

Business Continuity and Emergency Planning

A Lexis Practice Advisor® Practice Note by Richard D. Glovsky, Jordon R. Ferguson, and Rufino Gaytán III, Locke Lord LLP



Richard D. Glovsky
Locke Lord LLP



Jordon R. Ferguson
Locke Lord LLP



Rufino Gaytán III
Locke Lord LLP

This practice note provides guidance to employers on business continuity plans (BCPs) and preparing for and responding to emergencies, such as pandemic diseases and natural disasters. While COVID-19 is the latest pandemic disrupting businesses and families across the nation and the world, prior pandemics and disasters provide employers with baseline information related to workplace concerns and planning for the next inevitable challenge.

Specifically, this practice note provides guidance on the following issues:

- OSH Act – Employer’s Duty to Protect Employees from Recognized Hazards

- OSHA Guidance on Emergency Planning and Response
- Developing an OSHA-Compliant Emergency Action Plan (EAP)
- Additional Strategies for Effective Emergency and Disaster Planning and Responses during COVID-19
- Key Employment Laws to Consider during and after an Emergency
- Handling Displaced Employees
- Steps to Institute a Successful Business Continuity Plan (BCP)

For more guidance for preparing and responding to pandemic diseases, whether the coronavirus (COVID-19) or other widespread illnesses, see [Pandemic Flu/Influenza/Coronavirus \(COVID-19\): Key Employment Law Issues, Prevention, and Response](#). For a BCP, see [Business Continuity Plan](#).

For more guidance on a wide variety of COVID-19 legal issues, see [Coronavirus \(COVID-19\) Resource Kit](#). For tracking of key federal, state, and local Labor & Employment legal developments, see [Labor & Employment Key Legal Development Tracker](#).

OSH Act – Employer’s Duty to Protect Employees from Recognized Hazards

This section provides a brief description of an employer’s duty to protect employees from recognized hazards and the general duty clause under the Occupational Safety and Health Act (OSH Act).

Overview

The OSH Act covers all employers and employees in the United States, and all territories and jurisdictions under federal control. 29 U.S.C. § 653(a). The OSH Act is interpreted broadly to apply to all locations where at least one employee works and affects interstate commerce, even if the connection to interstate commerce is remote. 29 U.S.C. § 652.

Therefore, the OSH Act covers almost every employer and its employees in varied fields, though it excludes the following:

- The self-employed
- Immediate members of farming families who do not employ others
- Employees whose working conditions are regulated by other federal agencies, including workers in mining, certain trucking and rail, and atomic energy industries
 - However, the OSH Act still applies to those industries' workers if another agency's regulations do not specifically address the working conditions at issue.
- Employees in state and local governments

29 C.F.R. §§ 1975.1 and 1975.4.

Although the OSH Act covers employment in every state, state governments also may regulate health and safety matters if they develop plan requirements that the federal Occupational Safety and Health Administration (OSHA) approves. For information on state OSH Act laws, see [OSH Act Compliance, Employee Health, and Workplace Security State Practice Notes Chart](#).

For more guidance on key OSH Act legal issues, see [OSH Act Requirements, Inspections, Citations, and Defenses](#).

The General Duty Clause

While employers do not have a specific duty under the OSH Act to protect employees from disasters such as pandemics, the OSH Act contains a “general duty clause” requiring employers to furnish employees with a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” 29 U.S.C. § 654(a)(1).

To prove a violation of the general duty clause, OSHA must satisfy each of the following elements:

- The employer failed to keep the workplace free of a hazard to which employees were exposed.

- The hazard was recognized.
- The hazard was causing, or likely to cause, death or serious physical harm.
- There was a feasible and useful method to correct the hazard.

See [OSHA: Field Operations Manual, Directive CPL 02-00-163, Chapter 4, Section III\(A\)](#).

OSHA can establish that the hazard was recognized on the basis of any of the following:

- Employer recognition
- Industry recognition
- Commonsense recognition

See [OSHA: Field Operations Manual, Directive CPL 02-00-163, Chapter 4, Section III\(B\)\(6\)](#).

Employers in high-risk or disaster-prone locations or industries should take precautions and review their plans regularly to reduce the potential for violations of the general duty clause. OSHA also has enacted general industry standards employers should take note of in planning for emergencies. OSHA's general industry standards cover all businesses, except agriculture, construction, and maritime industries. 29 C.F.R. § 1910.5.

