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LIMITING YOUR EXPOSURE TO COVID-19 BUSINESS LIABILITY

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LIMITING YOUR LIABILITY

- ▶ To Employees.
- ▶ To Customers.
- ▶ To the Government.
- ▶ **How?** Be reasonable. Be compliant.

OVERARCHING CONSIDERATIONS: BE REASONABLE AND BE COMPLIANT

- ▶ **Don't be the Outlier.** Don't let your personal feelings about the virus play too significant a role in your decision-making.
 - ▶ Follow scientific guidance from the Centers for Disease Control and Prevention and the Minnesota Department of Health.
 - ▶ Continually reevaluate.
- ▶ **Be Reasonable.** What would a reasonable person or business do to avoid risk of harm?
- ▶ **Be Compliant.** Read and stay informed about the law so you can follow it. Use your payroll provider, insurance broker, accountant, and lawyer to find best practices and limit risk.

LIMITING LIABILITY TO EMPLOYEES

- ▶ **Reduce Risk.** Nothing can eliminate risk, but there are steps you can take to limit risk.
- ▶ **Educate Yourself.** Read, and then re-read, this document:
https://www.dli.mn.gov/sites/default/files/pdf/MN_worker_protections_related_to_COVID_19.pdf
- ▶ **Stay up to date.** Centers for Disease Control and Prevention and Minnesota Department of Health. Sign up for newsletters: <https://www.dli.mn.gov/about-department/news-and-media/sign-news-department-labor-and-industry>
- ▶ **Pay severance when terminating employees.** Your lawyer can help you with a severance agreement. Pay severance in exchange for an employee's release of potential claims.

CORONAVIRUS - THE PLAN

- ▶ **Develop a COVID-19 Preparedness Plan for your business.** One size does not fit all. Thoughtfully develop a plan for your business.
 - ▶ **The Executive Order.** Executive Order 20-56 includes a link to a sample plan, well sort of, indirectly. Here is an actual link to a sample plan: http://www.dli.mn.gov/sites/default/files/doc/COVID_19_business_plan_template_services.docx
 - ▶ **Industry Guidance.** New industry guidance documents are available here: <https://mn.gov/deed/newscenter/covid/safework/safe-reopening/>
 - ▶ **Need help with your plan?** Minnesota OSHA will assist businesses with their compliance with CDC and MDH Guidelines and OSHA requirements. If you need help with your COVID-19 Preparedness Plan, reach out to MNOSHA Workplace Safety Consultation at 651-284-5060 or OSHA.consultation@state.mn.us.

CORONAVIRUS IN THE WORKPLACE

- ▶ **Overcommunication is key in a crisis.** Communicate that the health and safety of staff and customers are of highest concern. Stick with the facts.
- ▶ **Test.** The EEOC allows you to get a thermometer reading given the potential direct threat to others who could be exposed to the virus. Treat it like a real medical test. Keep it confidential. https://www.eeoc.gov/facts/pandemic_flu.html
- ▶ **Ask about the symptoms.** Do you have a fever, are you experiencing shortness of breath? Send the employee home. Keep any records confidential. **Daily compliance checks for each employee should be part of your plan, although they can be self-assessments too.**
- ▶ **Warn of exposure.** Don't identify a diagnosed person under the ADA. But inform those who work directly with that person that they may have been exposed. The Minnesota Department of Health will also be in contact with exposed workers.

CORONAVIRUS IN THE WORKPLACE - CONT.

- ▶ **HIPAA.** This applies to health providers, not all employers. Employers of 15 or more are governed by the Americans With Disabilities Act (ADA). Smaller employers are covered by the Minnesota Human Rights Act. Employers can ask employees if an employee tested positive for coronavirus.
- ▶ **Isolation.** Make infected employees isolate at home. The same is true when employees have a sick family member at home. Don't punish them for it in any way.
- ▶ **No doctor's note.** Now is not the time to demand strict compliance for documentation. Do not require a doctors note or test results right now. Healthcare providers may be too busy to provide them.

LIMITING LIABILITY TO CUSTOMERS

- ▶ **Implement the Plan.** Have a plan to keep customers distanced and safe. (It's required for most businesses under Executive Order 20-56.)
- ▶ **Enforce Policies.** Don't let the plan slide.
 - ▶ Regularly communicate the importance of the plan to your employees.
 - ▶ Use clear signage for customers.
- ▶ **Document Your Plan and Your Compliance.** Keep your plan in a safe place for reference in the future. Keep track of what you are doing to implement the plan. Take weekly or daily notes and save them in a safe place.
- ▶ **High Risk Sectors.** Some small businesses will face a higher risk of liability.

