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COVID-19, commonly known as the Coronavirus, has dominated headlines and is starting to spread throughout the United States. Although the United States has not been the epicenter of the virus, it has already created issues related to safe workplace environments and raised concerns for businesses and employers that will likely be exacerbated in the coming weeks. While waiting for the medical and public-health experts to develop responses, businesses and employers should immediately prepare for disruptions.

There are many resources available to employers to assist in preparing for the impact of the virus. We want to ensure that your planning also considers the legal impact of matters such as wage and hour laws, medical leave requirements, nondiscrimination laws related to medical conditions and health privacy issues.

For healthcare and assisted living facilities, as we have seen in Washington State and across the world, COVID-19 poses a specific and significant threat to vulnerable populations. This makes the facilities susceptible to being particularly hard hit. These facilities need to take extra precautions to protect their populations, but also to have policies and procedures in place in the event COVID-19 does pass through the facility. These policies and procedures should be all encompassing and include matters ranging from patient safety and health to public communication and messaging.

Businesses generally face a myriad of issues on a regular basis and this is the time to test disaster recovery plans, obtain assurances from key vendors, and evaluate employee policies and procedures in light of the expected disruptions. To the extent the disruption planning includes potential temporary furloughs, medical leave, reduction in hours, or reduced pay measures, businesses need to be mindful of a variety of state and federal statutes and regulations applicable to both exempt and non-exempt employees.

The spread of COVID-19 will likely create unforeseen challenges, both practical and legal. However, many of those challenges can be mitigated by taking steps now to set expectations with employees, customers, suppliers, and vendors that will mitigate many of the disruptions. A few tips follow, but general common sense and consultation with experts are highly advised for specific issues.

If you have any questions or would like further information on any of these topics, please do not hesitate to contact us.

## **Center for Disease Control and Prevention (CDC) Guidelines**

Protecting your employees and their families is obviously of paramount concern. Taking steps to ensure a safe working environment will also help protect your business from potential liability issues. The CDC has published and continues to provide updated guidance for employers and businesses. These guidelines cover a wide variety of situations and scenarios which address how to minimize the spread of the illness, respond to ill employees that report to work, and address employees that return from travel from areas where the virus is prevalent. The website for these guidelines can be found by clicking [here](#).

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## **Safety and Health Standards**

Although most employers will act out of genuine concern for the well-being of their employees and their families, you should be aware that there are also legal reasons to keep your workplace safe. The Occupational Safety and Health Administration (“OSHA”) requires employers to provide a safe and healthy workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Employers should develop a plan outlining the steps to protect employees from COVID-19. It is also important to note that a covered employer is required to record any cases of employee illness or injury on the job resulting from such hazards.

## **Protecting Employees and Preventing the Spread of COVID-19**

Employers should adopt practices and promote efforts to minimize the chances for possible exposure to COVID-19 for your employees, clients, customers, and third-parties. Encourage “social distancing” for employees by having them keep respectable distances from others, increasing hygiene and sanitation practices, and utilizing modern video conferencing and remote communication platforms to conduct meetings with employees and clients. To the extent necessary, consider encouraging reduction in travel or banning all business travel.

Although facemasks are being utilized by many individuals out of precaution, based on current CDC guidance (March 2, 2020), face masks are only necessary for individuals who are showing symptoms of COVID-19 or who are treating or caring for an infected person, or for individuals to prevent the spread to others. Therefore, an employer may prohibit healthy employees from wearing a medical mask or respirator if the employee’s sole purpose is to avoid contracting COVID-19, which is consistent with OSHA guidelines.

## **Inform Employees of Internal Policies and Procedures and Set Expectations**

Businesses should have established policies regarding facility access to support restoration of data as part of a disaster recovery plan, with every key role having a back-up in case an employee is unavailable for any reason. To the extent any of these roles are outsourced to a key vendor, discussions should be made to ensure the vendor has built in resiliency in their systems.

As shown in other countries, it may be necessary to run the business under an emergency operations plan, with such plan communicated to key managers and, to the extent it effects employees, communicated to the employees as well. It may be necessary to prevent employees from showing up at the facilities and such protocol should be discussed in advance with employees. For many, this will require implementing an emergency remote work policy, but such policy will need to be cognizant of the business risks, such as handling sensitive data outside of the physical premises. It will be important that the managers effectively communicate with employees to ensure compliance with any decision that is made in the future.

Businesses should also take the time to circulate paid and unpaid leave policies for employees, consider whether to offer additional paid leave or more flexible work-from-home practices, and determine whether it is feasible to offer an incentive for employees to stay home and mitigate risks to the employee and the business.

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## **Be Mindful of Wage and Hour Law Compliance**

**Non-Exempt Employees:** Non-exempt employees only need to be paid for the time when they are working. Employers can prospectively reduce scheduled hours or hourly rates of pay without implicating wage and hour laws. Federal and state minimum wage laws must still be satisfied. Review your state laws regarding notification of pay-rate changes and ensure non-exempt employees are still paid on time.

**Exempt Employees:** Exempt employees are subject to the salary basis test which means they generally must be paid the same minimum weekly salary regardless of the actual hours they work each week. Absent a permissible exception, failure to pay an employee's full weekly salary could jeopardize the employee's exempt status and inadvertently recategorize them as non-exempt, making them eligible for overtime pay. Unlike non-exempt employees, prospective partial week reductions in hours for exempt employees are generally not permitted as they may violate the salary basis test. Generally, if an employer implements a full-workweek furlough, or in the alternative requires an employee to take a full week off and not pay salary, it must ensure exempt employees perform no work that week by requiring the employee unplug from the workplace and abstain from all work emails, telephone calls, and work responsibilities.