OSHA Guidance on Emergency Planning and Response

This section addresses federal OSH Act requirements for Emergency Action Plans (EAP) and fire prevention plans. It also discusses state and local requirements for emergency action planning.

Emergency Action Plan (EAP)

An EAP is a written document meant to facilitate and organize employer and employee actions during workplace emergencies or other emergencies that affect employers and/or employees.

Under the OSH Act, almost every employer must have an EAP. If an OSHA general industry standard requires it, employers must prepare and maintain a written EAP in the workplace, available for employees to review. 29 C.F.R. § 1910.38(a), (b); [OSHA: Evaluation Plans and Procedures eTool](#). Employers with 10 or fewer employees may communicate an EAP orally to employees. 29 C.F.R. § 1910.38(b).

Moreover, if any of the following conditions exist in an employer's workplace, the employer may be required to have an EAP:

- There are no fire extinguishers.
- There are fire extinguishers, but they are not intended for employee use.
- There are fire extinguishers that are intended for employee use, but employees must evacuate the workplace in certain circumstances.

See 29 C.F.R. § 1910.38. See also [OSHA Evacuation Planning Matrix - Appendix A - Does Your Facility Need an Emergency Action Plan?](#)

Additionally, an employer must have an EAP if any of the following exist:

- The employer's facility uses a total flooding extinguishing system that provides any one of these design concentrations:
 - 4% or greater of Halon 1211
 - 4% or greater of carbon dioxide
 - 10% or greater of Halon 1301 –or–
 - Exceeding 7% when egress from an area cannot be accomplished in one minute
- The employer uses a fire detection system with alarms or devices delayed by more than 30 seconds for reasons other than a total flooding extinguishing system.
- The employer must comply with any of the following general industry standards:
 - Process safety management of highly hazardous chemicals (29 C.F.R. §§ 1910.119 or 1926.64)
 - Fixed extinguishing systems, general (29 C.F.R. § 1910.160)
 - Note, even if employers are not required to have an EAP, employers still must provide portable fire extinguishers (29 C.F.R. § 1910.157).
 - Fire detection systems (29 C.F.R. § 1910.164)
 - Grain handling facilities (29 C.F.R. § 1910.272)
 - Ethylene oxide (29 C.F.R. § 1910.1047)
 - Methylenedianiline (29 C.F.R. §§ 1910.1050 or 1926.60) –or–
 - 1,3-Butadiene (29 C.F.R. § 1910.1051)
- The employer plans to evacuate all of its employees and to rely on an outside party to provide emergency response to a hazardous substance release.

See 29 C.F.R. § 1910.38. See also [OSHA Evacuation Planning Matrix - Appendix A - Does Your Facility Need an Emergency Action Plan?](#)

Fire Prevention Plan

In addition to an EAP, employers must also prepare a fire prevention plan when another applicable OSHA standard requires one. 29 C.F.R. § 1910.39(c). A fire prevention plan generally must identify flammable and combustible materials stored in the workplace, ways to control workplace fire hazards, and the names of employees responsible for the control of fire hazards. It must be in writing (except for employers with 10 or fewer employees), must be kept in the workplace, and must be available for employee review. 29 C.F.R. § 1910.39(b).

A fire prevention plan must include:

- A list of all major fire hazards, proper handling and storage procedures for hazardous materials, identification of potential ignition sources and their control, and the type of fire protection equipment necessary to control each major hazard (29 C.F.R. § 1910.39(c)(1))
- Procedures to control accumulations of flammable and combustible waste materials (29 C.F.R. § 1910.39(c)(2))
- Procedures for regular maintenance of safeguards installed on heat-producing equipment to prevent the accidental ignition of combustible materials (29 C.F.R. § 1910.39(c)(3))
- The name or job title of employees responsible for maintaining equipment to prevent or control sources of ignition or fires (29 C.F.R. § 1910.39(c)(4))

The name or job title of employees responsible for the control of fuel source hazards (29 C.F.R. § 1910.39(c)(5))

Employers must also inform employees assigned a job in the fire prevention plan of the fire hazards to which they are exposed, and they must review with each employee those parts of the fire prevention plan necessary for employees to protect themselves. 29 C.F.R. § 1910.39(d).

