

# Coronavirus (COVID-19) Update for Employers:

## Planning for the Potential Impact on the Construction Industry



**Presented By:**

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# Overview

- Prepare and Communicate
- Review/Revise Policies
  - Leave Policies (PTO, Sick Leave, FMLA, WC, ADA)
  - Work Restructure Policies (ADA, Work From Home, Travel Requirements)
- Furloughs, VSPs, Reductions in Force, and WARN
- Wage and Hour Implications
- Top Questions from Construction Employers
- Resources

- Actively encourage sick employees to stay home
  - Review and revise sick policies for flexibility
  - Consider remote working arrangements
- Emphasize hygiene
  - Avoid touching face
  - Soap & Water / Hand Sanitizer
  - Cough etiquette
  - Infographics
- Environmental cleaning
  - Including shared trucks, equipment, Porto -johns

# Communicate with Workforce

- Educate Employees on virus and policies
- Identify point-of-contact in case of exposure
- Travel restrictions
- Company's response to COVID-19 exposure

# Leave Policies That May Come into Play

- Follow normal policies:
  - PTO/Sick Leave
    - Follow policies, if deviate make sure for a consistent legitimate business reason
    - Be mindful of state and local laws
    - Follow call-in policy procedures
    - Require doctor notes?

# Leave Policies That May Come into Play

- FMLA

- Own Serious Health Condition
- Family Serious Health Condition

- ADAAA

- Could be a disability under the ADAAA
- But Maybe Not
- Leave Can Be a Reasonable Accommodation

- Workers' Compensation

# Large Scale Work Force Changes

- Effects of COVID-19 outbreak will be significant
  - Supply chain issues
  - Significant loss of business
  - Downturn of economy (recession)
  - Wage reductions, shift changes, furloughs, voluntary separation programs, reductions in force

# Wage or Hour Reductions, Shift Changes, Eliminations

- Wage Reductions
- Moving to fewer shifts or more shifts
  - consider shift rotations,
  - sub-contractor spread
- Hours changes/reduced schedules
  - Employment Agreements and Contracts/CBA
  - Results in Reduction in Wages/Change in Hours – state law notices
  - Business Reasons/Disparate Impact Analysis
  - WARN- 50% reduction of hours for 6 months or more= employment loss – could require 60 days notice



# Mandatory Furloughs

- Review current policies
- Employment Agreements and Contracts/CBA issues
- Decide structure based upon legitimate business reasons/Disparate Impact
- Comply with FLSA
- WARN - layoff exceeding 6 months

# Voluntary Separation Programs

- Assist with Company goodwill vs. a RIF
- Use a standard formula of who is eligible
- Use a release as a condition of the severance
- Analyze using an ERISA plan
- Comply with OWBPA in Release

# Reductions In Force

- Analyze and Base Upon a Business Need
- Analyze ERISA Plan
- Follow Severance Policies
  - Utilize a release
  - Follow OWBPA
- Disparate Impact Analysis
- Be Mindful of CBA

Determine Whether WARN or State WARN  
May Be Triggered



# WARN Act

- Worker Adjustment and Retraining Notification Act
- Requires “qualifying” employer to provide 60 days notice of:
  1. **Plant closing**  
OR
  2. **Mass layoff**



# Closing

- Permanent/temporary shutdown of

1. “single site of employment”

OR

2. one or more “facilities or operating units”  
within a single site [mini-plant closing]

IF

Shutdown results in “employment loss” at the single site during a 30-day period for  $\geq 50$  “full-time” employees

# Mini-employer Closing

- Employment loss of  $\geq 50$  “full-time” employees in one department, facility, unit at one location

# Mass layoff

Employment loss at single site during

30-day period for:

≥ 50 full-time employees; and

≥ 33% of full-time employees

OR

≥ 500 full-time employees





# Full-time employees

- Count toward numbers for mass layoff or plant closing
  - Not the same as your Company definition
  