## **Keep in Mind Leave Considerations and Disability Accommodations**

Decide whether benefit plans extend to absences for long-term quarantine or isolation orders and encourage employees to use any available paid leave benefits. However, be mindful of sick leave laws that can prevent employers from soliciting private health information from employees or requesting doctors' notes before an employee is absent more than three consecutive days. In certain situations, COVID-19 may also qualify as a serious health condition under the Family Medical Leave Act (FMLA) or a disability under state or federal disability discrimination laws. These laws, and corresponding state laws, protect employees returning to work after taking leave due to quarantine or isolation orders.

It is possible that the federal government and/or state governments will adopt new mandates, accommodations and assistance to employers facing these issues, such as assistance for the provision of paid leave for those affected. Until such time as those policies are implemented, existing law will apply. Vandennack Weaver will endeavor to keep you posted as new developments emerge from policymakers.

## **Specific Considerations for Long-Term Care and Nursing Home Facilities**

### *CDC Specific Guidance*

The CDC has released specific guidance and preventative steps and measures for long-term care and nursing home facilities. This [guidance](#) is intended to prevent the spread of COVID-19 **into**, **within**, and **between** your facilities.

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## *Regulatory Considerations*

Even though it is a time of crisis, expect the Centers for Medicare & Medicaid Services (CMS) to require heightened regulatory compliance. On March 4, 2020, CMS issued QSO-20-14-NH (Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes), which was then revised and updated on March 9. The March 9 revisions to QSO-20-14-NH specifically include recommendations as to restricting, limiting and/or discouraging visitors (with the level of restriction, limitation and/or discouragement varying depending on multiple factors), except for situations such as end-of-life or when a visitor is otherwise essential for the resident's emotional well-being and care.

A link can be found for QSO-20-14-NH can be found [here](#). Furthermore, the CMS released the following [guidance](#) for hospitals with QSO-20-13-Hospitals has also been issued for hospitals.

Assisted living facilities and nursing homes need to review such guidance, and “improve their infection control and prevention practices to prevent the transmission of COVID-19.” To do that, all facilities are encouraged “to monitor the CDC website for information and resources and contact their local health department when needed.” While QSO-20-14-NH is specific to nursing homes, you should monitor the requirements from your state health department daily, as they could expand restrictions similar to QSO-20-14-NH to assisted living providers and other facilities that the state health department regulates.

The CMS also provides answers to common questions that nursing homes and hospitals may have with respect to addressing cases of COVID-19, such as screening staff and visitors with questions about recent travel to countries with known cases, transferring patients between nursing homes and hospitals in cases for which COVID-19 is suspected or diagnosed, and when providers should take precautionary measures (including isolation and mask wearing) for patients and residents diagnosed with COVID-19 or showing signs and symptoms of COVID-19.

## *Prepare for Crisis Communications*

Prepare for the possibility of a “local crisis” in your facility or your local community. You should add COVID-19 to the list of possibilities that might need to be promptly communicated not only to residents, families and staff, but also to a variety of other stakeholders. These can include not only your regulatory agencies, but also referral sources, hospitals (including both those with which you have transfer agreements and others in your service area), insurers, lenders/landlords and vendors. Media inquiries to your facility may be sudden, and it is important to identify your spokesperson before the infection reaches your doors. Unlike other public relations events, a public health emergency can require assistance from medical professionals outside of your organization. You should also consider consultants to work with to ensure you are meeting standards of practice and to assist in your external communications. For example, you may need assistance from medical professionals you do not normally deal with, such as infection prevention specialists.

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## *Remember Resident's Rights and HIPAA*

Even in a time of crisis, residents are still entitled to personal privacy and confidentiality, including the HIPAA requirements and state law requirements. Educate and remind staff of those rules, especially if your facility falls into the “spotlight” during an isolated outbreak affecting only one or two facilities. While HIPAA permits certain disclosures to some health authorities to prevent or control the spread of disease, that exception is subject to the “minimum necessary” rule and deserves advance consideration. Certain situations that pose a serious and imminent threat to the health or safety of a resident or others may permit the disclosure of resident-specific information to prevent or lessen the threat (including those who are not healthcare professionals but may be in a position to prevent or lessen the threatened harm). When disclosing information to family, friends, and caregivers of a resident, check with the resident or use good professional judgment to infer what is in the resident’s best interest and limit disclosures to information related to that person’s involvement in the resident’s care. If you have any legal questions regarding your client’s privacy, please do not hesitate to ask us for legal assistance; after the crisis passes there may be “second guessing” of your actions and disclosures by families, regulators, tort attorneys and others. Note that while the Coronavirus Preparedness and Response Supplemental Appropriations Act (CPRSSAA) includes several provisions to allow providers to act quickly as they deal with COVID-19, provisions will not reduce or modify the HIPAA requirements.

## **Specific Guidelines for Healthcare Professionals**

The CDC has also provided specific guidance for healthcare professionals including guidelines for Persons Under Investigation (PUI’s), Clinical Care, Infection Control, managing of personal protective equipment, and implementing home care practices. These guidelines can be found [here](#).