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ATTORNEYS AND COUNSELORS AT LAW



## RESPONDING TO THE CORONAVIRUS: AN EMPLOYER'S GUIDE



PRESENTED BY

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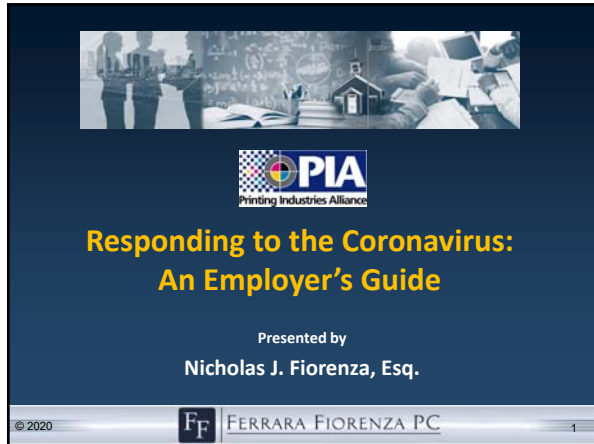
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# Responding to the Coronavirus: An Employer's Guide

*Notes*



The title slide features a dark blue background. At the top, there is a horizontal strip with a collage of images including people in a meeting, a person working at a computer, and a person in a lab coat. Below this is the PIA (Printing Industries Alliance) logo. The main title 'Responding to the Coronavirus: An Employer's Guide' is written in yellow and white. Below the title, it says 'Presented by Nicholas J. Fiorenza, Esq.' At the bottom, there is a logo for Ferrara Fiorenza PC and the year '© 2020'.

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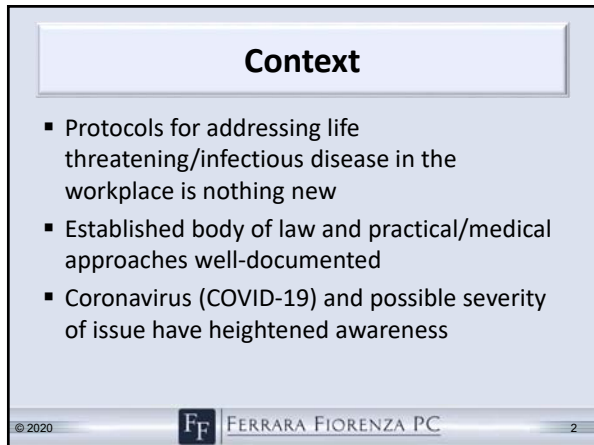
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The slide has a light blue background. At the top, the word 'Context' is in a white box. Below it, there are three bullet points: 'Protocols for addressing life threatening/infectious disease in the workplace is nothing new', 'Established body of law and practical/medical approaches well-documented', and 'Coronavirus (COVID-19) and possible severity of issue have heightened awareness'. At the bottom, there is a logo for Ferrara Fiorenza PC and the year '© 2020'.

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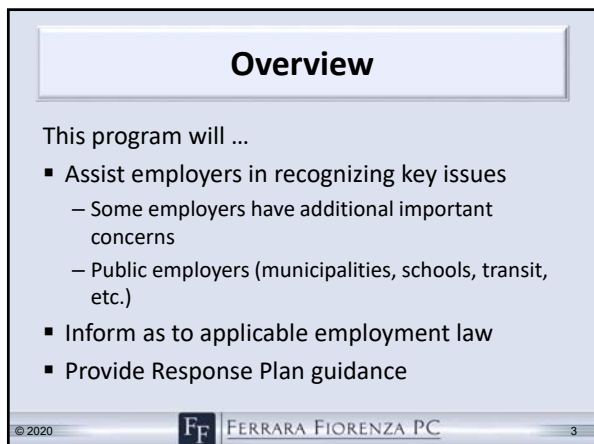
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The slide has a light blue background. At the top, the word 'Overview' is in a white box. Below it, the text 'This program will ...' is followed by three bullet points: 'Assist employers in recognizing key issues' (with sub-points for additional concerns and public employers), 'Inform as to applicable employment law', and 'Provide Response Plan guidance'. At the bottom, there is a logo for Ferrara Fiorenza PC and the year '© 2020'.