State and Local Requirements for Emergency Action Planning

States and localities may have their own requirements pertaining to emergency action planning. For example, California regulations state that an EAP should include:

- Procedures for emergency evacuations
- Procedures for employees who remain to operate critical plant operations to follow before they evacuate
- Procedures to account for all employees after an emergency evacuation has been completed

- Procedures for employees performing rescue or medical duties to follow
- The preferred means of reporting fires and other emergencies –and–
- Names or regular job titles of persons or departments to contact for further information or explanation of duties under the plan

8 Cal. Code Regs. § 3220.

Thus, it is necessary to check state and local law to determine if the EAP will require additional information.

Developing an OSHA-Compliant Emergency Action Plan (EAP)

The Federal Emergency Management Agency (FEMA) established suggested guidelines for employer emergency planning. Employers should:

- Form a planning team
- Analyze current capabilities and possible hazard
- Develop an EAP –and–
- Implement the EAP

See [DHS, FEMA: Emergency Management Guide for Business and Industry at 9-26, Oct. 1993 \(last updated Sept. 26, 2013\)](#).

Form a Planning Team

The size of the planning team will depend on an employer's operations, requirements, and resources. FEMA recommends involving a group of employees to encourage participation and investment and provide a broader perspective, among other things. A bigger team may be appropriate for larger employers to ensure a more diverse perspective and representation among all divisions within the company.

Employers also should consider obtaining input from all functional areas, whether in an active or advisory role, including from:

- Upper and line management
- Labor
- Human Resources (HR)
- Legal
- Engineering and maintenance
- Safety

- Public information and relations
- Security
- Community relations
- Sales and marketing –and–
- Finance and purchasing

Employers should consider appointing members in writing and updating job descriptions to reflect these assignments. Moreover, employers should establish authorities among the team, develop a mission statement, and establish a practical and realistic budget.

Analyze Current Capabilities and Possible Hazards

After forming a planning team, the team should review current emergency response capabilities and assess emergencies that are foreseeable. The team should identify critical products, services, and operations. This effort may include consideration of the equipment needed to produce products; the employer's relationship with and dependency upon suppliers and vendors; and the core services upon which the employer depends, such as power, water, gas, telecommunications, and transportation.

The team should analyze the employer's vulnerability in times of crisis to prioritize areas of emphasis. FEMA suggests compiling a hazard vulnerability analysis chart listing potential emergencies based on historical information, geography, technology, human error, those resulting from design or construction elements of facilities, and possible impacts of regulatory requirements.

In preparing a chart, the planning team should assign each potential emergency a rating based on the sum of the individual ratings for each of the following criteria (on a scale of one to five, with one as the lowest probability and five as the highest):

- The probability it will occur
- The potential human impact, including the possibility of death or injury
- The potential impact on the physical workplace, including the cost to:
 - Repair or replace the property –and–
 - Set up a temporary replacement location, if applicable
- The potential business impact, including:
 - Loss of market share
 - Business interruption
 - Employees unable to report to work

- o Customers unable to reach the workplace
- o Company violations of contractual agreement
- o Imposition of fines and penalties or incurrence of legal costs
- o Interruption of critical supplies –and–
- o Interruption of product distribution

FEMA also suggests that planning teams assess their employers' internal plans, policies, and resources for handling various emergencies. The planning team should assign a score to each of the internal and external resources using the 1–5 scale explained above. The planning team should consider each potential emergency from beginning to end and each resource it would need to respond. Likewise, FEMA recommends that in formulating and implementing its plan, the planning team should meet with external resources, such as government agencies; first responders (such as fire departments, law enforcement, and local emergency medical technicians (EMTs)); community organizations; and insurance carriers.

Moreover, the planning team should evaluate applicable laws and regulations—including OSHA standards, transportation regulations, and corporate policies—to ensure that the EAP is fully compliant.

Develop an EAP

This section provides guidance on creating an effective EAP.

