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**STEVEN N. DAVI**  
*Executive Director*  
Email: [sdavi@alliedbuilding.org](mailto:sdavi@alliedbuilding.org)  
Mobile: 516.361.8211

## BULLETIN

To: Membership of Allied Building Metal Industries, Inc.  
From: Steven N. Davi  
Date: March 12, 2020  
Re: Workplace Guidance: Coronavirus Preparedness and Response

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As disruptions associated with the 2019 novel coronavirus (also referred to as COVID-19, 2019-nCoV, or SARS-CoV-2) continue to escalate, it is important that employers take a fresh look at their obligations around employee safety and disease prevention in the workplace. This Bulletin is intended to provide basic policy guidance to assist you in your efforts to address the myriad implications of COVID-19 for your workplace and to address some of the more common questions and issues you are likely to face as an employer. If, after reviewing this Bulletin and linked attachments, you have any questions or wish to discuss best practices for safeguarding your workplace, please do not hesitate to contact the Allied office directly. Please also be advised we will continue to monitor developments in this regard as they arise and will supplement this Bulletin as circumstances warrant.

The flow of distressing information around the coronavirus outbreak seems to be [picking up speed](#) with each passing day. Early last month, COVID-19 was virtually unknown outside of Wuhan, China. Fast forward to yesterday afternoon when the World Health Organization (“WHO”) declared the novel coronavirus outbreak a [global pandemic](#). Coronavirus has now infected more than 115,000 individuals worldwide, and the number of cases in the United States has surpassed 1,000. Employers looking to distill from the nonstop media onslaught an effective and lawful strategy to address the workplace impacts of COVID-19 should pay careful attention to three key principles—staying informed, employee safety, and legal compliance.

### Stay Informed

It is important for employers to identify and separate authoritative sources of public health guidance on the pandemic from hyperbole, and stay up to date on officially recommended and mandated best practices. These sources include the [United States Centers for Disease Control](#) (“CDC”), the [WHO](#), and the [European Centre for Disease Prevention and Control](#).

Recent [Interim Employer Guidance](#) from the CDC is particularly instructive regarding strategies for employers to implement in advance of a more widespread coronavirus outbreak in the United States. Noteworthy highlights from the Guidance include the following:

- Employers are advised to “actively encourage” sick employees to stay home, and to speak with third-party companies that provide contract or temporary employees about the importance of sick employees staying home.
- Employees who may be traveling should be encouraged to check the CDC’s [Traveler Health Notices](#) for the latest travel guidance relating to the country any such employee intends to travel.
- Where an employee is confirmed to have the coronavirus, employers “should inform fellow employees of their possible exposure ... but maintain confidentiality as required by the Americans with Disabilities Act.”
- Employees that are exposed to a co-worker confirmed to have coronavirus “should refer to CDC guidance for how to conduct a [Risk Assessment](#) of their potential exposure.”
- Employees that have a family or household member diagnosed with coronavirus “should notify their supervisor and refer to CDC guidance on how to conduct a [Risk Assessment](#) of their potential exposure.”
- Employers should prepare for a possible increase in employee absences due to personal or family member illness, as well as child care concerns that may arise should schools, day cares, or similar programs be temporarily closed.
- Employers and employees can monitor the CDC’s coronavirus-driven [travel guidance](#) to determine whether non-essential business travel should be limited or canceled.

Employers also should review their infectious-disease management plans and emergency action protocols, if any. This would include travel policies, business continuity plans in the event of office closures, and remote access deployment. If you do not have such plans in place and require assistance in this regard, please do not hesitate to contact the Allied office. Allied has prepared template policies and procedures regarding infectious and communicable disease control, telecommuting and remote access, and emergency action plans designed to comply with Occupational Safety and Health Administration (“OSHA”) standards and to assist your commitment to maintaining a safe workplace.

### **Employee Safety and Employers’ Affirmative Legal Duty of Care**

Employers must do more than monitor the CDC’s website, cancel unnecessary employee meetings or travel, and distribute bottles of hand sanitizer. The CDC’s guidance and precautions regarding travel restrictions, postponing nonessential travel, cleaning hands, and [covering the mouth and nose with a tissue or sleeve](#) when coughing or sneezing goes only so far. While employers can and should take [commonsense steps](#) to prevent the spread of the virus, employers should also be looking at developing new health and safety plans to address coronavirus-related concerns and facilitate business continuity and litigation avoidance.

In this regard, employers should be guided by the general duty clause set forth in the Occupational Safety and Health Act of 1970 (the “Act”), which requires employers to furnish each worker with a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm. Moreover, while OSHA has not yet promulgated a rule specifically mandating steps that employers should undertake to address COVID-19 in the workplace, there are emerging signs to suggest such a mandate may be forthcoming.

Democrats in the U.S. House of Representatives recently urged the United States Department of Labor and OSHA to enact an emergency rule to prevent coronavirus exposure. On March 10, Democrats introduced a bill ([H.R. 6139](#)) requiring OSHA to issue an emergency standard covering health-care facilities. The homepage of [OSHA's website](#) is now devoted to the coronavirus. And in early March, OSHA issued [guidance](#) equating COVID-19 to other infectious diseases such as tuberculosis and hepatitis A, and requiring employers to track cases of COVID-19.

It is also worth noting that, despite the inherent complexities and uncertainties in determining whether a worker was stricken by COVID-19 on the job, COVID-19 would be considered a recordable illness in such event. As you know, OSHA requires most employers with ten or more employees, pursuant to 29 CFR Part 1904, to maintain a [log](#) of every workplace injury or illness requiring medical treatment beyond first aid or causing a worker to miss at least one day of work. See Allied Bulletin dated January 26, 2020.

