilities and hospitals can resume. Those who interact with residents and patients must be diligent regarding hygiene.</li> </ul>
	not be practical, unless precautionary measures are observed.		<ul> <li>Large venues (e.g., sit-down dining, movie theaters, sporting venues,</li> </ul>
0	Low-risk populations should consider minimizing time spent		places of worship) can operate under limited physical distancing protocols.
	in crowded environments.		<ul> <li>Gyms can remain open if they adhere to standard sanitation protocols.</li> </ul>
			<ul> <li>Bars may operate with increased standing room occupancy</li> </ul>



# **Employment Status**



	FURLOUGH / UNPAID LOA	REDUCED HOURS	LAYOFF
EMPLOYMENT STATUS	Remains an "inactive" W-2 employee	Ongoing employment relationship	Employment relationship ends

#### Employer Obligations - Employee Health & Safety





#### **OSHA General Duty Clause**



#### Each employer

Shall furnish to each of his employees 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 to his employees;

Shall comply with occupational safety and health standards promulgated under this Act.

Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

### Mitigating Risk



On-site employee screening – only for practice team members who are coming onsite or exposed to other workers, clients, vendors, etc.



Taking temperatures



Asking exposure questions



Asking medical questions

#### What You Can Ask About the EE's Own Condition



Are you experiencing any of the following CDC - COVID-19 Symptoms or combination of symptoms:

- Cough
- Shortness of Breath

#### Or at least two of these symptoms:

- Fever (100.4 degrees)\*
- Chills
- Repeated shaking with chills

- Muscle pain
- Headache
- Sore throat
- New loss of taste or smell

- Are you currently waiting for COVID-19 test results?
- Have you tested positive for COVID-19?

<sup>\*</sup> The employer may take the employee's temperature. The person conducting the daily prescreening should be provided PPE including an appropriate mask.

#### **Employer-Administered Testing**



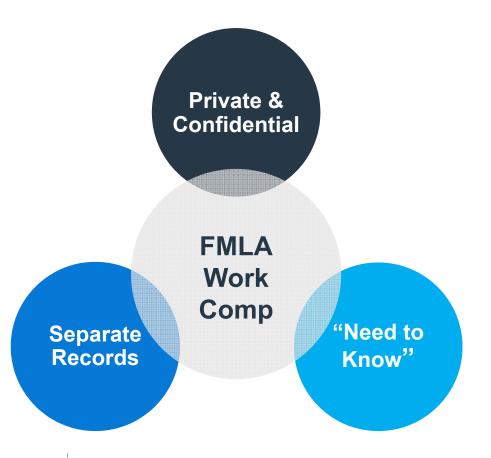
- ADA mandatory medical test of employees be "job related and consistent with business necessity."
- ADA standard employers should ensure that the tests are accurate and reliable.
- EEOC Recommendation
  - Review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing
  - Review guidance from CDC or other public health authorities and check for updates
  - Should consider the incidence of falsepositives or false-negatives associated with a particular test

#### EEOC Reminders

- Testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.
- Employers should still require –
  to the greatest extent possible –
  that employees observe infection
  control practices (such as social
  distancing, regular handwashing,
  and other measures) in the workplace
  to prevent transmission of COVID-19.

#### Confidentiality and Medical Information







# What You Can Ask About the EE's Exposure



- Have you self-isolated? If so, how many days and why?
   (remaining in your home and outdoor activities without coming closer than 6-feet from others)
- Have you been exposed to anyone currently waiting for COVID-19 test results?
- Have you been exposed to anyone who has tested positive for COVID-19?
- Have you been exposed to anyone with any of the CDC specified symptoms?
- Have you traveled outside your state or regional area?

#### What You Can Share



If you've been informed by the employee that they have a confirmed positive test for COVID-19 you may:

- ask the employee that has tested positive for COVID19 to identify:
  - last time he/she was in the workspace
  - what parts of the workspace he/she may be been in
  - with whom the employee may have had direct contact

- share with the employees that an unidentified employee with whom they have had recent contact has tested positive.
- ask how the employees (with whom the diagnosed employee had contact) are feeling and if they have any symptoms?
- direct the exposed employees to monitor their own health COVID19 symptoms.
- ask employees to disclose if they have tested positive or have been in close contact with others who have tested positive for COVID19.

Depending on the job and local health department regulations, there may be mandatory reporting obligations and the employer should consult with that health department.