What to Include in an EAP

After studying the factors to include in the EAP, the planning team should develop a written (or oral, if applicable) EAP. The OSH Act requires that all plans include, at a minimum:

- Procedures for reporting a fire or other emergency, including dialing 911 or an internal emergency number, or pulling a manual fire alarm
- Procedures for emergency evacuations, including the types of evacuations and an exit route assignments
- Procedures to be followed by employees who operate vital plan operations on premise after most employees have evacuated and before they evacuate
- Procedures to account for all employees after evacuations
- Procedures to be followed by employees performing medical or rescue duties –and–
- Contact information for an individual who can answer any employee questions during an evacuation or in implementing the plan

29 C.F.R. § 1910.38.

Although not required by OSHA, employers should also consider including one or more of the following areas in their EAPs:

- A description of the alarm system used to notify employees (including disabled employees) to evacuate or take other actions
- The site of an alternative communications center in the event of a fire or explosion
- A secure on-site or off-site location to store originals or duplicate copies of accounting records, legal documents, employees' emergency contact lists, and other important records

Additional EAP Materials That FEMA Recommends

Many employers also include in their EAP materials akin to the following, which FEMA recommends:

- **Executive summary.** An executive summary that sets out:
 - o The purpose of the plan
 - o The employer's emergency management policy
 - o The authorities and responsibilities of key personnel, both internally and externally, during an emergency
 - o The types of emergencies that may occur –and–
 - o Where response operations will be managed
- **Emergency management section.** An emergency management section that describes:
 - o Escape routes
 - o Procedures for employees who perform or shut down critical operations before an evacuation
 - o Procedures to account for all employees
 - o Procedures for reporting emergencies
 - o A schedule for training employees on emergency procedures
 - o Contingencies for the protection of property
 - o Community outreach, including coordination with outside contacts in organizations, such as public service entities and support personnel –and–
 - o Plans for recovery and restoration
- **Emergency response procedures.** Emergency response procedures that cover:
 - o Assessing a situation to establish the extent of the emergency
 - o Ways to protect employees, customers, visitors, equipment, vital records, and other assets –and–

- o Business continuity plans (BCPs), such as communicating with employees and logistics to be implemented following an emergency

- **Support documents.** Support documents, including:

- o Emergency contact lists
- o Building and site maps –and–
- o Internal and external resource lists

Employer teams also should consider the needs of disabled and non-English-speaking personnel.

See [DHS, FEMA: Emergency Management Guide for Business and Industry at 22–23, Oct. 1993 \(last updated Sept. 26, 2013\)](#).

Implement the EAP

Once the planning team drafts the EAP, the employer must publish the EAP throughout the workplace. Employers may publish the EAP in employee manuals / employee handbooks, employee portals / the employer’s intranet, email, postings in breakrooms, or by other similar methods and locations. 29 C.F.R. § 1910.38(b). Employers regularly should review their EAPs and, if necessary, modify and republish them to their employees. FEMA recommends an annual audit.

Employee Training on EAPs and Responding to Emergencies

Employers must also train employees on the implementation of their EAPs and for responding to emergencies. Training for all employees should address:

- Individual roles and responsibilities
- Information about threats, hazards, and protective actions employees must take
- Notification, warning, and communications procedures
- Means for locating family members
- Response procedures
- Evacuation, shelter, and accountability procedures
- Location and use of emergency equipment –and–
- Shutdown procedures

Beyond this primary training, employers also should consider orientation and other training sessions, walk-through and evacuation drills, and other exercises to prepare employees to safely respond to emergencies.

See [DHS, FEMA: Emergency Management Guide for Business and Industry at 22–23, Oct. 1993 \(last updated Sept. 26, 2013\)](#).

Additional Strategies for Effective Emergency and Disaster Planning and Responses during COVID-19

Although the federal OSHA has not adopted a standard addressing employers’ obligations to safeguard employees during a pandemic, OSHA has issued general guidance for employers as a direct result of the COVID-19 outbreak in the United States.

OSHA’s latest guidance is available [here](#). The OSHA guidance (which is not mandatory as it does not constitute a law or regulation) encourages employers to take all the following actions during COVID-19:

- **Create an infectious disease preparedness and response plan.** This plan should:
 - o Identify potential sources of infection inside and outside of the workplace
 - o Identify and implement controls to reduce exposure, such as use of personal protective equipment (PPE)
 - o Prepare for increased absenteeism and supply chain disruptions –and–
 - o Consider downsizing or closing operations
- **Develop and implement infection prevention measures.** Prepare and implement basic infection prevention measures not included in existing OSHA requirements. These measures should include:
 - o Promoting handwashing
 - o Covering coughs and sneezes
 - o Social distancing –and–
 - o Encouraging employees to stay home if they are ill
- **Develop procedures for ill employees.** Develop procedures for prompt identification and isolation of ill employees and visitors.
- **Create flexible work arrangements.** Consider and implement flexible work arrangements, such as working remotely, reducing hours, and alternating schedules.
- **Adhere to OSHA standards for sanitary workplace.** Follow existing OSHA standards to maintain a clean and sanitary workplace.