  - Employed on average, in shorter of (a) 90 days or (b) time employed, at least 20 hours/week
- OR
- Employed for 6 of relevant 12 months
    - Employed on or before: 6 months before . . . . RIF Date <minus> 60 days

# Single site of employment

- Single location or group of contiguous locations

NOT

1. Non-contiguous sites in same geographic area without shared staff or operational purpose,

OR

2. Contiguous buildings owned by same employer with separate management, separate workforce, different products

# Beware 90-day rolling window

- Aggregates any small RIFs (i.e., not large enough, by itself, to be a mass layoff or plant closing) in rolling 90-day window
- Unless different RIFs are the result of “separate and distinct actions and causes” (employer’s burden to prove)



# Qualifying employer

- Either:

1. 100 or more employees, excluding part-time

OR

2. 100 or more employees who work at least 4,000 hours/week (not including overtime)

# WARN Act requirements

- Notice
  - Specific language
  - Specific recipients
- Non-compliance
  - Back pay & benefits
  - Attorneys' fees
- Exceptions
  - Unforeseeable business circumstances
  - Faltering company
  - Natural Disaster?



# Employment loss

- 1 of 3 things must occur (usually):
  1. **Employment termination**—but not:
    - For cause,
    - Voluntary, or
    - Retirement
  - OR
  2. **Layoff exceeding 6 months,**
  - OR
  3. **Reduction in hours >50%** during each month for 6-month period

# Wage and Hour Considerations

- 2 Primary Scenarios:
  - Employee is instructed not to work, for several reasons
  - Business/economic conditions require employee work schedule modification

# Fair Labor Standards Act (FLSA) implications vary based on several factors:

- Classification
- Method of compensation
- Workweek
- PTO policy
- Paid sick leave/vacation policy
- State Laws



# Non-Exempt Employees

- Federal law requires pay for all hours worked
  - Regardless of reason that a non-exempt employee does not work, federal law does not require employee to be paid
- Strategies
  - Substitution of paid PTO/vacation/sick leave for missed work
  - Compensating employee at reduced rates for missed work

# Exempt Employees: Salary Basis and Amount Tests

- Exempt employee must receive guaranteed salary of at least \$684 per week that represents all or part of their compensation
  - Salary can be paid bi-weekly, semi-monthly, or monthly
- Deductions from salary (including for variations in quantity or quality of work) are not allowed
- Employee must receive salary for any workweek in which any work is performed, with 7 exceptions
- If no work is performed in a workweek, then employer does not have to pay salary
- Deductions from salary for absences or changed business operations required by employer are not allowed

# Exempt Employee: Salary Basis Requirement

- Permissible deductions limited to 7 exceptions:
  1. Full-day absences for personal reasons other than sickness and disability;
  2. Full day absences due to sickness or disability where the deduction is in accordance with bona fide plan, policy, or practice to provide compensation for loss salary due to sickness or disability;
  3. Unpaid leave under Family and Medical Leave Act; employer required to pay proportionate amount of salary to time actually worked;
  4. Penalty amount assessed for violations of major workplace safety rules;
  5. Unpaid disciplinary suspensions in full-day increments for violating workplace conduct rules where suspensions are imposed in good faith and pursuant to written policy;
    1. Likely not applicable here
  6. Offsets for jury duty or military leave pay
  7. Beginning and last weeks of employment if partial week worked (proportionate deduction).

# Definitions

- **Symptomatic**

- Subjective or measured fever ( $>100.4^{\circ}$  F or  $37.8^{\circ}$  C), cough, or difficulty breathing

- **Asymptomatic**

- Not exhibiting symptoms of COVID-19, but exposed through close contact

- **Close contact**

- Being within approximately 6 feet of a COVID-19 person for a prolonged period (e.g., caring for, living with, visiting, sharing a waiting room, or sitting within 6 feet on a plane with a COVID-19 case)

**OR**

- Having direct contact with infectious secretions of a COVID-19 person (e.g., being coughed on)

# Questions Employers are Asking:

## ▪ Travel

- Can employer forbid business-related travel to affected areas?
- Can employer require employees to go on business trips to affected areas, despite employees expressing concern over contracting the virus?

