

COVID-19: Impacts on Construction,
Safety Practices and a Federal Update

Jeff Stone

Member

Simmons, Perrine, Moyer Bergman PLC

319-896-4029

jstone@simmonsperrine.com

COVID-19

- City of Boston shut down construction
- California's stay at home has an exception for construction projects

Legal definition

- Force majeure is “an event that can be neither anticipated nor controlled.”

Force Majeure

- Exceptional occurrence
- Performance becomes impossible or impractical
- Unanticipated

Standard contract language

- If the Contractor is delayed at any time in progress of the Work by an act or neglect of the Owner or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by other causes which the Owner determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Owner may determine.

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Standard contract language

- Scope of excusable delay language
- Notice requirements
 - 1 - 3 days
 - 21 days

What happens with force majeure?

- Excusable delay
 - Extended contract times
 - No liquidated damages for excusable delay
 - No other delay damages
- Additional money?
 - Depends on contract language

What else might happen?

- Owner may declare a force majeure event
- Owner may suspend for convenience
- Owner may terminate for convenience
- State of Iowa may stop construction

What about the future?

- For contracts executed in 2019, COVID-19 is likely a force majeure event
- For contract executed in March 2020 or in the future, COVID-19 may not be a force majeure event because it is an anticipated risk
 - Important to negotiate a reasonable excusable delay provision
 - If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Design Professional or of a separate contractor; or by changes ordered in the Subcontract Work; **or by disease, epidemics, or pandemic or labor shortages caused by diseases, epidemics, or pandemic**; or by labor disputes, fire, unusual delay in deliveries, **quarantine, restrictions on access or travel**, unavoidable casualties or other causes beyond the Subcontractor's control; or by delay pending mediation and arbitration; or by other causes that the Design Professional may determine justify delay, then the contract times shall be extended.

Craig Hansen
Senior Vice President
Holmes Murphy
515-223-6902
chansen@holmesmurphy.com

- **Impact of COVID 19 on the Construction / Surety Industry**

- Supply chain disruption
- Labor shortages
- Schedule delays and increased project costs
- Suspension of Work and/or Termination for Convenience
- Delays in awarding and/or starting new work
- Potential project funding issues

- **Best Practices for Contractors**

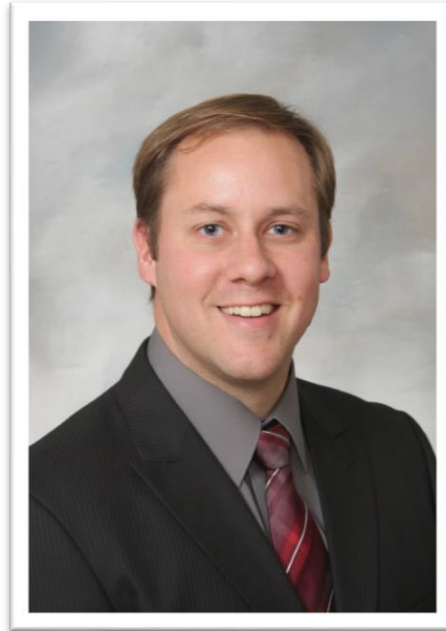
- Review relevant contract terms
- Provide clear and compliant notice
- Document cost and schedule impacts
- Carefully consider language in new contracts
- Cash flow management
- Financial presentation
- Communication