Exposure Risk Categories

On April 13, 2020, OSHA also issued an [Interim Enforcement Response Plan for Coronavirus Disease 2019](#)

[\(COVID-19\)](#) (the Plan). The Plan describes the following three exposure risk categories applicable in various work settings.

Category 1: High and Very High Exposure Risk Jobs

High and very high exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19. Workplaces falling into this category include, but are not limited to:

- Hospitals treating suspected and/or confirmed COVID-19 patients
- Nursing homes
- Emergency medical centers
- Emergency response facilities
- Settings where home care or hospice care is provided and that handle human remains
- Biomedical laboratories, including clinical laboratories – and–
- Medical transport facilities

OSHA also emphasizes the “very high risk” presented by aerosol-generating procedures, including bronchoscopies, sputum inductions, nebulizer therapies, endotracheal intubations and extubations, open suctioning of airways, cardiopulmonary resuscitations, and autopsies. OSHA identifies these procedures as ones needing engineering and administrative controls and personal protective equipment.

Category 2: Medium Exposure Risk Jobs

Medium exposure risk jobs include those with frequent and/or close contact with (i.e., within six feet of) people who may be (but are not known to be) infected with COVID-19. Workers in this risk group may have frequent contact with travelers returning from international locations with widespread COVID-19 transmissions. See [Coronavirus \(COVID-19\) Considerations for Traveling Employees](#).

Workers fall into this category if their jobs are in areas where there is ongoing community transmission including, but not limited to, those who have contact with the general public (e.g., in schools, high-population-density work environments, and some high-volume retail settings).

Category 3: Lower Exposure Risk Jobs

Lower exposure risk jobs are those that do not require contact with people known to be, or suspected of being, infected with COVID-19, nor frequent close contact with

(i.e., within six feet of) the general public. Workers in this category have minimal occupational contact with the public and coworkers.

Focus of OSHA Inspections during COVID-19

The Plan indicates that workplaces in the high and very high exposure risk categories, “such as hospitals, emergency medical centers, and emergency response facilities, will typically be the focus of any inspection activities in response to COVID-19-related complaints/referrals and employer-reported illnesses.” COVID-19 complaints relating to work in the medium or lower exposure risk categories “will not normally result in an on-site inspection.”

Suspension of Compliance with Existing OSHA Recordkeeping Requirements (with Key Exceptions)

OSHA recognizes that determining whether COVID-19 exposure is work-related and thus recordable on the OSHA 300 log may not be possible at this time. As a result, OSHA has, for now, suspended enforcement of its recordkeeping requirements for COVID-19 cases, with a couple caveats. For information on OSHA 300 logs and OSHA recordkeeping requirements, see [OSH Act Requirements, Inspections, Citations, and Defenses](#).

First, the temporary suspension will not apply to (1) employers in the healthcare industry; (2) emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services); and (3) correctional institutions. Employers in these categories must continue to make work-relatedness determinations pursuant to 29 C.F.R. pt. 1904. The OSHA regulations require employers to 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 preexisting injury or illness.

Second, all employers must continue to record COVID-19 cases if (1) they have objective evidence that the infection may be work-related and (2) the evidence was reasonably available to the employer.

Note that state and local laws and ordinances may describe additional limitations or obligations on employers, such requiring particular protective coverings or similar protocols.

See [Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#). For additional OSHA guidance, see [COVID-19 \(OSHA\)](#), [Prevent Worker Exposure to Coronavirus \(COVID-19\)](#), and [Guidance on Preparing Workplaces for COVID-19](#). See also [COVID-19 and OSHA](#).

For more guidance on key OSH Act legal issues, generally, see [OSH Act Requirements, Inspections, Citations, and Defenses](#).