## When May Employees Return to Work?

Employees should not return to work until he or she has satisfied CDC post-diagnosis / illness criteria to return to work:

Test-based strategy – exclude from work until:	Non-test-based strategy – exclude from work until
<ul> <li>✓ Resolution of fever without the use of fever-reducing medications and</li> <li>✓ Improvement in respiratory symptoms (e.g., cough, shortness of breath), and</li> <li>✓ Negative results of an FDA Emergency Use Authorized molecular assay for COVID-19 from at least two consecutive nasopharyngeal swab specimens collected ≥ 24 hours apart (total of two negative specimens)</li> </ul>	<ul> <li>✓ At least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and</li> <li>✓ At least 7 days have passed since symptoms first appeared</li> </ul>

#### Negligence - The Legal Standard



The employer exercised the level of care which, under all the circumstances the reasonably prudent person would exercise in making the relevant decisions

Once it is established that the employer owed a duty to the particular plaintiff, the plaintiff must next allege that the **employer breached that duty.** 

This element concerns the **standard of care** required of the employer. In general, the test is whether the employer exercised the level of care which, under all the circumstances, the reasonably prudent person would exercise in choosing or retaining an employee for the particular duties to be performed.

# The Litigation Begins! Estate of Wando Evans v. Walmart



- Failed to implement social distancing guidelines promulgated by the federal and state authorities
- Failed to properly cleanse and sterilize the store to prevent infection, and failure to properly train personnel to implement and follow procedures designed to minimize the risks of contracting COVID-19
- Failed to provide Wando Evans and other employees with personal protective equipment such as masks, latex gloves and other devices designed to prevent infection of COVID-19, as well as failure to provide employees with antibacterial soaps, antibacterial wipes and other cleaning agents as recommended by the CDC

- Failed to periodically interview and evaluate its employees for signs and symptoms of COVID-19, as well as failure to warn Wando Evans and other employees that individuals at the store experiencing symptoms may have been infected by COVID-19
- Failed to follow recommendations and descriptions for mandatory safety and health standards promulgated by the DOL and OSHA, and failure to conduct periodic inspections of the conditions and cleanliness of the store to prevent and/or minimize the risk others contracting COVID-19 as recommended by the CDC

# Estate of Wando Evans v. Walmart, cont.



- Failed to follow the guidelines promulgated by the CDC with regard to keeping a safe and healthy environment, including failure to prepare and implement basic infection prevention measures, failure to develop an infectious disease preparedness and response plan and failure to implement engineered-controlled devices designed to prevent COVID-19 infection, such as installation of high efficiency air filters and physical barriers such as sneeze quards
- Failed to develop policies and procedures for prompt identification and isolation of sick people and failure to cease store operations and close when employees were experiencing symptoms of COVID-19
- Hiring employees via telephone or other remote means in an expedited process without personally interviewing or evaluating employees to see if they were experiencing signs and symptoms of COVID-19

#### Guidelines for Employers



Develop and implement appropriate policies, in accordance with Federal, State and local regulations and guidance, and informed by industry best practices, regarding:

- Social distancing and protective equipment
- ✓ Temperature checks
- ✓ Sanitation

- Use and disinfection of common and high-traffic areas
- ✓ Business travel

Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider.

Develop and implement policies and procedures for workforce contact tracing following employee COVID+ test.

# **Employee Relations**





## Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination on the basis of:		Title VII prohibits adverse employment actions against protected classes including:	
<ul> <li>Sex     (including     pregnancy     and gender     nonconformity)</li> <li>Race</li> <li>Color</li> <li>Age</li> </ul>	<ul> <li>Religion</li> <li>National origin</li> <li>Age Discrimination in Employment (ADEA)</li> <li>Genetic Information Nondiscrimination Act (GINA)</li> </ul>	<ul> <li>Termination</li> <li>Failure to hire</li> <li>Demotion</li> </ul>	

# Fair Labor Standards Act (FLSA) Exempt Employees (Usually Salaried)



- Must receive guaranteed salary of at least \$684 each week (may vary by state)
  - May be paid bi-weekly, semi-monthly, or monthly
  - May not reduce pay based on hours worked
  - May reduce annualized salary

- Required to be paid if they perform work at some point during the workweek
- May apply vacation / PTO / sick leave to days not worked to arrive at predetermined regular weekly compensation
- Be careful of substantial changes to job duties and preserving exempt status

