

**Best Practices for
Minimizing COVID-19
Spread and Liability**

**Nonprofit Leadership
Center**

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Mitigating Risk and Exposure



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THE WALL STREET JOURNAL.



Safeway employee Pedro Zuniga, shown with a foster child his family cared for, died of Covid-19 in April. ZUNIGA FAMILY

**Families File First Wave of
Covid-19 Lawsuits Against
Companies Over Worker
Deaths**

Coronavirus victims and their families allege
workplaces failed to protect them



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Lawsuits Abound: Employee claims

- Wave of COVID-19 litigation asserting claims including:
 - failure to provide a safe workplace (inadequate protocols, PPE, protection from customers)
 - discrimination claims, particularly by older workers, workers with disabilities
 - failure to provide sick leave or family and medical leave for reasons related to COVID-19 under the Family Medical Leave Act, the Families First Coronavirus Response Act
 - retaliation and whistleblower claims (employee was terminated for complaining about workplace safety or working conditions or for exercising leave rights)



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Failure to Provide Safe Workplace

- Employers have a “general duty” to provide safe workplace under OSHA
- Workers’ compensation should cover claims relating to work-related illness or injury
- But if a plaintiff’s lawyer can establish reckless or intentional conduct....
- Best practice to avoid that:
 - Demonstrate compliance with federal, state and local guidance / orders

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Lawsuits Abound: Customer Claims

- Business owes general duty of care to customers to protect them from foreseeable harm.
 - Generally, no duty to those with whom it has no relationship, although certain businesses (such as common carriers) have a greater obligation of protection toward unrelated parties (airlines, railroads, taxi services)
- Must be reasonable to believe that harm would result from a business’s failure to act.
 - Did the business have a reasonable opportunity to warn of the harm or take action to protect its customers?
 - Once duty of care is established, did business breach that duty and if so, was that breach the cause of the plaintiff’s injuries?
 - What is the business’s obligation to warn of past exposures to COVID-19 at its workplace and/ or to protect present and future employees, customers, and strangers from exposure?

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CDC and OSHA Guidance



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CDC Guidance (May 6, 2020)

“All employers should implement and update as necessary a plan that:

- Is specific to your workplace,
- identifies all areas and job tasks with potential exposures to COVID-19, and
- includes control measures to eliminate or reduce such exposures.”

Should identify ways to:

- prevent and reduce transmission among employees,
- maintain healthy business operations, and
- maintain a healthy work environment.

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CDC Guidance

Specific guidance for multiple industries and sites, including:

- Restaurants and bars
- Casinos and gaming
- Small business
- Schools and child care
- Colleges and universities
- Parks and recreational facilities
- Community and faith based organizations
- First responders, law enforcement
- Shared and congregate housing
- Retirement communities
- Correctional facilities
- Health care

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Top 10 Tips to Protect Employees' Health

Healthy employees are crucial to your business. Here are 10 ways to help them stay healthy.

- 1. **Actively encourage sick employees to stay home.** Develop policies that encourage sick employees to stay at home without fear of reprisals, and ensure employees are aware of these policies.
- 2. **Have conversations with employees about their concerns.** Some employees may be at higher risk for severe illness, such as [older adults](#) and those with chronic medical conditions.
- 3. **Develop other flexible policies for scheduling and telework** (if feasible) and create leave policies to allow employees to stay home to care for sick family members or care for children if schools and childcare close.
- 4. **Talk with companies that provide your business with contract or temporary employees about their plans.** Discuss the importance of sick employees staying home and encourage them to develop non-punitive "emergency sick leave" policies.
- 5. **Promote etiquette for coughing and sneezing and handwashing.** Provide tissues, no-touch trash cans, soap and water, and hand sanitizer with at least 60% alcohol.
- 6. **Plan to implement practices to minimize face-to-face contact between employees if social distancing is recommended by your state or local health department.** Actively encourage flexible work arrangements such as teleworking or staggered shifts.
- 7. **Perform routine environmental cleaning.** Routinely clean and disinfect all frequently touched surfaces, such as workstations, countertops, handrails, and door knobs. Discourage sharing of tools and equipment, if feasible.
- 8. **Consider the need for travel and explore alternatives.** Check [CDC's Travel page](#) for the latest guidance and recommendations. Consider using teleconferencing and video conferencing for meetings, when possible.
- 9. **Provide education and training materials** in an easy to understand format and in the appropriate language and literacy level for all employees. Use [fact sheets and posters](#).
- 10. **If an employee becomes sick while at work, they should be separated from other employees, customers and visitors and sent home immediately.** Follow CDC guidelines for [cleaning and disinfecting](#) areas the sick employee visited.

For more tips and information see the CDC [Interim Guidance for Businesses and Employees](#) and the OSHA [Guidance for Preparing Workplaces for COVID-19](#). 