### **National Labor Relations Act Issues and Related Legal Obligations**

Of particular interest to Allied employers in navigating the coronavirus outbreak should be the potential impact on labor relations. The coronavirus may require labor and management to collaborate to accommodate affected bargaining unit members and to ensure business continuity. Among the topics we may have to confront with our industry partners are:

- paid sick leave;
- periodic mandatory testing;
- paid time off for testing;
- longer or additional shifts for those able to work; and
- implementation of support programs for employees who are ill or quarantined.

With regard to [paid sick leave](#) in particular, Governor Cuomo included a proposal in his executive budget that would require it. Such proposed legislation may become law prior to approval of the state budget as more and more workers in the state are exposed to COVID-19. In this regard, it was reported yesterday that New York state Senate Majority Leader Andrea Stewart-Cousins' conference is moving ahead with proposed state legislation to require paid sick leave in light of increasing coronavirus quarantines. It is also being reported that State Assembly Speaker Carl Heastie's conference is sorting through details and could move legislation as soon as next week. Allied, through its government affairs consultant, is working with the AFL-CIO and others to get language written into the proposed legislation that would provide an automatic exemption from the state sick leave proposal to parties, such as Allied's members, that are exempt from the analogous city sick leave law by virtue of express waiver language in their CBAs.

Potential issues also may emerge regarding how best to handle bargaining unit members who, based on concerns around safety and health, refuse to report for work. To be covered under the National Labor Relations Act ("NLRA"), an individual's refusal to work based on employee concerns about safety and health generally must be "concerted activity," meaning the employee is acting either in concert with at least one other employee or on behalf of other employees. The threshold to satisfy the NLRA's concerted requirement for safety and health concerns is low. Under Section 502 of the Labor Management Relations Act, employees are not required to prove the existence of abnormally dangerous working conditions. Rather, all that is required is a good faith belief, supported by ascertainable, objective evidence, that their working conditions are abnormally dangerous. If an individual satisfies this Section 502 reasonable good faith belief element, the employee who refuses to work generally may not be replaced. If, however, there is no immediate danger to employees based on the Section 502 good faith belief standard,

employers generally can bring in replacements and permanently replace an employee who refuses to work because of safety concerns or issues.

The COVID-19 crisis will also implicate other federal and state laws relevant to the workplace that are beyond the scope of this Bulletin, including Title VII, HIPAA, the NYS Workers' Compensation Law, the federal and state WARN Act, and other federal, state and local laws. These laws should not be disregarded, but the crux of the matter for most employers around questions such as whether employees may be required to submit to body temperature testing, whether employees may be required to stay home if they have symptoms of the pandemic virus and, when employees want to return to work, whether employers may require employees to provide health care provider notes certifying their fitness for duty, will concern the Americans with Disabilities Act ("ADA") or state analog, subject, of course, to any countervailing CBA-related obligations.

With this in mind, and in light of the WHO's pandemic designation, you may want to familiarize yourself with the U.S. Equal Employment Opportunity Commission's ("EEOC") [Pandemic Preparedness in the Workplace and the ADA](#) guide. In a March 4 [news alert](#), the EEOC reminded employers of its 2009 guidance and made clear the prohibitions set forth in the ADA do not interfere with or prevent employers from following the CDC's [Interim Employer Guidance](#). With that being said, it is important to note the ADA places general restrictions on the kinds of inquiries that can be made into an employee's medical status. Specifically, the ADA prohibits employers from making disability-related inquiries and requiring medical examinations, unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) where the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

Several key takeaways from the EEOC's guidance are also worth noting now that a pandemic has been declared, including that employers: (i) may encourage teleworking and require the adoption of infection-control practices, such as regular hand washing; (ii) need not wait until an employee returning from travel develops symptoms to inquire about exposure to the coronavirus; (iii) may require employees who have traveled to affected areas or were otherwise potentially exposed to stay home; and (iv) may ask employees about the reason for their absence from work.

In the weeks and months ahead, you may be faced with tricky workplace scenarios you have not encountered before, such as:

- Can I send employees home if they display influenza-like symptoms during a pandemic?
- How much information can I request from employees who report feeling ill at work or who call in sick?
- May I take my employees' temperatures to determine whether they have a fever?
- Can I encourage employees to work remotely as an infection-control strategy during a pandemic?
- During a pandemic, can I require employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?
- During a pandemic, can I ask an employee why he or she has been absent from work if I suspect it was for a medical reason?
- During a pandemic, can I ask an employee's health care provider to tell me if the employee tested positive for the COVID-19 virus, even if the employee refuses to give permission?

You are encouraged to bring these types of scenarios to Allied's attention as they arise if you require assistance in navigating them.

## **Additional Resources for More Information**

### CDC Guidance

- [COVID-19 Website](#)
- [What You Need to Know About COVID-19](#)
- [What to Do If You Are Sick With COVID-19](#)
- [Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease](#)
- [Health Alert Network](#)
- [Travelers' Health Website](#)
- [NIOSH Small Business International Travel Resource Travel Planner](#)
- [2019 Novel Coronavirus Recommendations for Ships](#)

### Other Federal Agencies and Partners

- OSHA Guidance: [https://www.osha.gov/SLTC/novel\\_coronavirus/index.htm](https://www.osha.gov/SLTC/novel_coronavirus/index.htm)external icon
- WHO: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>