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THINKING AHEAD

JOBSITE SAFETY & LIABILITY



JOSHUA JACOBSEN, CSP, SMS
SENIOR LOSS CONTROL CONSULTANT
515-223-7047
JJACOBSEN@HOLMESMURPHY.COM

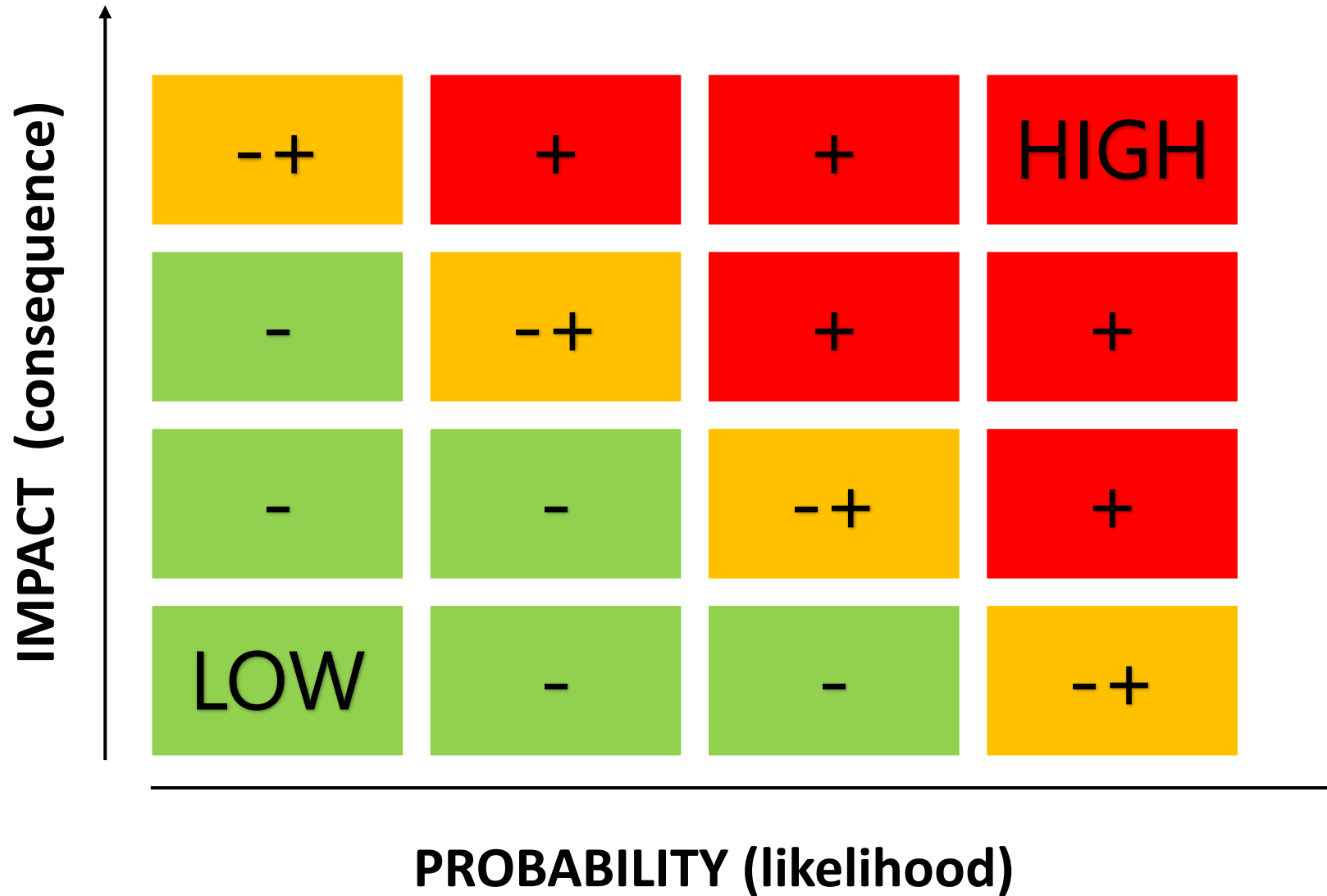
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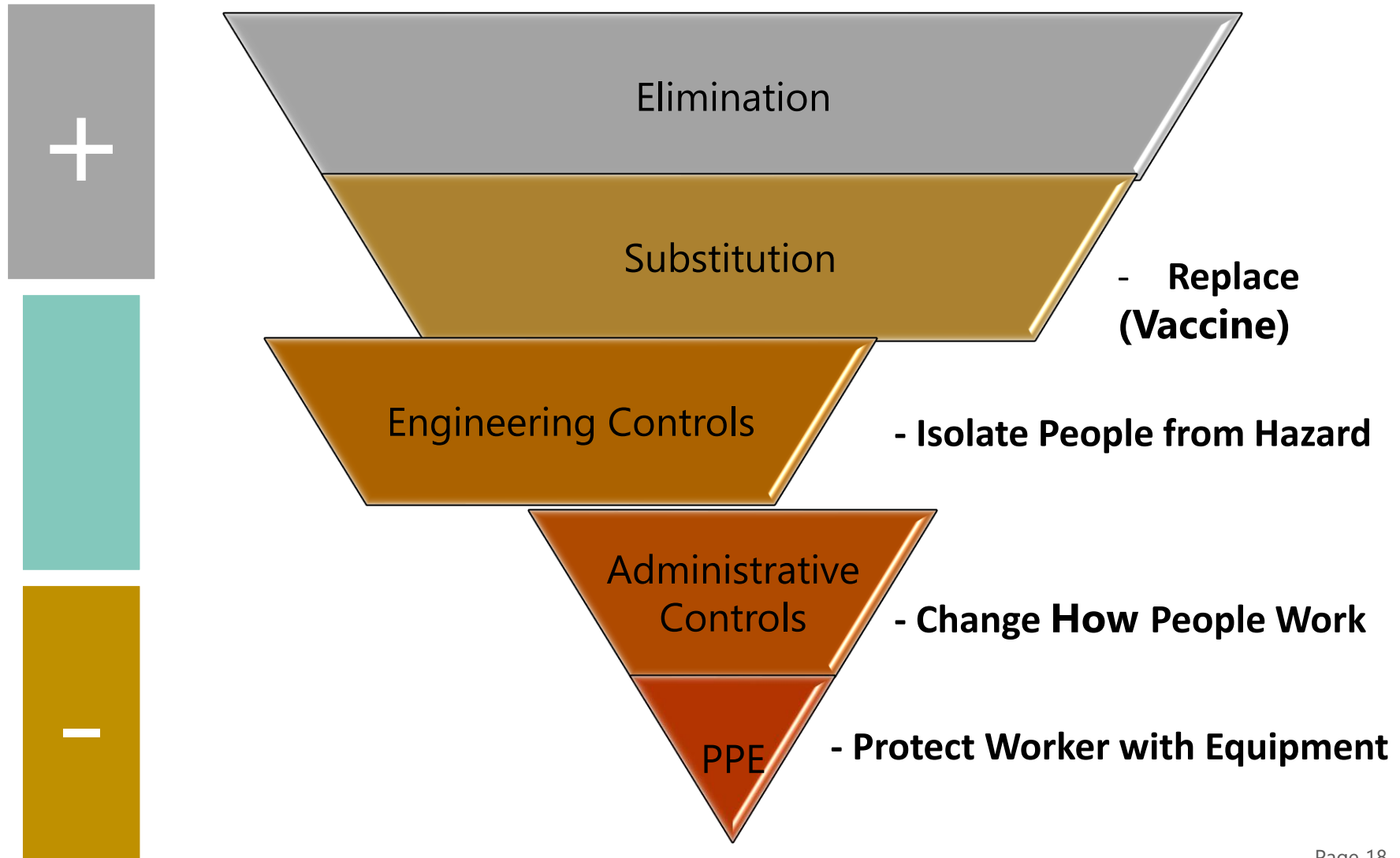
EXPOSURE



