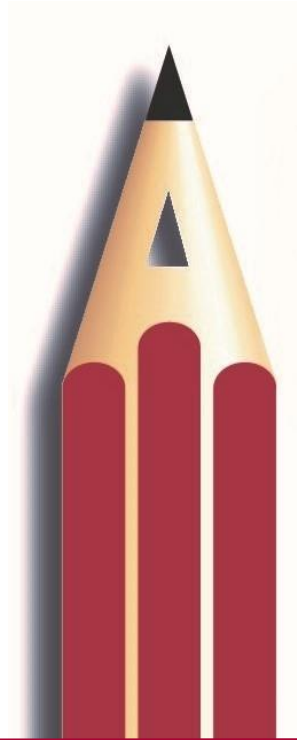


# NEW LEGAL DEVELOPMENTS IN THE WORLD OF CORONAVIRUS DISEASE 2019

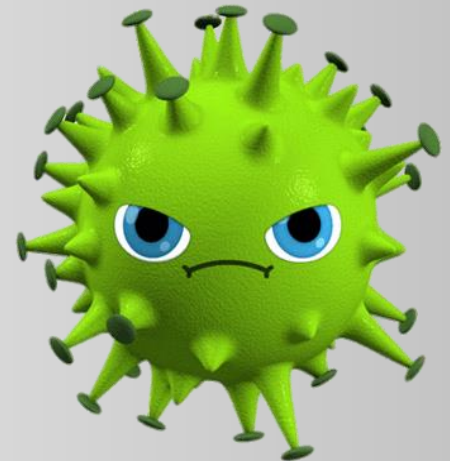


ALLIANCE OF  
SCHOOLS FOR  
COOPERATIVE  
INSURANCE  
PROGRAMS



**Kristine E. Kwong, Esq.**

May 18, 2020



# AGENDA

- Pandemics and the workplace
- Americans with Disabilities and pandemic planning
- Mandatory Testing
- Medical Confidentiality
- Employees predisposed to catching COVID-19
  - Reasonable accommodation
- Families First Coronavirus Response Act



# WHAT'S A “PANDEMIC?”

- On March 11, 2020, the World Health Organization declared a pandemic
- According to CDC, pandemic is a virus that easily spreads in efficient and sustained way
- World has seen 4 influenza pandemics in last century
  - 1918 – Spanish flu
  - 1950-1960 – Asian flu
  - 2003 – SARS (pandemic “scare”)
  - 2009 – H1N1 outbreak



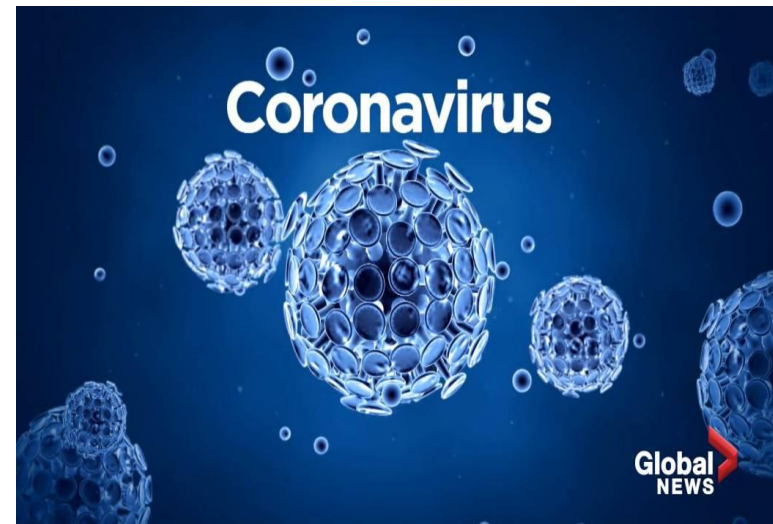
# SYMPTOMS OF CORONAVIRUS DISEASE 19

## CDC: symptoms

- Cough, shortness of breath, difficulty breathing;

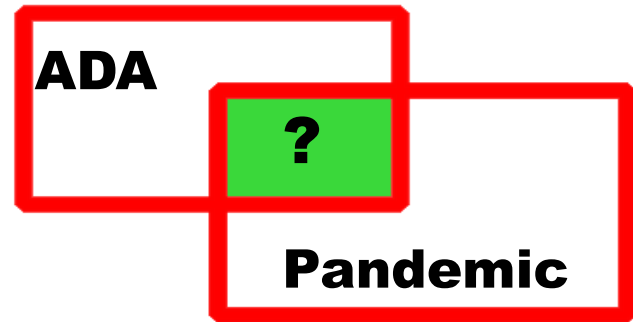
OR

- At least two of the following:
  - Fever
  - Chills
  - Repeated shaking with chills
  - Muscle pain
  - Headache
  - Sore throat
  - New - loss of taste or smell



# AMERICANS WITH DISABILITIES ACT

ADA and pandemics:  
What's the intersection?



