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## Q&A – Coronavirus and Safety

*By: Aaron D. Graves (Member) and Katherine F. Cser (Senior Associate), Workplace Law Practice Group*

We have received multiple safety questions related to Coronavirus. The following Q&A may help with issues you are facing in the workplace.

**Question:** *Could an employee refuse to come to work for fear Coronavirus infection?*

**Answer:** Under the NLRA, an employee (even if there is no union) can refuse to work if she reasonably believe there is an immediate threat to health and safety. This protection applies even the employee is “honestly mistaken.” If your employees are represented by a union, you are required to abide by any applicable labor contract provisions and obligated to bargain over changes you make in terms and conditions of employment you wish to implement related to Coronavirus (e.g., safety or leave provisions).

Also, OSHA protects employees from retaliation when they refuse to perform an assignment that involves “a risk of death or serious physical harm” if the following conditions apply: (1) the employee has “asked the employer to eliminate the danger and the employer failed to do so”; (2) the employee “refused to work in ‘good faith’” (a genuine belief that “an imminent danger exists”); (3) “[a] reasonable person would agree that there is real danger of death or serious injury”; and (4) “[t]here isn’t enough time, due to the urgency of the hazard, to get it corrected the hazard through regular enforcement channels, such as requesting an OSHA inspection.” A general Coronavirus fear is not likely sufficient to justify a work refusal, but a belief that there has been exposure may be sufficient. Employers should conduct a thorough review of the facts and contact counsel before taking disciplinary action against an employee who refuses to perform his job for fear of Coronavirus exposure.

**Question:** *Could an employee who is concerned about having COVID-19 and being asymptomatic refuse to come to work for fear of infecting others?*

**Answer:** It depends. If the employee can establish that she has had close contact with someone who tested positive for COVID-19, the employer should allow the employee to work remotely (if possible) or self-quarantine for 14 days. If close contact with an individual who tested positive cannot be established, the employer need not allow the employee time off work. All employers should continue to remind its workforce of the additional precautions it is taking to stop the spread of Coronavirus.

**Question:** *Can we mandate respirator use? Are there any requirements we need to be aware of?*

**Answer:** The CDC “does not recommend that people who are well wear a facemask to protect themselves from respiratory illnesses, including Coronavirus.” For certain workers, like health workers, providing facemasks may be appropriate or even required by applicable OSHA standards. OSHA requirements do apply if respirators (including dust and N95 masks) are provided. OSHA requires a written respiratory protection program, including training and fit-testing. A copy of Appendix D of OSHA’s Respiratory Protection Standard must be provided. Whether the masks pose a hazard to employees must be verified. Dirty masks may inhibit breathing or exposure to other substances may make mask usage in appropriate.

Surgical masks are not considered “respirators,” and generally do not prevent a healthy person from inhaling droplet contaminants like Coronavirus. Employers that require or permit employees to wear them do not have any compliance obligations under OSHA’s Respiratory Protection Standard. Surgical masks for people infected with Coronavirus may help limit the spread of the illness to others.

**Question:** *What if my employee wants to wear their own respiratory protection and/or gloves?*

**Answer:** You can allow it if the items are not otherwise limited by CDC guidance or OSHA standards, and you determine that use of the items does not present a hazard to the employee (e.g., if they interfere with the employee’s ability to work safely). Employers can communicate to employees who ask to wear respirators that:

- (1) The situation has been assessed and that the CDC has determined that respirators are not necessary.
- (2) Self-provided respirators may be allowed as long as they do not interfere with the employee’s ability to safely perform his work, but consulting with a personal physician to determine whether the employee can safely use the respirator is recommended.

**Question:** *Respirators are required at our workplace, what are the OSHA compliance implications?*

**Answer:** Normal OSHA requirements apply. For specific healthcare, deathcare, laboratories, airlines, border protection, solid waste and waste management employees where there is an elevated level of risk compliance with OSHA Section 5(a)(1) should be considered. Section 5(a)(1) requires employers to maintain a “workplace that is free from recognized hazards”

**Question:** *What OSHA requirements apply when an employee is diagnosed with Coronavirus?*

**Answer:** Ensure that your infected employee stays away from the workplace. OSHA could cite an employer under the general duty clause if an employee known to be infected is allowed or directed to work and expose others.

If an employee is symptomatic, he must be quarantined immediately. Restrict contact with the potentially infectious employee and contact the CDC and/or local health authorities for further guidance.

Also, OSHA requires the recording of illnesses that are “work related” and meet one of the recording criteria: days away from work; job transfer; and medical treatment. An OSHA Form 300, and a Form 301 must be completed “if it is more likely than not that a factor or exposure in the workplace caused or contributed to the illness.” If an employee infects a coworker, the coworker has suffered a work-related illness if one of the recording criteria (e.g., medical treatment or days away from work) is met. Coronavirus, is not exempted from reporting like the common cold or flu. OSHA’s current guidance states that “Coronavirus is a recordable illness when a worker is infected on the job.”

Employers should apply the guidance set forth in this Q&A uniformly and in a manner that does not discriminate based on any protected characteristic (e.g., national origin, gender, race, etc.).

A myriad of situations may arise regarding the Coronavirus. Please contact any member of **Bodman’s Workplace Law Group** if you need assistance. We will be providing frequent updates and additional FAQs as the situation develops.

# WORKPLACE LAW PRACTICE GROUP

<b>AARON D. GRAVES</b>   <i>Chair</i> 313.392.1075 agraves@bodmanlaw.com	<b>JOHN T. BELOW</b> 248-743-6035 jbelow@bodmanlaw.com	<b>JOHN C. CASHEN</b> 248.743.6077 jcashen@bodmanlaw.com
<b>GARY S. FEALK</b> 248-743-6060 gfealk@bodmanlaw.com	<b>STEVEN J. FISHMAN</b> 248.743.6070 sfishman@bodmanlaw.com	<b>JOHN DAVID GARDINER</b> 616.205.3123 jgardiner@bodmanlaw.com
<b>MELISSA M. TETREAU</b> 248.743.6078 mtetreau@bodmanlaw.com	<b>BRENT R. SCOTT</b> 616.205.3317 bscott@bodmanlaw.com	<b>REBECCA C. SEGUIN-SKRABUCHA</b> 313.393.7594 rseguin-skrabucha@bodmanlaw.com
<b>KATHERINE F. CSER</b> 248.743.6031 kcser@bodmanlaw.com	<b>DAVID B. WALTERS</b> 248.743.6052 dwalters@bodmanlaw.com	<b>KAREN L. PIPER</b>   <i>Of Counsel</i> 248.743.6025 kpiper@bodmanlaw.com