#### Nonexempt Employees (Usually Hourly)



- Paid for work actually performed
- Minimum Wage: \$7.25 (may vary by state)
  - Government: \$10.80
- Overtime compensation
  - Time-and-one-half for all hours in excess of 40 in a workweek (may vary by state)

 If non-exempt employee does not perform any work you generally do not have to pay

#### **Financial Considerations**





### **Employee Handbooks**



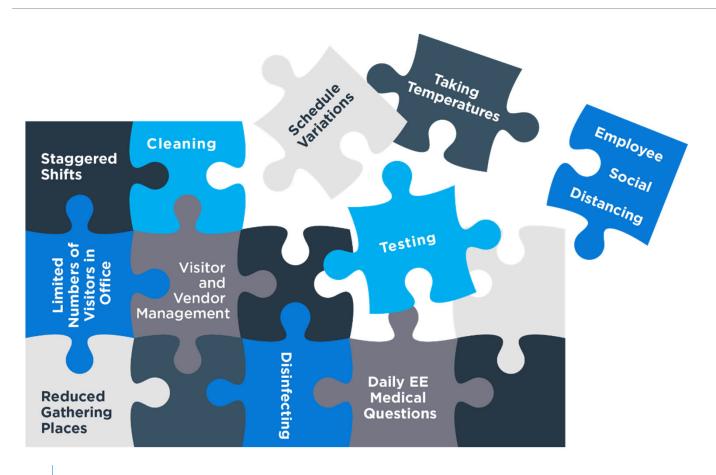
#### New standards of conduct and behavioral expectations

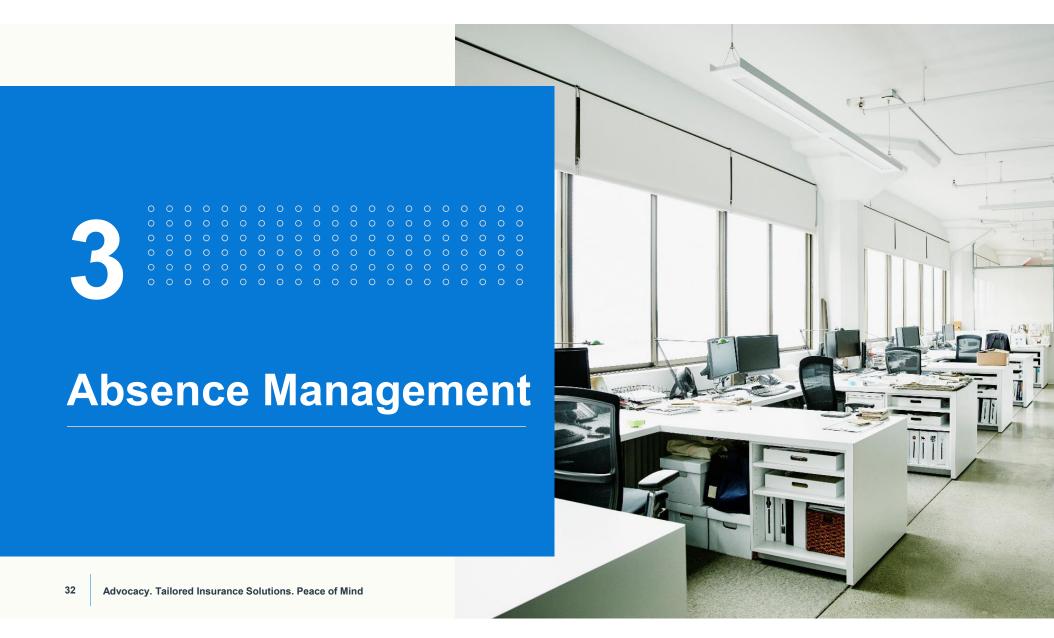
- Hand washing
- Elevators
- Washing hands before entering the office
- Frequency of cleaning work space

- Social distancing
- Use of common areas
- Consequences for failure to comply
- Acknowledgement of new policies
- "Employed at Will"

## Comprehensive Risk Management









# **Interaction of Absence Programs**

	Quarantine	Child School Closure	Disabled/Diagnosed
Emergency FMLA		✓	
Emergency Paid Sick Leave	✓	✓	✓
"Original" FMLA			✓ / possible
ADA			✓ / possible
State Leave (unpaid)		✓ / possible	✓ / possible
State/Local Paid Sick Leave	√ / possible	✓ / possible	✓
Employer Paid Time Off	✓	✓	✓
Short Term Disability			✓ / possible
Statutory Disability/PFML	√ / possible		✓ / possible

#### Qualified Leave Reasons Under FFCRA



#### Emergency Paid Sick Leave (EPSL): Up to 2 weeks

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health-care provider to self-quarantine because of COVID-19;
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;

- The employee is caring for an individual subject to or advised to be in quarantine or isolation;
- The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

#### Expanded FML & EPSL: Up to 12 weeks combined

 The employee is caring for a son or daughter whose school or place of care is closed, or child-care provider is unavailable, due to COVID-19 precautions.