- Three ways ADA affects pandemics at work
  - Disability related inquiries: regulates disability-related inquiries and medical exams
  - Prohibition from work: ADA prohibits excluding employees with disabilities from work for health & safety reasons unless there is a “**direct threat**”
  - Reasonable accommodation: ADA requires “reasonable accommodation” for individuals with disabilities



# ADA and Pandemics

- Disability-related inquiries
- Definition: a question that is likely to elicit information about a disability
- Examples:
  - Are you immune compromised?
    - A YES is associated with medical conditions like cancer
  - Do you have COVID-19?



# ADA AND PANDEMICS

- What's a medical exam?
- Definition: procedure or test that seeks information about person's physical or mental impairments or health.
- ADA standards for disability related inquiries and medical exams:
  - During employment: ADA prohibits both unless it is both:
    - Job related and
    - Consistent with business necessity



# ADA AND PANDEMICS

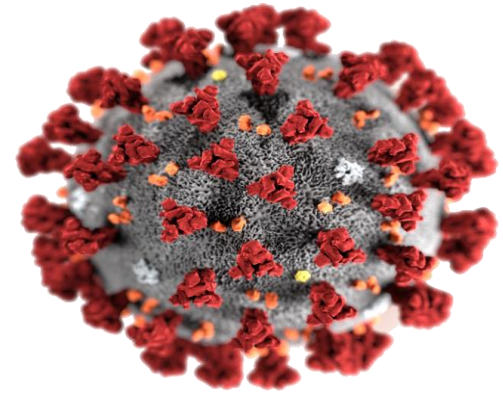
## “Job-related” and “Business necessity”

- Definition: Objective evidence that:
  - Employee’s ability to perform essential job functions impaired
  - Employee will pose a direct threat due to a medical condition





# ADA AND PANDEMICS



## What's a "Direct Threat"?

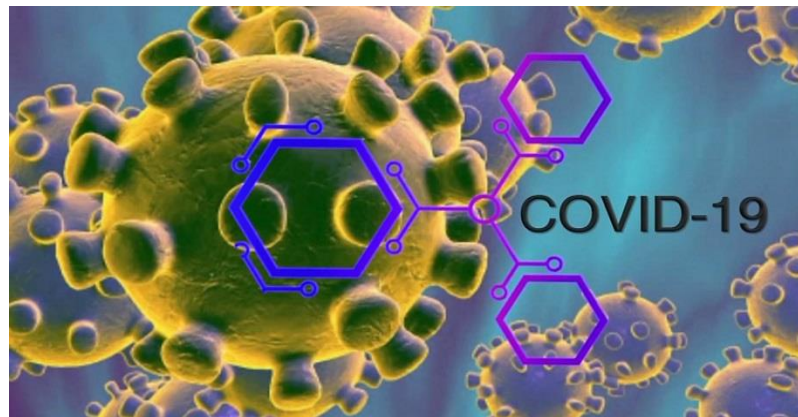
### Definition

- A significant risk of substantial harm to the health or safety of the person or others that cannot be eliminated or reduced by reasonable accommodation
- NOT required to accommodate if person with disability poses direct threat despite reasonable accommodation



# COVID-19 AND DIRECT THREAT

- As of March 2020, CDC and public health authorities acknowledged community spread and EEOC promulgated guidance employee with COVID-19 or symptoms of it, present at work, poses a DIRECT THREAT



# ADA-COMPLIANT EMPLOYER PRACTICES FOR PANDEMIC PREPAREDNESS

- EEOC guidelines on Pandemic Planning
- Identify a Pandemic Team
  - One person with EEOC expertise
  - Include employees with disabilities
  - Risk Management
  - Public relations persons



# ADA/PANDEMIC PLANNING

- Employees more susceptible to catching COVID
- Are you allowed to ask all employees to disclose if they have a compromised immune system or other chronic health conditions that makes them more susceptible?
  - NO – such an inquiry violates ADA
    - Is a prohibited disability-related inquiry
    - Unless – have objective evidence that pandemic symptoms will cause a direct threat to self or others



# DURING A PANDEMIC/WHAT CAN YOU DO?

## Employees displaying CV symptoms at work

- During a pandemic, ER may send employee home
- ER may prohibit employees CV positive or CV symptoms from entering the workplace
- ER may ask if employee has been tested for CV
- **ER may not ask these questions if teleworking since employees are not interacting with co-workers**
- Sending employee home is not a disability-related inquiry since illness poses a direct threat to others



# DURING PANDEMIC/WHAT CAN YOU DO?

Degree of Information To Obtain from an Employee who report feeling ill at work or call in sick