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OSHA Guidance on Preparing Workplaces for COVID-19 and Re-Opening

- Develop an infectious disease preparedness and response plan that can help guide protective actions against COVID-19 (March 2020).
- Conduct a hazard assessment for each job category, outline protective measures, conduct health screenings (June 2020)

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OSHA Guidance on Re-Opening (June 18, 2020)

During all phases of reopening, employers should implement strategies that are appropriate for the particular workplace and phase for:

- determining when, where and how employees might be exposed
- basic hygiene (hand hygiene, sneezing/coughing etiquette)
- cleaning and disinfection
- social distancing
- identification and isolation of sick employees, policies for return after illness and exposure
- workplace controls and flexibilities

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OSHA Guidance on Re-Opening

- controls, including engineering and administrative controls, safe work practices, and personal protective equipment selected as a result of an employer's hazard assessment.
- workplace flexibilities around telework and sick leave.
- training on the signs, symptoms and risk factors associated with COVID-19 and how to prevent its spread.
- anti-retaliation policies that ensure that no adverse action is taken against an employee who raises workplace safety and health concerns.

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State and local EOs

- Vary significantly
- Compliance with one does not necessarily indicate compliance with another

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COVID-19 Preparedness and Response Plan



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What's in a COVID-19 Plan

- Identify a monitor
- Conduct a hazard assessment of each job
- Identify safety protocols
- Train your employees
- Have them acknowledge:
 - Receipt of the plan
 - Obligation to report safety issues

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COVID-19 Plan Protocols Should Include:

- Address all the CDC and OSHA guidance, including:
- Pre-arrival screening for symptoms
- Social distancing strategies
- Cleaning and disinfection efforts

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Sample Daily Health Screening Questions

- Are you experiencing any of the following symptoms: fever, chills, cough, shortness of breath, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, diarrhea?
- In the previous 14 days, have you had any contact with someone who, at the time of the contact had a confirmed diagnosis of COVID-19; or had symptoms and was awaiting test results?
- In the previous 14 days, have you traveled to a state or international country with widespread, sustained community transmission, or been on a cruise ship?

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Your Confidentiality /Privacy Obligations

- All medical information re employees must be maintained in separate confidential medical files – separate from regular personnel files
- All medical information regarding parents/ students must also be maintained in confidential files.
- Don't retain medical information you don't need!

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Adopt Rules for Illness

- Any employee that displays ANY sign or symptom related to COVID-19 or any other illness, should be immediately isolated and removed from the worksite.
- No employee should be permitted to return until they meet appropriate CDC return criteria.

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Provide Plan to Employees

- Share your COVID-19 Plan and Protocols with employees.
- Include their obligations to follow the protocols and to notify management of any safety issues.
- Have employees sign an acknowledgement of the plan and their obligations; NOT a waiver!

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Participants? Consider a Participation Agreement, Waiver and Release

- Industry specific – think sky-diving; fitness centers, sports camps.
- Advise them of their COVID-19 obligations (wear a face covering, observe social distancing), agree to comply.
- Identify, acknowledge the attendant risks of illness or injury.
- Expressly waive any claims, release the owners /operators /employees from any cause of action arising as a result of participating.
- Include express COVID-19 waiver.
- Include express acknowledgement of assumption of risk.
- Do not ask EMPLOYEES to sign waivers!

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Caution: Waivers May Not Be Enforceable

- Courts scrutinize them carefully.
- Were they knowing and voluntary?
- Waiver will NOT release operator from intentional or reckless conduct!
- Best practice: follow CDC, OSHA, state and local guidance.

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Exposure in the Workplace

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Employees with COVID-19 symptoms

- An employee who has COVID-19 symptoms should be directed to not report to work and consult their doctor.
- Employees should be instructed if they had close contact (within six feet for 15 minutes or more) with anyone, who at the time of the contact, had a confirmed case or had symptoms and was awaiting test results, SHOULD NOT REPORT TO WORK.
- Employees should be permitted to return to work only when they meet the CDC return-to-work criteria (or provide a doctor's note clearing them to return to work.)

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Exposure/ Positive COVID-19 Tests

- Must report positive tests to local health authorities.
- Should NOT disclose name of positive individual to anyone other than health authorities, unless that individual consents in writing.

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Employee Tests Positive for COVID-19

- If operator learns that an employee has tested positive, should determine who may have had close contact with the confirmed-positive employee in the time period commencing 48 hours before onset of symptoms.
- Should direct those who had close contact with the confirmed-positive employee to self-quarantine for 14 days from the last date of close contact with that employee and self-monitor for symptoms (or follow latest CDC guidance.)

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Employee Tests Positive for COVID-19

- CDC has different standards for return to work depending on symptoms or no symptoms, and other circumstances. Consult CDC guidance.
- Employers may want to require employees to submit a doctor's note that confirms the employee does not have COVID-19 and releases the employee to return to work in writing, but keep in mind doctor's offices may be overwhelmed.
- Consider not allowing employees to return to work until either they meet the CDC criteria for ending isolation or following hospitalization, or, if they had symptoms, a doctor confirms the cause of the symptoms is not COVID-19 and releases them to return to work in writing.

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Part IV: Families First Coronavirus Response Act

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Families First Coronavirus Response Act

- Covered employers: private employers with fewer than 500 employees and certain government employers
- Requires covered employers to provide paid leave to eligible employees
 - Emergency Paid Sick Leave
 - Expanded Family and Medical Leave
- Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide **leave due to school closings or child care unavailability** if the leave requirements would jeopardize the viability of the business as a going concern. Must still provide leave for other qualifying reasons.