# FMLA Requirements to Remember



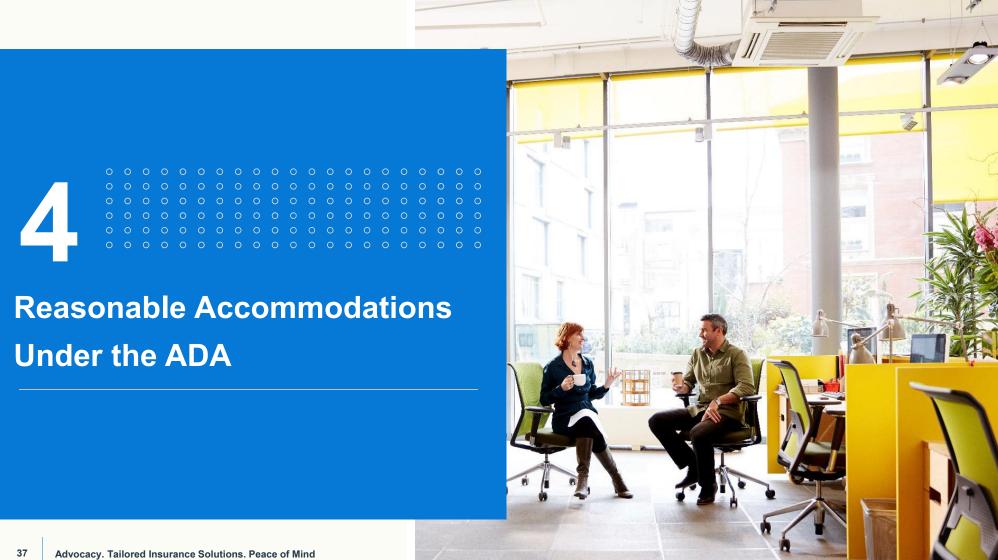
Employees must provide:	Employers must provide:
<ul> <li>Notice of a need for FMLA</li> <li>Certification confirming a need for leave (except bonding)</li> </ul>	<ul> <li>Eligibility Notice</li> <li>Rights and Responsibilities Notice</li> <li>Designation Notice</li> </ul>

 Can require a doctor's release under FMLA for an employee's OSHC, but be practical on obtaining

# Employee Rights Under FMLA



Maintenance of Benefits	Job Restoration
<ul> <li>Group Health Plan</li> <li>Employer Responsibilities</li> <li>Employee Responsibilities</li> </ul>	<ul> <li>Same or "equivalent" job</li> <li>Equivalent pay</li> <li>Limitations on an Employee's right to return to work</li> </ul>



## What is a Disability Under ADA?

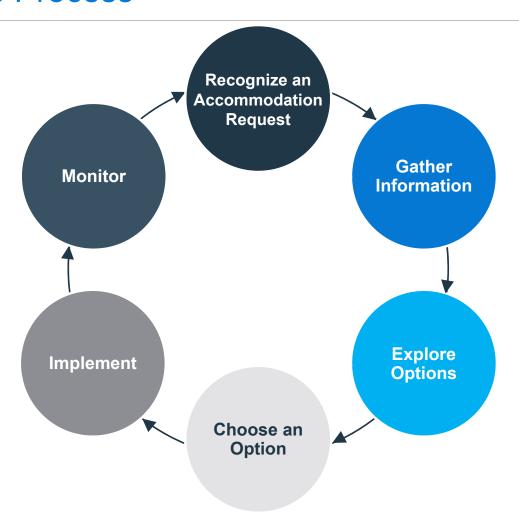


- An individual must have an "actual" or a "record of" a disability as defined by the ADA Amendments Act (ADAAA)
- Disability: an impairment that substantially limits a major life activity
  - Review the EEOC's list of conditions
  - Definition is broad, so always err on the side of caution