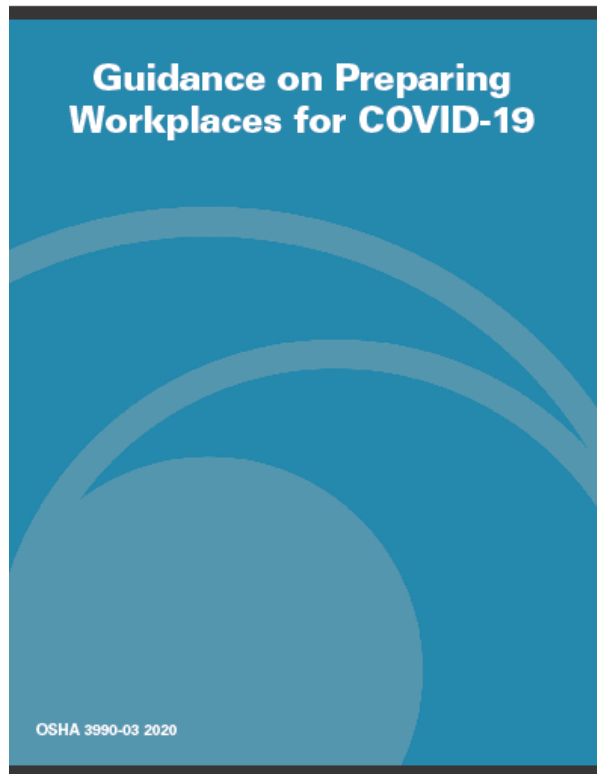
EXPOSURE - JOB TASK RISK ANALYSIS



PREVENTION - HIERARCHY OF CONTROLS



PREVENTION - RESOURCES



Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

<https://www.osha.gov/Publications/OSHA3990.pdf>



OSHA RECORDABILITY

YOU MUST CONSIDER AN INJURY OR ILLNESS TO BE WORK-RELATED IF AN EVENT OR EXPOSURE IN THE WORK ENVIRONMENT EITHER CAUSED OR CONTRIBUTED TO THE RESULTING CONDITION OR SIGNIFICANTLY AGGRAVATED A PRE-EXISTING INJURY OR ILLNESS. WORK-RELATEDNESS IS PRESUMED FOR INJURIES AND ILLNESSES RESULTING FROM EVENTS OR EXPOSURES OCCURRING IN THE WORK ENVIRONMENT, UNLESS AN EXCEPTION IN §1904.5(B)(2) SPECIFICALLY APPLIES



RECORDABILITY FOR COVID-19

1. THE CASE IS A CONFIRMED CASE OF COVID-19 (SEE [CDC INFORMATION ON PERSONS UNDER INVESTIGATION AND PRESUMPTIVE POSITIVE AND LABORATORY-CONFIRMED CASES OF COVID-19](#));
2. THE CASE IS WORK-RELATED, AS DEFINED BY [29 CFR 1904.5](#); AND
3. THE CASE INVOLVES ONE OR MORE OF THE GENERAL RECORDING CRITERIA SET FORTH IN [29 CFR 1904.7](#) (E.G. MEDICAL TREATMENT BEYOND FIRST-AID, DAYS AWAY FROM WORK).



MULTI-EMPLOYER WORKSITES

CREATING

EXPOSING

CORRECTING

CONTROLLING





Erin R. Nathan

Member

Simmons Perrine Moyer Bergman PLC

(319) 896-4013

enathan@spmbllaw.com

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Families First Coronavirus Response Act (FFCRA)

What does the Families First Coronavirus Response Act (FFCRA) do?

- The FFCRA responds to the coronavirus outbreak by:
 - Creating new paid sick leave requirements.
 - Amending the Family and Medical Leave Act (FMLA) to provide new temporary qualifications for FMLA leave to care for children and requiring some pay during this FMLA leave.
 - Providing free coronavirus testing.
 - Expanding food assistance.
 - Expanding unemployment benefits.
 - Requiring certain employers to provide additional protections for health care workers.

FFCRA

- **When will the FMLA and paid sick changes go to into effect?**
 - Fifteen days from enactment, or on Thursday, April 2, 2020 and the FFCRA allows these changes to continue until December 31, 2020.

FFCRA – COVID-19 related FMLA to care for children

With respect to the FMLA changes, to whom does FFCRA apply?

These changes only apply to COVID-related FMLA leave to care for children. Meaning, if you have an employee who is requesting FMLA for non-COVID related issues, the new thresholds for employers and employees do not apply.

Employers: The FFCRA FMLA changes and paid sick benefits apply to employers with fewer than 500 employees.

Under the new FMLA provisions, there appear to be further exemptions for healthcare employers and small businesses. However, these regulations have not yet been drafted.

- The DOL is allowed to draft new regulations to exclude certain healthcare providers and emergency responders from the definition of “eligible employee.”
- The DOL is allowed to draft new regulations to exempt small businesses (fewer than 50 employees) when it would jeopardize the viability of the business as a going concern

FFCRA – COVID-19 related FMLA to care for children

- **Employees:** The FMLA provisions apply to employees who have been employed for 30 calendar days.
- *The usual FMLA requirements that the employee has been employed for a year, worked for 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius do not apply.*

FFCRA – FMLA to care for children

- Covered Employers (those with fewer than 500 employees) will have to allow 12 weeks of FMLA leave for use by employees who have been employed for 30 days if the employee has a “qualifying need related to a public health emergency.”
- “Qualifying need related to a public health emergency” means an employee is unable to work (or telework) due to a need for leave to:
- **Care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.**
- **Calculation of Pay for COVID-19 related FMLA:** The first 10 days may be unpaid, although employees may elect to use other paid benefits to cover this period. The remaining time must be paid at 2/3 the employee’s regular rate up to a maximum of \$200 per day and \$10,000 in the aggregate.