- ER may ask if they have CV symptoms to determine if they have CV-19
- Information obtained is confidential medical record



# DURING A PANDEMIC/WHAT CAN YOU DO?

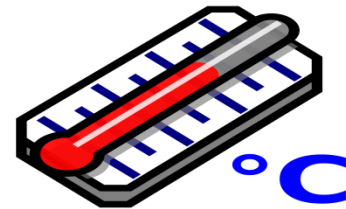
- Asking Employees if they have associated with Family Members that have CV?
  - Limiting this inquiry to just family members may violate the Generic Information Nondiscrimination Act and limits the extent of the employee's potential exposure
  - Suggestion: Ask the employee if she/he has had contact with someone who the employees knows has CV or CV symptoms





# DURING A PANDEMIC/WHAT CAN YOU DO?

- Taking Employees' Temperatures at Work?
  - Temperature taking is a medical exam
  - But, since CDC acknowledged community spread of CV-19, ER may measure body temperature
  - Subject to medical confidentiality



- Employees Returning from Travel
  - If CDC states those traveled to certain countries stay at home to ensure no CV-19 symptoms, ER may ask employees if they traveled to those places
    - DO NOT ask if they only visited Wuhan, China



# DURING PANDEMIC/WHAT CAN YOU DO?

- My employee refuses to let me take his/her temperature and refuses to answer my symptoms checklist or tell me if they had CV!
  - Per the EEOC, the ADA may prohibit the employee from coming to work
    - Suggest asking the employee why he/she is refusing to answer
    - Reassure them of medical confidentiality



# MEDICAL CONFIDENTIALITY

- Asking about symptoms and CV diagnosis protected under medical confidentiality
- ER may not disclose to co-workers information obtained through questioning employee about CV
- All “need to know” management should be advised about medical confidentiality

**CONFIDENTIAL**



# MEDICAL CONFIDENTIALITY

- Is this legal to announce at work?
- “JANE DOE ON THE FOURTH FLOOR HAS COVID-19. IF YOU HAVE BEEN AROUND HER, PLEASE REPORT TO THE PANDEMIC TEAM RIGHT AWAY.”



# AGE RELATED ISSUES

- CDC identified those age 65 and older at higher risk of severe illness
- May an ER exclude employees over 65 from coming to work?
  - NO. Such an exclusion is a form of age discrimination



# TELEWORKING

- Must an ER allow those in high risk categories to telework? (65+, pregnant, chronic conditions)
- Employees' request to telework should be treated that same as those similarly situated



# ADA AND MEDICAL CONDITIONS

- CDC identified several medical conditions
  - Chronic lung disease, heart conditions, diabetes
- Requesting different work arrangements (i.e., teleworking) is request for reasonable accommodation
- May verify employee has disability
- May verify accommodation is needed because disability places employee at greater risk
  - Getting to a doctor may be difficult. Consider alternative forms of verification



# REASONABLE ACCOMMODATIONS/ TELEWORK

- If teleworking during pandemic, must the ER continue teleworking arrangement after the pandemic?
  - NO
  - ER needs to understand the disability-related limits of employee
  - If there are disability-related limits, ER may explore other forms of accommodation
  - ER needs to remove essential functions in accommodating employee



# AFTER THE PANDEMIC

- Medical notes/Fitness to Return to Work
- ADA permits ER to require employees who have been away from work due to pandemic to provide doctor's note certifying fitness to return to work
  - Note: providers may be too busy to provide note and alternate documents may be necessary such as a form, email, stamp, etc.





# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Families First Coronavirus Response Act
  - Signed on March 18, 2020
  - Effective April 2, 2020
  - Provides emergency paid sick leave and expanded Family and Medical Leave until December 31, 2020
- Emergency Paid Sick Leave Act
  - No length of employment eligibility required
- Emergency Family and Medical Leave Expansion Act



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Who is a covered employer
  - Private employers fewer than 500 employees
  - Most public sector employers



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Emergency Paid Sick Leave
- Duration – up to 80 hours of paid sick leave
  - May not force employees to use accrued sick leave first
- Unable to work because:
  1. Government issued quarantine/isolation order
  2. Advised by provider to self-quarantine due to CV
  3. Experienced CV symptoms and seeking diagnosis
  4. Caring for someone subject to quarantine/self isolation
  5. Caring for child whose school/childcare center is closed
  6. Experienced similar conditions specified by HHS