- Must be a connection between the impairment and the specific accommodation requested
- Those not covered solely by ADA:
  - 65 or older or pregnant employees
  - Caregivers of individuals with disabilities

## The Interactive Process





### Employer Actions Under the ADA



#### **Engage in the interactive process**

Ask employees now if they will need an accommodation in the future when they are permitted to return to the workplace

Employees who request an accommodation for something that is already provided to all employees

**Confidentiality of medical information** 

## Requesting Information from Employees



#### To explain why an accommodation is needed

- 1. How the disability created a limitation
- 2. How the requested accommodation will address the limitation

- 3. Whether another form of accommodation could address the issue
- 4. How a proposed accommodation will enable continued ability to perform the "essential functions" of the position

#### To determine if a condition is a "disability" under ADA

 Only if the disability is not obvious or already known



# Accommodation Challenges for Employers Amidst COVID

#### **Undue Hardship Considerations**

# Ability for employees to provide documentation

- Significant Difficulty
- Significant Expense

 Provide temporary accommodations on an interim or trial basis for urgent requests





- Ford Motor Company was sued by the EEOC in 2011 for failing to provide a reasonable accommodation to a disabled employee
- Employee requested an accommodation to telework due to a gastro-intestinal condition

- Ford refused to allow the employee to participate in it's liberal telecommuting program as a reasonable accommodation
- In addition, Ford began to criticize her performance, placed her on a performance plan, and ultimately terminated the employee months after she complained about being denied for an accommodation

#### Additional Considerations Under ADA



- Employees transitioning from telework back to the worksite
- Those without telework capabilities but are at a higher risk of COVID
  - Temporary, low cost options
  - Flexibility is key

- Mental illness or disorder exacerbated by COVID-19
- Employees with accommodations prior to COVID-19 requesting additional or altered accommodations
- Development of return-to-work programs for the future

#### Accommodation Resources



#### **Job Accommodation Network (JAN)**

Askjan.org

EEOC: What you should know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

 https://www.eeoc.gov/eeoc/newsroom/wysk/wysk ada rehabilitaion act corona virus.cfm

# **Employers' Obligations and Liability for Safety**

Best Practices To Address Before Your Employees Return to Work



# Goals of Returning to Work Safely



- Protect people
- Protect property
- Manage the business through the crisis
- Sustain reputation
- Resume normal operations
- Suppliers
- Customers



# **Best Practices**



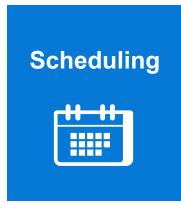
Pandemic Plan	5 Cleaning and Disinfecting
Employee Monitoring / Reporting	6 OSHA and CDC Guidelines
Rotational Jobs / Work	EEOC Guidelines
Contractor Management	Plan, Organize, Evaluate, Respond

### Pandemic Plan













# **Employee Exposure and Monitoring**



#### These symptoms may appear 2-14 days after exposure to the virus:

- Fever
- Cough
- Shortness of breath or difficulty breathing

- o Chills
- Repeated shaking with chills
- Muscle pain
- Headache
- Sore throat
- New loss of taste or smell

#### When to Seek Medical Attention



- Sick employees should follow <u>CDC-recommended steps</u>
- If employees develop emergency warning signs for COVID-19 they should get medical attention immediately.
- Emergency warning signs include\*
  - Trouble breathing
  - Persistent pain or pressure in the chest
  - New confusion or inability to arouse
  - Bluish lips or face

<sup>\*</sup> This list is not all inclusive. Please consult your medical provider for any other symptoms that are severe or concerning

# Workforce Planning



Remote Workers	Onsite / Facility Work	OSHA / CDC Guidelines
<ul> <li>Consider continuation of employees working remotely to reduce the number of people in the workplace.</li> <li>Ensure employees have proper equipment to continue their productivity at home.</li> <li>If employees are required to come into the workplace – Complete a Health Screening Assessment via phone prior to arriving on-site.</li> </ul>	<ul> <li>Limit the number of employees in the workplace to those of essential workers.</li> <li>Provide an area for employees to set-up, complete their daily job tasks and move back to working remotely as soon a possible.</li> <li>Determine job rotation, staggered shifts, adjusting job tasks, hours duration, work schedules etc.</li> </ul>	<ul> <li>Follow guidelines for social distancing, PPE and other areas to reduce the spread of the virus.</li> <li>Testing for employees should be completed by a Medical Practitioner or Health Care Provider.</li> <li>Commitment to stay current on all areas of Employee Health, Safety and Wellness.</li> </ul>

## **Contractor Management**



#### Develop a "Critical" Contractor Management List

What are your contractors doing to monitor their employees?