Best Practices for Handling Health and Safety Issues during Pandemics and COVID-19

For additional information on key OSHA pandemic and coronavirus recommendations and guidance on handling health and safety issues during pandemics and COVID-19, see [Pandemic Flu/Influenza/Coronavirus \(COVID-19\): Key Employment Law Issues, Prevention, and Response – Occupational Safety and Health Administration Best Practices for Preventing and Responding to Flu/Coronavirus Outbreaks in the Workplace](#).

Key Employment Laws to Consider during and after an Emergency

In addition to the OSH Act and state and local equivalents, employers also must remain cognizant of other legal obligations that they may owe to employees during an emergency. When updating emergency action plans (EAPs) or business continuity plans (BCPs), or in implementing them, employers should consider the applicability of the following employment laws and issues:

- **FLSA.** The Fair Labor Standards Act (FLSA) and state and local laws governing wages and working conditions.
 - For statutory requirements and exemptions under the FLSA, see the [Wage and Hour Statutory Requirements and Exemptions](#) task page. For compensation issues, see [Wage and Hour Compensation](#) task page.
 - **FMLA.** The Family and Medical Leave Act (FMLA) and state equivalents.
 - For FMLA information related to COVID-19, see [COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers](#). For additional information on the FMLA, see [FMLA Leave: Guidance for Employers and Employees](#). See also the [Family and Medical Leave practice note page](#) and the [Family and Medical Leave forms page](#).
 - For information on state family and medical leave laws, see the [Family, Medical, Sick, Pregnancy, and Military Leave column of Attendance, Leaves, and Disabilities State Practice Notes Chart](#).
 - **ADA.** The Americans with Disabilities Act (ADA), its amendments, the Rehabilitation Act, and state equivalents.
 - For more information on the ADA, see [Americans with Disabilities Act: Guidance for Employers](#). For more information on ADA and disability management, see the [ADA and Disability Management](#) task page.
 - **Title VII.** Title VII of the Civil Rights Act of 1964 (Title VII), as amended, and state and local equivalents.
 - For more information on Title VII, see [Title VII Compliance Issues](#).
 - For more information state discrimination, harassment, and retaliation laws, see [Discrimination, Harassment, and Retaliation State Practice Notes Chart](#).
 - **PDA.** The Pregnancy Non-Discrimination Act (PDA), and state and local equivalents.
 - For more information on PDA, see [Pregnancy Discrimination Act: Compliance Tips](#).
 - **WARN.** The federal Worker Adjustment and Retraining Notification (WARN) Act and state equivalents.
 - For more information on WARN and reductions in force, see [Reductions in Force and WARN Compliance](#) and [Reduction in Force \(RIF\) Alternatives](#).
 - **USERRA.** The Uniformed Services Employment and Reemployment Rights Act (USERRA).
 - For more information on USERRA, see [Attendance, Leaves, and Disabilities—Military Leave](#) task page.
 - For information on state military leave laws, see the [Family, Medical, Sick, Pregnancy, and Military Leave column of Attendance, Leaves, and Disabilities State Practice Notes Chart](#).
 - **Employee benefits.** Employee benefits for employees affected by disasters, including health insurance and 401(k) plans.
 - For more information on retirement plans, see [Employee Benefits and Executive Compensation – Retirement Plans](#) task page.
 - For more information on health and welfare plans, see [Employee Benefits and Executive Compensation – Health and Welfare Plans](#) task page.
 - **Discrimination, harassment, and/or retaliation.** Discrimination, harassment, and/or retaliation against employees, including those who comply with emergency evacuation orders.
-