# Questions Employers Are Asking

## ▪ Travel Continued

- May employer ask employees about their personal travel?
- May employer ban employees from personal travel to affected areas?
- May employer require an employee returning from travel to an area with “widespread transmission” to work from home?
- Does this apply to subs on my jobsites?

# Question Employers Are Asking

- May an employer (who was away) require employee to undergo a medical or fitness-for-duty examination or provide a doctor's note before returning to work?
- Does this apply to subs on my jobsites?

# Questions Employers are Asking

## ▪ Exposure

- May employer send employee who is exhibiting symptoms of COVID-19 home?
- May employer send employee who has had close contact with someone who has COVID-19 home?
- Does this apply to subs on my jobsites?



# Questions Employers are Asking

- May employer disclose employee's COVID-19 diagnosis to others?
- Do I have a duty to warn other employees?
- Do I have a duty to warn other persons who may enter a jobsite?

# Questions Employers are Asking

- What is the status of the federal response and different legislation that addresses COVID-19

# Questions Employers are Asking

- What is the current status of unemployment in NC, SC, Va, Ga and Tenn?
- If I have to layoff employees should I do anything out of the ordinary?

# Questions Employers are Asking

- Have states, locales begun shutting down construction jobsites?
- What happens if there is a statewide order closing non-essential businesses?

# Questions Employers are Asking

- If an employee is infected at work is this an injury covered by worker's compensation?
- What happens if a jobsite becomes subject to quarantine?
  - What happens if workers are quarantined (self or imposed), and contractors lack available, skilled craft persons to perform the work?
  - What happens if materials are delayed because of factory quarantines, shipping holds, or other supply chain disruptions?
  - If state advises certain safety protocols or equipment utilization, how will these new, unanticipated cost be administered and applied?
- Is a confirmed COVID-19 case a recordable event on your OSHA log?

# Questions Employers are Asking

- What assistance is being offered to employers in light of this crisis?

# Recommendations

- Remain calm and measured
- Monitor the latest guidance
- Communicate regularly with workforce.
- Be flexible, but consistent
- Communicate and analyze individual issues with HR and Legal

# Resources

## SARS-COV-2 / COVID-19 Resources by Jurisdiction

### United States

#### Federal Website

**CDC**      [CDC COVID-19 Website](#)

**OSHA**      [OSHA COVID-19 Website](#)

**EEOC**      [EEOC 2009 Pandemic Flu](#)



# Resources

States	Website
Alabama	<a href="http://www.alabamapublichealth.gov/infectiousdiseases/2019-coronavirus.html">http://www.alabamapublichealth.gov/infectiousdiseases/2019-coronavirus.html</a>
Alaska	<a href="http://dhss.alaska.gov/dph/Epi/id/Pages/Human-Coronavirus.aspx">http://dhss.alaska.gov/dph/Epi/id/Pages/Human-Coronavirus.aspx</a>
Arizona	<a href="https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/index.php#novel-coronavirus-home">https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/index.php#novel-coronavirus-home</a>
Arkansas	<a href="https://www.healthy.arkansas.gov/programs-services/topics/novel-coronavirus">https://www.healthy.arkansas.gov/programs-services/topics/novel-coronavirus</a>
California	<a href="https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/nCOV2019.aspx">https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/nCOV2019.aspx</a>
Colorado	<a href="https://www.colorado.gov/pacific/cdphe/2019-novel-coronavirus">https://www.colorado.gov/pacific/cdphe/2019-novel-coronavirus</a>
Connecticut	<a href="https://portal.ct.gov/DPH/Public-Health-Preparedness/Main-Page/2019-Novel-Coronavirus">https://portal.ct.gov/DPH/Public-Health-Preparedness/Main-Page/2019-Novel-Coronavirus</a>
Delaware	<a href="https://dhss.delaware.gov/dhss/dph/epi/2019novelcoronavirus.html">https://dhss.delaware.gov/dhss/dph/epi/2019novelcoronavirus.html</a>
Florida	<a href="http://www.floridahealth.gov/diseases-and-conditions/COVID-19/">http://www.floridahealth.gov/diseases-and-conditions/COVID-19/</a>
Georgia	<a href="https://dph.georgia.gov/coronavirus-disease-2019-covid-19-outbreak">https://dph.georgia.gov/coronavirus-disease-2019-covid-19-outbreak</a>