#### Observe, Monitor and Review

- Provide an overview of your company protocol to the contractors and their employees
- Obtain and agreement from your contractor on their firm's protocols

- Ensure the contractor
   works in the designated
   areas and does not interact
   with your employees
- Contain movements of the contracted firm within the facility

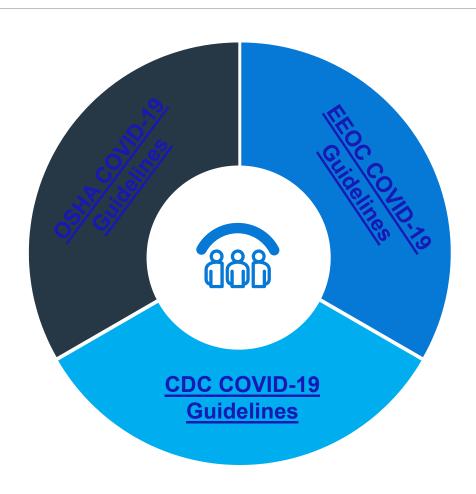
# **Cleaning and Disinfecting**



Document	Results	Common Areas
<ul> <li>Identify affected areas</li> <li>and employees –</li> <li>quarantine as needed based on</li> </ul>	<ul> <li>Provide notification of cleaning / disinfecting results to management and employees</li> </ul>	<ul> <li>Public entry doors (handles, push bars, surface area) – a minimum of four times a day</li> </ul>
<ul><li>the Risk Assessment</li><li>Provide thorough documentation</li></ul>	<ul> <li>Develop ongoing tracking of employ</li> </ul>	<ul> <li>Elevator buttons –</li> <li>three times each day</li> </ul>
on cleaning vendors, service, chemicals and affected areas	<ul> <li>And (after a short shootout with the police) all the equipment</li> </ul>	<ul> <li>Public counters in lobbies and reception areas / Handrails –</li> </ul>
<ul> <li>Review guidelines provided by CDC and OSHA to ensure</li> </ul>	was recovered.	twice each day
compliance		<ul> <li>Copy-rooms, breakrooms and kitchen appliances         (vending machines, microwaves and refrigerators) /         Conference room light switches – twice each day</li> </ul>
		<ul> <li>Employee workspaces – three times each day</li> </ul>

# **Regulatory Guidelines**





# Ongoing Evaluation of Pandemic Plan and Operations



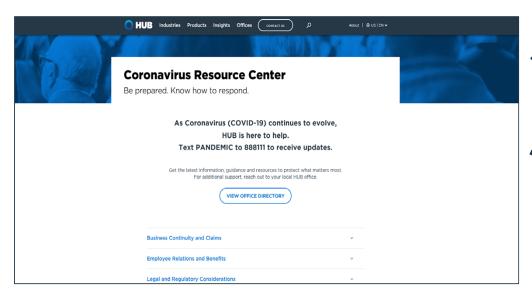
"the ability of an organization to anticipate, prepare for, respond, and adapt to incremental change and sudden disruptions in order to survive and prosper"

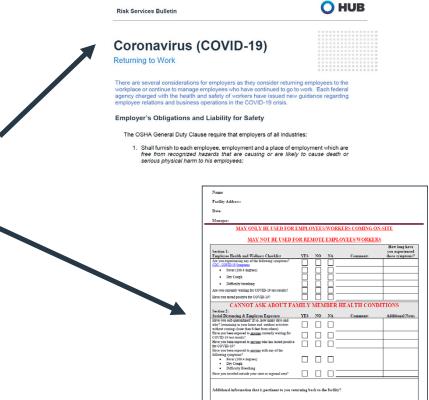


#### **HUB Crisis Resource Center**



# Click here to access our Coronavirus Resource Center.





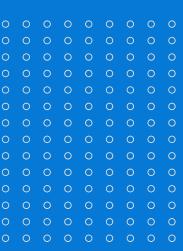


Be prepared. Be safe.

Visit HUB's Coronavirus Resource Center.

hubinternational.com/coronavirus





# Thank you.