- o For more information on discrimination, harassment, and retaliation, see [Discrimination, Harassment, and Retaliation](#) task page.
- o For more information state discrimination, harassment, and retaliation laws, see [Discrimination, Harassment, and Retaliation State Practice Notes Chart](#).
- **FFCRA and CARES.** The Families First Coronavirus Response Act (FFCRA); the Coronavirus Aid, Relief, and Economic Security Act (CARES Act); and other paid and unpaid leave enactments.
 - o For more information on the FFCRA, see [Pandemic Flu/Influenza/Coronavirus \(COVID-19\): Key Employment Law Issues, Prevention, and Response – FFCRA: Detailed Analysis](#).
 - o For more information on the CARES Act, see [Pandemic Flu/Influenza/Coronavirus \(COVID-19\): Key Employment Law Issues, Prevention, and Response – Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\): Brief Overview of Key Employment-Related Provisions](#).
- **Leave and paid time off (PTO) policies.** The employer's policies affording employees leave, vacation, and other benefits.
 - o For more information on attendance, time-off, and leave of absence policies, see [Attendance, Time-Off, and Leave of Absence Policies: Best Drafting and Administration Practices](#).
 - o For more information on state attendance, leave, and disabilities laws, see also [Attendance, Leaves, and Disabilities State Practice Notes Chart](#). For sample non-jurisdictional and state leave policies, see [Attendance, Leaves, and Disabilities State Expert Forms Chart](#).
 - o For more information on paid sick leave, see [Paid Sick Leave State and Local Law Survey \(Private Employers\)](#) and [Paid Sick Leave Policies Checklist \(Best Drafting Practices for Employers\)](#).
 - o For state laws on PTO, see [Paid Vacation and PTO State Law Survey](#).
- **NLRA.** The National Labor Relations Act and, if applicable, collective bargaining agreements.
 - o For information on labor-management issues, see [Labor-Management Relations](#) practice note page.
- **Employee privacy laws.** Laws governing employee privacy, such as the Genetic Information

Nondiscrimination Act (GINA), the Health Insurance Portability and Accountability Act (HIPAA), the California Consumer Privacy Act (CCPA) and other state and local privacy laws and ordinances.

- o For more information on GINA, see [Genetic Information Nondiscrimination Act \(GINA\) Employment Discrimination Prohibitions](#). For more information on GINA policies, For an annotated GINA policy, see [Genetic Information Non-discrimination \(GINA\) Policy](#). For state-specific practice notes regarding genetic information, see [Discrimination, Harassment, and Retaliation State Practice Notes Chart](#).
- o For more information on HIPAA, see [HIPAA Resource Kit](#).
- o For more information on CCPA, see [California Consumer Privacy Act \(CCPA\) Overview and California Consumer Privacy Act \(CCPA\) Resource Kit](#).

Handling Displaced Employees

Certain employees may be unable to return to work during an emergency due to government or health official mandates, the impact of the emergency on employees or other individuals, or the impact of the emergency on employees' commutes. Certain laws, like the FFCRA, include protections for certain employees in emergent situations like COVID-19. Employers may want to consider the legal and practical impact of shutdowns, furloughs, and employees unable to telework. For more guidance on telecommuting employees, see [Telecommuting Employees: Best Practices Checklist](#). For information on furloughs, see [Reduction in Force \(RIF\) Alternatives, What Employers Need To Know About Furloughs](#), and [Furloughs: Weighing The Unemployment Costs And Benefits](#).

Moreover, employers also may need to be cognizant of employees who typically travel for work. Certain government orders may impact the ability of those employees to return home or return to work, including quarantine orders applicable in locations to which they have travelled or upon return. Employers should stay abreast of these changes and the impacts they or other orders may have on their obligations to employees. For additional guidance regarding employee travel during the COVID-19 outbreak, see [Coronavirus \(COVID-19\) Considerations for Traveling Employees](#).

Steps to Institute a Successful Business Continuity Plan (BCP)

In light of the shutdowns that COVID-19 has caused and related health and government guidance and mandates, many employers are evaluating their plans for business continuity. Employers should create a realistic strategy for restarting and/or continuing business operations during and after crises to meet ongoing financial expectations and obligations and to protect employees and avoid potential employment-related claims.

Federal Government Guidance

Employers may want to consider implementing both an EAP and a BCP. FEMA has issued [Preparedness Planning for Your Business](#), a guide to help employers regain functionality after a disaster. FEMA has updated this guidance to include [FEMA's response to COVID-19](#) and includes a [toolkit](#) for employers. Additionally, the Department of Homeland Security (DHS) has provided employers with a BCP [template](#).

Business Continuity Plan Guidance

Proper business continuity planning can supplement and work in conjunction with an employer's EAP. In general terms, an EAP focuses on the safety of employees and an employer's responses to an emergency. A BCP, however, focuses on the overall survival of the business through and following an emergency. FEMA provides a worksheet and other tools for employers to consider when adopting

the elements of a BCP and the steps for implementing the same. See [FEMA: Business Continuity Plan](#).