States	Website
Hawaii	<a href="https://health.hawaii.gov/docd/advisories/novel-coronavirus-2019/">https://health.hawaii.gov/docd/advisories/novel-coronavirus-2019/</a>
Idaho	<a href="https://healthandwelfare.idaho.gov/COVID19/tabid/4664/Default.aspx">https://healthandwelfare.idaho.gov/COVID19/tabid/4664/Default.aspx</a>
Illinois	<a href="http://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus">http://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus</a>
Indiana	<a href="https://www.in.gov/isdh/28470.htm">https://www.in.gov/isdh/28470.htm</a>
Iowa	<a href="https://idph.iowa.gov/Emerging-Health-Issues/Novel-Coronavirus">https://idph.iowa.gov/Emerging-Health-Issues/Novel-Coronavirus</a>
Kansas	<a href="http://www.kdheks.gov/coronavirus/index.htm">http://www.kdheks.gov/coronavirus/index.htm</a>
Kentucky	<a href="https://chfs.ky.gov/agencies/dph/Pages/covid19.aspx">https://chfs.ky.gov/agencies/dph/Pages/covid19.aspx</a>
Louisiana	<a href="https://ldepthealth.blogspot.com/2020/02/coronavirus-2019-ncov-covid-19.html">https://ldepthealth.blogspot.com/2020/02/coronavirus-2019-ncov-covid-19.html</a>
Maine	<a href="https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus.shtml">https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus.shtml</a>
Maryland	<a href="https://phpa.health.maryland.gov/Pages/Novel-coronavirus.aspx">https://phpa.health.maryland.gov/Pages/Novel-coronavirus.aspx</a>