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Emergency Paid Sick Leave

Two weeks (up to 80 hours) of **Emergency Paid Sick Leave** at the employee's regular rate of pay where the employee is unable to work or telework because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised to self-quarantine by a health care provider due to concerns related to COVID-19; or
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

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Emergency Paid Sick Leave (c'td)

4. The employee is caring for an individual who is subject to an a quarantine or isolation order (1-2 above.)
5. The employee is caring for his/her son or daughter if the school or place of care of the child has been closed or the child care provider is unavailable, due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

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Emergency Paid Sick Leave (c'td)

- **All employees** of covered employers are eligible for two weeks of Emergency Paid Sick Leave for specified reasons related to COVID-19.
- Part-time employees are also entitled to the above paid sick time, based on the number of hours that the employee would otherwise be normally scheduled to work in a two-week period.
- Emergency Paid Sick Leave is **in addition** to an employee's other leave entitlements.

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Expanded FMLA Leave

- Employees who have been employed **for at least 30 calendar days**, are entitled to up to an additional 10 weeks of **paid Expanded FMLA Leave** at two-thirds the employee's regular rate of pay if the employee is unable to work or telework due to a bona fide need for leave **to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19**.
- Employee must provide notice of need for leave as soon as is practicable.

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Small Business Exemption

- Allows an employer with fewer than 50 employees to be exempt from providing (a) Emergency Paid Sick Leave due to **school or daycare closures for COVID-19 related reasons** and (b) Expanded Family and Medical Leave **due to school or daycare closures for COVID-19 related reasons**, when doing so would jeopardize the viability of the small business as a going concern.

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Small Business Exemption (c'td)

Must be able to show that providing leave for school or child care closures or child care unavailability would threaten the company's ongoing viability in one of three ways:

- The leave would result in expenses exceeding available revenues, causing the business to cease operating; or
- The absence of the employee requesting the leave would entail a substantial risk to the capabilities of the operations because of the employee's unique skills or responsibilities; or
- There would not be enough other qualified workers available to perform the work needed to keep operating.

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Small Business Exemption (c'td)

- Determine whether to claim the exemption with respect to **specific employees** requesting the leave, rather than claim the exemption across the board as to all employees.
- May deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would:
 - cause the small employer's expenses and financial obligations to exceed available business revenue,
 - pose a substantial risk, or
 - prevent the small employer from operating at minimum capacity.
- An officer of the company should make the determination, document the reasoning and maintain it in the company's records.

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Air filtration guidance

- Consider taking steps to improve ventilation in the building, in consultation with an HVAC professional, based on local environmental conditions (temperature/humidity) and ongoing community transmission in the area:
 - Increase the percentage of outdoor air, (e.g., using economizer modes of HVAC operations) potentially as high as 100% (first verify compatibility with HVAC system capabilities for both temperature and humidity control as well as compatibility with outdoor/indoor air quality considerations).
 - Increase total airflow supply to occupied spaces, if possible.
 - Disable demand-control ventilation (DCV) controls that reduce air supply based on temperature or occupancy.
 - Consider using natural ventilation (i.e., opening windows if possible and safe to do so) to increase outdoor air dilution of indoor air when environmental conditions and building requirements allow.

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Air filtration guidance

- Improve central air filtration:
 - [Increase air filtration](#) to as high as possible without significantly diminishing design airflow.
 - Inspect filter housing and racks to ensure appropriate filter fit and check for ways to minimize filter bypass.
- Consider running the HVAC system at maximum outside airflow for 2 hours before and after occupied times, in accordance with [industry standards](#).
- [Generate clean-to-less-clean air movements](#) by re-evaluating the positioning of supply and exhaust air diffusers and/or dampers and adjusting zone supply and exhaust flow rates to establish measurable pressure differentials. Have staff work in "clean" ventilation zones that do not include higher-risk areas such as visitor reception or exercise facilities (if open).

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Air filtration

- Consider using portable high-efficiency particulate air (HEPA) fan/filtration systems to help [enhance air cleaning](#) (especially in higher-risk areas).
- Ensure exhaust fans in restroom facilities are functional and operating at full capacity when the building is occupied.
- Consider using [ultraviolet germicidal irradiation \(UVGI\)](#) as a supplemental technique to inactivate potential airborne virus in the [upper-room](#) air of common occupied spaces, in accordance with industry guidelines.
- <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>

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Karen M. Buesing, a partner at Akerman LLP, Tampa, has more than 35 years of experience counseling and representing employers in workplace law matters. Karen is one of only about 200 lawyers who are Board Certified by The Florida Bar as specialists in Labor & Employment Law. Her expertise includes discrimination/harassment matters, hiring/firing/disciplinary matters, leave and accommodation matters, wage and hour matters, non-compete and trade secret litigation, whistleblower and retaliation claims, and all aspects of employment counseling and training. She is currently on the Akerman Return to Work Resource Guide Team, assisting employers in navigating re-opening during the COVID-19 pandemic.

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Questions?





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