Employers should perform a business continuity analysis, similar to the EAP formula described above, to identify the effects resulting from disruption of business functions and processes to make a decision tree or other plan that helps with recovery priorities and strategies. Employers can use FEMA's [Operational & Financial Impacts worksheet](#) to capture this information as discussed in its [Business Impact Analysis](#).

Moreover, employers should identify the resources, both internal and external, that are necessary and that would be expected to be available in an emergency, including personnel and working spaces, records, production facilities, utilities, and third-party services. Employers also may want to consider scenarios where production machinery becomes unusable, suppliers fail to deliver, technology is disrupted, or other similar business impacts that can stymie business operations.

Employers should regularly review their BCPs to address:

- Emerging technologies
- Financial obligations
- Changes in the law or in personnel or management within their companies
- Governmental programs and guidance –and–
- Environmental developments that may impact their operations

For an annotated BCP to help employers get started with drafting a BCP, see [Business Continuity Plan](#).

Richard D. Glovsky, Partner, Locke Lord LLP

Richard D. Glovsky, who co-chairs the Firm's Labor and Employment Practice Group, handles significant employment related litigation, including class actions, wage and hour issues, and discrimination and retaliation claims. Most significantly, Dick has become a trusted advisor and general counsel to various companies and their senior executives. Dick also prosecutes cases for financial services, healthcare, hospitality companies and other businesses to protect their trade secrets and to prevent former employees from violating non-competition and non-solicitation obligations. Dick has developed a niche specialty advising clients on Enterprise Risk Management (ERM) programs and Own Risk and Solvency Assessment (ORSA) reports.

Recently, Dick prevailed in a case in New Hampshire involving alleged violations of non-compete agreements. In the past year or two, he concluded expeditiously a trade secret theft case by securing the entry of a permanent injunction in Massachusetts in a case arising out of the state of Michigan. Similarly, Dick wrapped up litigation by avoiding class certification on behalf of a construction company client and secured a verdict in a class action case in the United States District Court for the District of Florida for a Paris-based client. He also prevailed in a preliminary injunction context after two days of trial in a matter in the United States District Court for the Southern District of Florida involving violations of a former executive's non-solicitation obligations. In the United States District Court for the Eastern District of Pennsylvania, Dick first-chaired, and his client prevailed, in one of the few evidentiary hearings that have been conducted on the issue of class certification.

Jordon R. Ferguson, Associate, Locke Lord LLP

Jordon Ferguson's practice is devoted to providing litigation and counseling services to employers on national and state-specific bases.

Jordon has extensive experience defending and prosecuting claims on behalf of employers on individual, representative, and class-wide claims before state and federal courts and governmental agencies, including the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, and the California Division of Labor Standards Enforcement. He has assisted clients with defending myriad claims, including claims of employment discrimination and harassment, violation of family and medical leave laws, as well as class, collective, and representative actions brought under the Fair Labor Standards Act (FLSA), California Labor Code, and the California Private Attorneys' General Act (PAGA).

Jordon is an aggressive litigator that partners with his clients to promote "best practices" focused on litigation avoidance. He regularly advises employers regarding their drafting and implementation of new policies and procedures. Moreover, a large share of his practice involves working hand-in-hand with his clients to evaluate risk. To wit, Jordon is frequently called upon for internal and external investigations, on-site employee and management trainings, and the handling of sensitive workplace issues.

Rufino Gaytán III, Associate, Locke Lord LLP

Rufino Gaytán counsels employers in every aspect of labor and employment law. Rufino has extensive experience advising clients on workplace health and safety issues, and he has represented clients before the Occupational Safety and Health Administration (OSHA). Rufino has advised and represented clients during OSHA's initial onsite inspections, negotiated the reduction or elimination of alleged violations and penalties and defended clients before the Occupational Safety and Health Review Commission.

Rufino has also developed considerable experience representing clients in labor disputes, including collective bargaining negotiations, unfair labor practice charges, union election petitions and most other aspects of a collective bargaining relationship. Rufino regularly defends clients before the National Labor Relations Board (NLRB) and has represented clients in labor arbitration proceedings.

This document from Lexis Practice Advisor[®], a comprehensive practical guidance resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis[®]. Lexis Practice Advisor includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practice-advisor](https://www.lexisnexis.com/practice-advisor). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.