# Resources

States	Website	States	Website
Massachusetts	<a href="https://www.mass.gov/guides/information-on-the-outbreak-of-2019-novel-coronavirus-covid-19">https://www.mass.gov/guides/information-on-the-outbreak-of-2019-novel-coronavirus-covid-19</a>	New Mexico	<a href="https://nmhealth.org/about/erd/ideb/ncov/">https://nmhealth.org/about/erd/ideb/ncov/</a>
Michigan	<a href="https://www.michigan.gov/mdhhs/0,5885,7-339-71550_5104_97675---,00.html">https://www.michigan.gov/mdhhs/0,5885,7-339-71550_5104_97675---,00.html</a>	New York	<a href="https://www.health.ny.gov/diseases/communicable/coronavirus/">https://www.health.ny.gov/diseases/communicable/coronavirus/</a>
Minnesota	<a href="https://www.health.state.mn.us/diseases/coronavirus/index.html">https://www.health.state.mn.us/diseases/coronavirus/index.html</a>	North Carolina	<a href="https://epi.dph.ncdhhs.gov/cd/diseases/COVID19.html">https://epi.dph.ncdhhs.gov/cd/diseases/COVID19.html</a>
Mississippi	<a href="https://msdh.ms.gov/msdhsite/_static/14,0,420.html">https://msdh.ms.gov/msdhsite/_static/14,0,420.html</a>	North Dakota	<a href="https://www.health.nd.gov/diseases-conditions/coronavirus">https://www.health.nd.gov/diseases-conditions/coronavirus</a>
Missouri	<a href="https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/">https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/</a>	Ohio	<a href="https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/Novel-Coronavirus/2019-nCoV">https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/Novel-Coronavirus/2019-nCoV</a>
Montana	<a href="https://dphhs.mt.gov/publichealth/cdepi/diseases/coronavirus/mt">https://dphhs.mt.gov/publichealth/cdepi/diseases/coronavirus/mt</a>	Oklahoma	<a href="https://www.ok.gov/health/Prevention and Preparedness/Acute Disease Service/Disease Information/2019 Novel Coronavirus/index.html">https://www.ok.gov/health/Prevention and Preparedness/Acute Disease Service/Disease Information/2019 Novel Coronavirus/index.html</a>
Nebraska	<a href="http://dhhs.ne.gov/Pages/Coronavirus.aspx">http://dhhs.ne.gov/Pages/Coronavirus.aspx</a>	Oregon	<a href="https://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/DISEASES/ESAZ/Pages/emerging-respiratory-infections.aspx">https://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/DISEASES/ESAZ/Pages/emerging-respiratory-infections.aspx</a>
Nevada	<a href="http://dpbh.nv.gov/coronavirus/">http://dpbh.nv.gov/coronavirus/</a>	Pennsylvania	<a href="https://www.health.pa.gov/topics/disease/Pages/Coronavirus.aspx">https://www.health.pa.gov/topics/disease/Pages/Coronavirus.aspx</a>
New Hampshire	<a href="https://www.dhhs.nh.gov/dphs/cdcs/2019-ncov.htm">https://www.dhhs.nh.gov/dphs/cdcs/2019-ncov.htm</a>	Rhode Island	<a href="https://health.ri.gov/diseases/respiratory/?parm=163">https://health.ri.gov/diseases/respiratory/?parm=163</a>
New Jersey	<a href="https://www.nj.gov/health/cd/topics/ncov.shtml">https://www.nj.gov/health/cd/topics/ncov.shtml</a>	South Carolina	<a href="https://scdhec.gov/health/infectious-diseases/viruses/coronavirus-disease-2019-covid-19">https://scdhec.gov/health/infectious-diseases/viruses/coronavirus-disease-2019-covid-19</a>

# Resources

States	Website
<b>South Dakota</b>	<a href="https://doh.sd.gov/news/Coronavirus.aspx">https://doh.sd.gov/news/Coronavirus.aspx</a>
<b>Tennessee</b>	<a href="https://www.tn.gov/health/cedep/ncov.html">https://www.tn.gov/health/cedep/ncov.html</a>
<b>Texas</b>	<a href="https://dshs.texas.gov/coronavirus/">https://dshs.texas.gov/coronavirus/</a>
<b>Utah</b>	<a href="https://health.utah.gov/coronavirus">https://health.utah.gov/coronavirus</a>
<b>Vermont</b>	<a href="https://www.healthvermont.gov/response/infectious-disease/2019-novel-coronavirus">https://www.healthvermont.gov/response/infectious-disease/2019-novel-coronavirus</a>
<b>Virginia</b>	<a href="http://www.vdh.virginia.gov/surveillance-and-investigation/novel-coronavirus/">http://www.vdh.virginia.gov/surveillance-and-investigation/novel-coronavirus/</a>
<b>Washington</b>	<a href="https://www.doh.wa.gov/emergencies/coronavirus">https://www.doh.wa.gov/emergencies/coronavirus</a>
<b>West Virginia</b>	<a href="https://dhhr.wv.gov/Coronavirus%20Disease-COVID-19/Pages/default.aspx">https://dhhr.wv.gov/Coronavirus%20Disease-COVID-19/Pages/default.aspx</a>
<b>Wisconsin</b>	<a href="https://www.dhs.wisconsin.gov/disease/covid-19.htm">https://www.dhs.wisconsin.gov/disease/covid-19.htm</a>
<b>Wyoming</b>	<a href="https://health.wyo.gov/publichealth/infectious-disease-epidemiology-unit/disease/novel-coronavirus/">https://health.wyo.gov/publichealth/infectious-disease-epidemiology-unit/disease/novel-coronavirus/</a>