FFCRA – Sick Leave

- **Covered employers** (those private employers with fewer than 500 employees and public agencies with 1 or more employees) are required to provide **employees** (regardless of how long the employee has been employed with employer)

with up to **80 hours of paid sick leave** (or the equivalent of two weeks of hours for part-time employees)

to the extent that the employee is unable to work (or telework) due to a need for leave because:

...

FCRA – Sick Leave

to the extent that the employee is unable to work (or telework) due to a need for leave 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 by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
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 the Treasury and the Secretary of Labor.

Except that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.

FFCRA – Sick Leave

- Sick Pay is calculated based on an employee's regular rate of pay.
- Leave under Sections (1), (2), and (3) on previous slide: Paid at regular rate. Max sick time pay is \$511 per day and \$5,110 in the aggregate.
- Leave under Sections (4), (5) and (6) on previous slide: Paid at 2/3 regular rate. Max sick time pay is \$200 per day and \$2,000 in the aggregate.
- Additional regulations regarding calculation of sick time pay will be released by the DOL within 15 days.

FFCRA – Who pays?

- Employers must pay these benefits. There are provisions in the FFCRA that provide tax credits to employers in certain circumstances and with certain caps.

Iowa Unemployment

- Layoff vs. Voluntary Shared Work Program

UNEMPLOYMENT INSURANCE GUIDANCE FOR EMPLOYERS AND WORKERS

COVID-19

Unemployment Insurance Guidance for Workers and Employers

If you are laid off due to COVID-19 or have to stay home to self-isolate, care for family members or due to illness related to COVID-19, you can receive unemployment benefits, provided you meet all other eligibility requirements that essentially require you to have worked for wages from an employer who claims you as an employee in six of the last eighteen months and have earned at least \$2,500 in the same time period. More specific explanation of benefit eligibility can be found at:

www.iowaworkforcedevelopment.gov/2019-unemployment-insurance-claimant-handbook

Claimants can expect to receive payment within 7-10 days after the date the claim is filed. Work search requirements and work availability will be waived.

Claims that are filed and identified as a direct or indirect result of COVID-19, will not be charged to employers. Fact-finding interviews for these claims will not be held although employers will be notified of claims received.

IWD will process unemployment insurance payments will continue to be paid in a timely manner. The Iowa Workforce Development team is dedicated to providing assistance to lowans when work is not available and serving our customers efficiently during this difficult time. If you have questions, please call the customer service line at **1-866-239-0843**.

OSHA Guidance

- There is no specific OSHA standard covering COVID-19. However, some OSHA requirements may apply to preventing occupational exposure to COVID-19. Among the most relevant are:
 - OSHA's Personal Protective Equipment (PPE) standards (in general industry, [29 CFR 1910 Subpart I](#)), which require using gloves, eye and face protection, and respiratory protection.
 - When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard ([29 CFR 1910.134](#)).
 - OSHA has issued [temporary guidance](#) related to enforcement of respirator annual fit-testing requirements for healthcare.
- The General Duty Clause, [Section 5\(a\)\(1\)](#) of the [Occupational Safety and Health \(OSH\) Act of 1970](#), 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."
- OSHA's Bloodborne Pathogens standard ([29 CFR 1910.1030](#)) applies to occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions that may transmit COVID-19. However, the provisions of the standard offer a framework that may help control some sources of the virus, including exposures to [body fluids](#) (e.g., respiratory secretions) not covered by the standard

Medical Inquiries of Employees

Question: *May an employer send employees home if they display influenza-like symptoms during a pandemic?*

- Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. **Applying this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.**

Medical Inquiries of Employees

Question: *During a pandemic, how much information may an employer request from employees who report feeling ill at work or who call in sick?*

- Employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. **Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.**

***Applying this principle to current CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.**

Medical Inquiries of Employees

Question: *During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?*

- Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

Example: During an influenza pandemic, an employer directs a supervisor to contact an employee who has not reported to work for five business days without explanation. The supervisor asks this employee why he is absent and when he will return to work. The supervisor's inquiry is not a disability-related inquiry under the ADA.