THE MASK

- ▶ **Shoes, shirts, and masks.**
- ▶ **No Service.** If masks are required, there is probably a low risk that refusal of service will give rise to a lawsuit.
- ▶ **Plenty of Cover.** You're in good company if you require employees or customers to wear masks. It seems fairly clear that everyone who is anyone (from the CDC to Governor Walz) is basically ignoring Minnesota's anti-masking law, which seems more like a legal novelty than a law at this point.
- ▶ **Mask-wearing is a still a crime, technically.** Minnesota law actually makes it a crime to wear a mask in a public place: "A person whose identity is concealed by the person in a public place by means of a robe, **mask**, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, **is guilty of a misdemeanor.**" Minn. Stat. 609.735.
 - ▶ The law originally focused on the Klu Klux Klan.
 - ▶ But now we're all criminals for wearing surgical and other masks at the urging of public officials. But we're in good company because the governor and public officials who encouraged us to commit the crime are guilty of aiding and abetting. "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. 609.05.
 - ▶ Executive Order 20-56 reads: "**Masks and face coverings strongly encouraged.**"
 - ▶ In Minneapolis, it is also now a misdemeanor to enter a public place of accommodation not wearing a mask.
- ▶ So in Minneapolis, it's \$1,000 if you wear it (State law), and \$1,000 if you don't (Minneapolis ordinance). We shouldn't have this inconsistency. So call your legislator. But don't expect action anytime soon, because this is considered a partisan issue.

COULD I BE SUED?

- ▶ **OSHA.** Occupational Safety and Health Act's general duty clause, employers are required to “furnish to each of his employees 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 to his employees.”
- ▶ **Exercise Good Judgment.** Put the safety and health of employees and customers first and work backward from there.
- ▶ **Insure.** Get insurance against the risk. Now is a good time to re-evaluate risk.

COULD I BE SUED? - CONT.

- ▶ “These are claims that as an employee, or as a customer at a business, whether grocery stores or movie theaters, you did not take appropriate actions to safeguard me from the coronavirus, and I’ve had injury that flowed from that,” Kim said. “Your basic negligence type of claim is a big area of concern.” **As Businesses Reopen, Lawsuits Loom Over COVID-19 Exposure.** [Law.com](https://www.law.com/2020/05/01/as-businesses-reopen-lawsuits-loom-over-covid-19-exposure/) (https://www.law.com/2020/05/01/as-businesses-reopen-lawsuits-loom-over-covid-19-exposure/)
- ▶ **Negligence.** Anatomy of a legal claim.
 - ▶ **Duty:** you owed a duty of care to your employee or customer (What would a reasonable Minnesota business do?);
 - ▶ **Breach of Duty:** your business failed to meet that duty;
 - ▶ **Cause in Fact:** but for the that failure, the employee or customer would not have been injured;
 - ▶ **Proximate Cause:** your failure (and not something else) caused the injury; and
 - ▶ **Damages:** The employee or customer has actually been injured and suffered some loss.

COULD I BE SUED? - CONT.

- ▶ **Focused fight.** The fight will likely be over breach, causation, and damages. You can't control damages, but you can impact the breach and causation discussion by what you do now. Document, document, document.
- ▶ **Breach Argument:** Have a plan. Keep good records. Follow your plan. If someone does get sick at your business, you'll have an argument that you did not breach your duty to take appropriate precautions to keep them safe. There is no strict liability rule in this context.
- ▶ **Causation Argument:** COVID-19 is difficult to track in a pandemic because of community spread. It's hard to prove where you got it. As numbers go down, it will be tracked more clearly. Follow public guidance on protections so you don't become the cause.
- ▶ **Damages Argument:** Most people recover from COVID-19. But where loss of life occurs, the recoverable damages may be significant. Comorbidity will impact the numbers.

CHECK YOUR STATUS

- ▶ **Limited Liability Entities.**

- ▶ Get your entity set up, or confirm yours is active.

<https://mblsportal.sos.state.mn.us/Business/Search> If your entity has expired, renew it and update your information.

- ▶ Don't commingle. Don't be undercapitalized.
- ▶ Do follow corporate formalities.
- ▶ Don't expose your business to veil-piercing.

LIMITING LIABILITY TO THE GOVERNMENT

- ▶ Avoid government penalties.
 - ▶ Provide required notices.
 - ▶ Follow executive orders. Gross misdemeanors, fines and \$25,000 in civil penalties, per occurrence.
 - ▶ Avoid terminations that violate employee rights.
- ▶ Follow Executive Orders.
- ▶ Don't cut corners.

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ **PAID LEAVE ENTITLEMENTS**
Generally, employers covered under the Act must provide employees:
Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.


A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ **ELIGIBLE EMPLOYEES**
In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.


▶ **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**
An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

<ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);	<ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.
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▶ **ENFORCEMENT**
The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

 **WAGE AND HOUR DIVISION**
UNITED STATES DEPARTMENT OF LABOR

For additional information or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



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Q&A

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