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# Responding to the Coronavirus: An Employer's Guide

*Notes*

## What Should Employers Do Now?

- Educate workers as to nature of risk
- Implement immediate preventive steps to minimize them
  - Require hand washing before starting workday, after coughing or sneezing, regularly after touching possibly infected surfaces (door, equipment, cafeteria surfaces, etc.)
- Assemble a work area disinfection team – regularly clean work areas
- Require that employees report travel to high risk areas (CDC provides regular updates and advisories)

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## Related Strategies

- Actively encourage sick employees to stay home
- Communicate the symptoms of acute respiratory illness
  - Fever of 100.4° without use of symptom altering medication, cough and shortness of breath
- Update or draft sick leave and workplace illness policies
  - Another form of communication
  - Confidentiality
  - Stigma
- Consider not requiring doctors' notes immediately for those absent with acute respiratory illness (delay factor)
- Establish a protocol for employees who appear to have acute respiratory illness symptoms upon arrival to work (send home immediately)

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## Legal Landscape

- Obligation to act to protect workforce
- Boundaries on legally permissible action
- Balancing interests
- Sometimes no clear answer

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**The OSHA "General Duty" Standard**

- OSHA requires employers to protect employees from "foreseeable hazards"
- Other infectious disease outbreaks have been considered foreseeable hazards
  - West Nile virus
  - SARS
  - Bird flu
- So, employers should not ignore COVID-19
- Prevention efforts are not only good practice but can minimize risk

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**Other Potential Legal Issues**

- Negligence claims by third parties in your workplace
- Absenteeism-related issues
- Disability Discrimination Law

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**Disability Discrimination Law**

**FAQ's concerning the legal risks associated with workplace coronavirus protocols**

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**Is COVID-19 a Disability?**

- Possibly under the ADA
  - Impacts major life activities/major bodily functions
  - Severity becomes determinative
- Some states have different standard
  - NYS law lower threshold – any “diagnosable condition” triggers disability discrimination law protections apply
- Rule of thumb: treat coronavirus as disability

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**Is COVID-19 a “serious health condition” under FMLA?**

- Single overnight stay in hospital
- Can't complete essential functions for four or more consecutive calendar days and
  - Has visited a healthcare professional at least twice in person OR once with continuing regimen

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**Can we require our employees to work from home?**

- Short answer, yes
- Make such assignments in accordance with a consistent policy
- Remote work is a preferred prevention/control strategy
- Planning ways to increase use of remote work is key part of Response Plans

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## Are the jobs of quarantined employees protected?

- Not directly - most states do not grant special protections
- Special rules in certain states
  - Employers in SC, NM, TX, NJ, MD and ME should carefully review
- Generally your absence policy/rules apply
- Reasonable accommodation process applies (especially if “regarded as” disabled)
- And consider HR impact of strict application of absence rules

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## May we demand that employees who have been exposed to infectious disease stay home?

- Sometimes
- Courts and agencies do not always see issue the same way
- ADA “direct threat” standard applies
- Proof of the issue is key
  - Requires “significant risk”
  - CDC assessments can help form basis
  - Doctor’s (specialist) assessment required to prove threat – considering accommodations

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## Reasonable Accommodation Process

- Applies to infectious disease issues
- Must engage in interactive process with exposed or ill employee
  - Is LOA appropriate
  - Remote work?
  - Modify workplace ... etc.
- None of this possible? Consider direct threat risk and exclude employee

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*Notes*


**Other FAQ's**

Can we ask employees to disclose if they have a compromised immune system?

- No, even during a pandemic, the question is not allowed

Can we automatically "quarantine" an employee who returns from a trip likely to have led to exposure?

- No
- But CDC guidelines provide guidance based on risk level

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**Can we take nation of origin into consideration in hiring and other employment decisions?**

- No – it's one of the fundamental prohibitions
- Employers may not discriminate based on national origin
- EEOC has commented that even an honest fear of infectious disease does not allow such discrimination

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**Can we compel employees to take vaccines?**

- Not automatically – there are exceptions
- An employee may be entitled to an exemption based on a disabling condition or a religious belief
- EEOC believes employers should encourage but not require the vaccine

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Notes

**Other FAQ's**

Can employees be required to supply their own masks, gloves and other safety equipment?

- No
- Employers have responsibility to provide what is required to do the job

Are there ways to identify which employees are more likely to become unavailable during a pandemic?

- Yes. If pandemic occurs, "yes or no questions" can be asked about availability

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**ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY**

**Directions:** Answer "yes" to the whole question without specifying the factor that applies to you. Simply check "yes" or "no" at the bottom of the page.