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

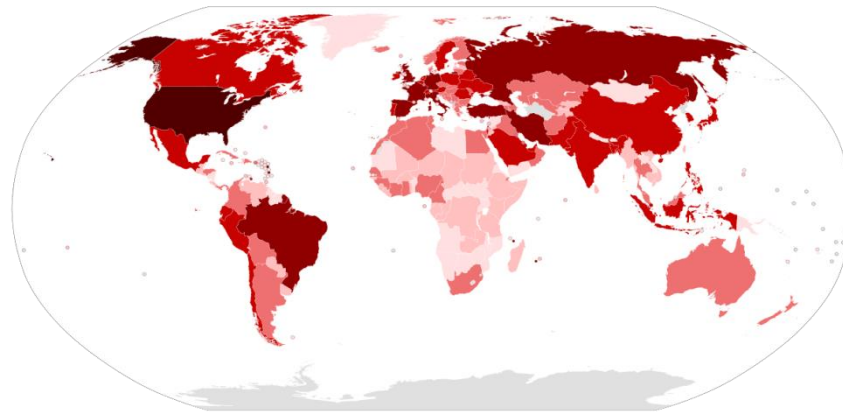
## Emergency Paid Sick Leave

- How much to pay employee depends on the reasons for the leave
- Reasons 1 – 3
  - Paid at the Regular Rate of Pay
  - Maximum of \$511 per day and \$5,110 in aggregate



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Emergency Paid Sick Leave
- Reasons 4 – 6:
  - Pay  $\frac{2}{3}$ <sup>rd</sup> of the Regular Rate of Pay
    - May supplement  $\frac{1}{3}$ <sup>rd</sup> with PTO
  - Max of \$200 per day and \$2,000 in aggregate



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Expanded Family and Medical Leave Act
  - Provided up to 10 weeks of leave
    - Intermittent leave – only if ER agrees
- Eligibility Requirements
  - Employed at least 30 calendar days
- Reasons for leave
  - Unable to work or telework because:
    - Care for child whose school/childcare has been closed due to CV public health emergency



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

## Expanded Family and Medical Leave

- How to pay employee
  - First 2 weeks - First 10 days at  $\frac{2}{3}$ <sup>rd</sup> pay
    - May supplement with any paid time off (i.e., vacation)
  - How to pay the remaining 10 weeks
    - $\frac{2}{3}$ <sup>rd</sup> regular rate of pay for number of hours would have worked
      - Max at \$200/day
  - \$12,000 aggregate maximum
    - ER may require EE exhaust vacation/personal leave first
      - Balance of 10 weeks paid at  $\frac{2}{3}$ <sup>rd</sup> pay
        - Max at \$200 per day and \$10,000 aggregate



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Right of Job Restoration
- Fewer than 25 employees
  - No right of reinstatement if position no longer exists due to operating conditions caused by public health emergency while on leave and ER makes efforts to restore to equivalent condition
- Fewer than 50 employees
  - Secretary of Labor may exempt small businesses if jeopardizes viability of businesses





# EXECUTIVE ORDER N-62-20

- Ex. Order signed May 6, 2020
- WC benefits extended for employees who test positive for CV19
- CV related illness presumed to arise out of employment if:
  - Tested + or diagnosed within 14 days of work at place of work
  - Work occurred after March 19, 2020
  - Place of employment not the employee's residence
  - Diagnosis by physician with physician and surgeon license and confirmed by further testing within 30 days



# EXECUTIVE ORDER N-62-20

- Presumption is disputable with contrary evidence
- If claim is not rejected in 30 days, illness presumed compensable
- Eligible for all benefits including:
  - Hospital, surgical, medical, disability indemnity, death benefits
  - Must exhaust paid sick leave benefits, including CV sick leave benefits



EXECUTIVE ORDER N-62-20

**Discuss with ASCIP &**

**Michael Sullivan**

**Workers' Compensation Roundtable Zoom Chat**

**Friday, May 22  
11:30 am – 1:00 pm**

# CALIF. STATE DISABILITY INSURANCE

- Unable to work due to illness, including CV
- Employee may apply for SDI
- Provide SDI Brochure 2515 to employee
- Wage replacement benefit up to 52 weeks
  - Up to 60% to 70% of normal wages
  - Weekly cap of \$1,300
  - ER may integrate sick leave with SDI benefits



# PAID FAMILY LEAVE BENEFITS

- PFL when caring for ill or quarantined family members with CV
- Up to 60% to 70% of normal wages
  - May integrate with paid time off
- Cap of \$1,300 for 6 weeks in 12 month period
- May apply for PFL on-line
- Provide employee with PFL Brochure 2511
- Family member
  - Child, parent, parent in law, grand parent, grandchild, sibling, spouse, or registered domestic partner



ALLIANCE OF  
SCHOOLS FOR  
COOPERATIVE  
INSURANCE  
PROGRAMS



# MusickPeeler



THANK  
YOU

A red pushpin is pinned to the top of a white, rectangular piece of paper. The paper is slightly tilted and has the words "THANK YOU" written on it in a large, black, handwritten-style font. The background is a dark red gradient.