**In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:**

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES \_\_\_\_\_, NO \_\_\_\_\_

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**Practical Questions**

- Can an employee exhibiting symptoms be sent home?
  - Yes
- CDC provides that employees who become ill with symptoms of infectious disease should leave the workplace
- The action could also be permitted under direct threat standard with follow up

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**How much information can be requested if an employee calls in sick?**

- In addition to job-related questions (e.g., when will you be available for work?, what will you be doing during work hours, etc.)
- During a pandemic employers may ask if employees are experiencing virus like symptoms (e.g., fever, shortness of breath, etc.)
- Information must be kept as a confidential medical record

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**Building Your Response Plan  
The Basics**

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**No "Cookie-Cutter" Solution**

Where does issue fit in your existing structure?

- Safety Committee?
- Labor-Management Group?
- Wellness Committee?
- Business or Non-profit Association?
- Point is to identify or establish the team to lead your effort

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**Response Team Tasks**

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**Vulnerability Self Audit**

- Review staffing options
- Determine level of labor union involvement
  - Bargaining obligations may be involved
- Analyze work-station layout
- Assess internal resources
  - Handwashing stations
  - Disinfectants
  - Signage, policy postings, etc.

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**Communication Plan**

- Involve your employees and seek input to maximize “buy-in” BUT don’t overact
- Theme should be “ounce of prevention worth pound of cure”
- Utilize government resources
- Be diligent about prevention rules
  - Treat like any other important standard
  - How will you address violations?

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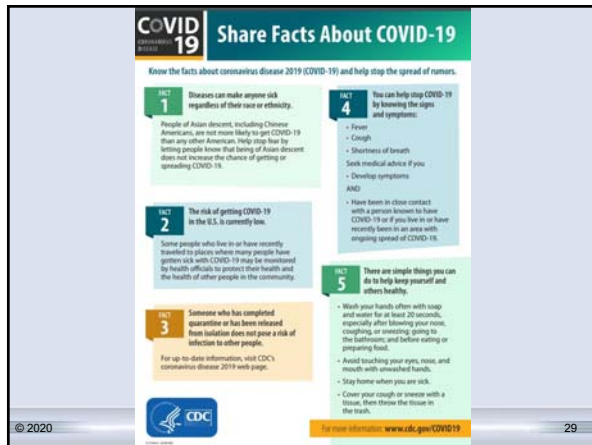
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## CDC's Prevention Rules

- Avoid close contact with others when sick
- Stay at home when sick
- Cover mouth and nose when sneezing or coughing
- Wash hands often
- Avoid touching mouth and nose or eyes
- Disinfect objects at work

Seem obvious? Ingrain in work culture.

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# Responding to the Coronavirus: An Employer's Guide

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**Plan to Keep Business in Operation**

- Identify key functions to keep business running
- Develop “bare-bones” operation plan
  - Will vary widely by industry group
- Seek cooperation of customers
  - They are facing same issues
- Identify alternate sources of supply and vendors
- Establish financial contingency plans

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**Plan for Absences**

- Determine minimum staffing requirements
- Identify at-risk employees
  - Consider cross training
  - Maintain current work project status reports
- Involve union
- Identify outside labor sources
- Create “Communication Tree”
- Train supervisors to implement plan AND avoid discrimination issues.

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# RESPONDING TO THE CORONAVIRUS: AN EMPLOYER'S GUIDE

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## ABOUT THE PRESENTER

### NICHOLAS J. FIORENZA



Nicholas J. Fiorenza is the President and Managing Partner of the Ferrara Fiorenza PC law firm. A graduate of the George Washington University law school, his practice is dedicated to representation and counsel of employers with respect to all aspects of employment and labor relations law as well as offering expanded business counseling to his private sector clients. Nick is also the Manager of Delacroix Consulting Group, LLC, the Firm's affiliated human resources management consulting firm.

In addition to his active practice, Nick has developed and presented comprehensive managerial workshops on a myriad of employment-related topics, including compliance with the Americans with Disabilities Act, the Family and Medical Leave Act, minimizing employment law risk, affirmative action obligations, effective management and leadership, administration of workplace discipline, and general compliance with all aspects of Federal and State employment law. He is a frequent speaker and author with respect to such topics.

## ABOUT THE FIRM

**Ferrara Fiorenza PC** is a law firm dedicated exclusively to the representation of private and public sector employers in all aspects of employment and labor relations law. This highly regulated environment demands representation based on strategic solutions tailored to the needs and objectives of each employer. We recognize the importance of both leadership and compliance in organizational success. Toward this end, our Firm:

- Stresses litigation avoidance and the efficient use of legal resources
- Maintains the full range of traditional litigation capabilities
- Provides practical day-to-day advice
- Promotes effective management through positive policy development and training

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