

*ADA, COVID-19 and the Pandemic—
(1) Reasonable Accommodations;
(2) Direct Threat, and
(3) Return to Work Issues.*

Presented by

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Disclaimer

- ▶ The opinions expressed in this presentation by Leslie Hayes are hers alone and not the opinions of the Idaho Office of Attorney General.
- ▶ Likewise, the opinions expressed by Jacki Fearnside and Sim Avila are their opinions alone and not the opinions or positions of St. Alphonsus or St. Luke's. Some of the facts or anecdotes presented may have been changed slightly to preserve privacy and confidentiality.
- ▶ As the COVID-19 pandemic evolves and different federal and state authorities and agencies respond to the needs faced by this event, the legal analysis will continue to evolve.

Overview

Intent is to have a dialogue and allow for questions as the panel addresses the following issues

- ▶ Reasonable Accommodation Issues - **Jacki Fearnside**
- ▶ Direct Threat Issues - **Leslie Hayes**
- ▶ Return to Work - **Sim Avila**

“New Peak for U.S. Cases”

NYTimes - October 24, 2020

- ▶ Thirteen states endure their worst week yet
- ▶ Warnings of a Cold-Weather Surge
- ▶ Europe is enduring a second wave
- ▶ Idaho is experiencing the same bad news with many counties facing the highest number of infections.
 - On October 26, 2020, Governor Little announced that the State would be rolling back into Stage 3 of the Rebound Plans.

Reinfection

AJMC - Oct. 12, 2020

- ▶ *The United States has its first reported of coronavirus reinfection, in a young male patient with no underlying immune conditions.*
- ▶ A young man in Nevada is the first reported case of coronavirus reinfection in the United States and the fifth case of reinfection worldwide,...The second reinfection was more serious than the first, but he has since recovered.
- ▶ Mark Pandori, PhD, lead author of the study said in a statement that the case study suggests that people who have previously tested positive for COVID-19 should continue to take serious precautions, including practicing social distancing, wearing face masks, and handwashing.

Coronavirus Can Survive on Surfaces for Weeks

WEBMD - Oct. 12, 2020

- ▶ The coronavirus can remain on some surfaces for 28 days, including phone screens, paper money, and stainless steel, according to a new study published in the *Virology Journal*.
- ▶ The study also found that the virus survived longer at lower temperatures and tended to last longer on non-porous or smooth surfaces such as glass and stainless steel rather than porous or rough surfaces such as cotton.

Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission

CDC Update - October 5, 2020

- ▶ Infections with respiratory viruses are principally transmitted through three modes: contact, droplet, and airborne.
- **Contact transmission** is infection spread through direct contact with an infectious person (e.g., touching during a handshake) or with an article or surface that has become contaminated. The latter is sometimes referred to as “fomite transmission.”
- **Droplet transmission** is infection spread through exposure to virus-containing respiratory droplets (i.e., larger and smaller droplets and particles) exhaled by an infectious person. Transmission is most likely to occur when someone is close to the infectious person, generally within about 6 feet.
- **Airborne transmission** is infection spread through exposure to those virus-containing respiratory droplets comprised of smaller droplets and particles that can remain suspended in the air over long distances (usually greater than 6 feet) and time (typically hours).

ADA, COVID-19 and the Pandemic— (1) Reasonable Accommodations

Reasonable Accommodation: a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.

Undue Hardship: an accommodation poses an undue hardship if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.

Common Requests for Accommodation and Relevant Considerations

- ▶ Requests from employees to either work from home or in another department where there will be reduced exposure to others
 - ▶ Ability to effectively perform job remotely
 - ▶ Alternative accommodations if job can only be performed in the workplace - e.g., changes to work environment, PPE, temporary job restructure, temporary transfer to another position, or modifying work schedule to reduce exposure to others
 - ▶ Leave of absence is another alternative accommodation if job cannot be performed remotely and workplace modifications insufficient
 - ▶ All employees who are high risk for COVID-19 do not necessarily have a disability
 - ▶ No requirement to accommodate an employee without a disability based on the disability-related needs of a family member - e.g., an employee without a disability is not entitled to work from home as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure

Common Requests for Accommodation and Relevant Considerations

- ▶ Exemption from masking requirements for employees who cannot tolerate masking due to medical or psychiatric condition
 - ▶ Consider employee's ability to tolerate other PPE (e.g., different types of masks, face shield), as well as whether the employee can tolerate limited use of mask (i.e., wear mask until he/she is isolated in office)
 - ▶ Alternative accommodations: face shield/different type of mask; work from home; temporary reassignment; modifying work schedule; leave of absence
 - ▶ Direct threat to employee and others (i.e., coworkers, customers) if cannot wear a mask in the workplace

EEOC Resources

- ▶ Pandemic Preparedness in the Workplace and the Americans With Disabilities Act
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- ▶ What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

ADA, COVID-19 and the Pandemic— (2) Direct Threat

Direct Threat: a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by a reasonable accommodation.

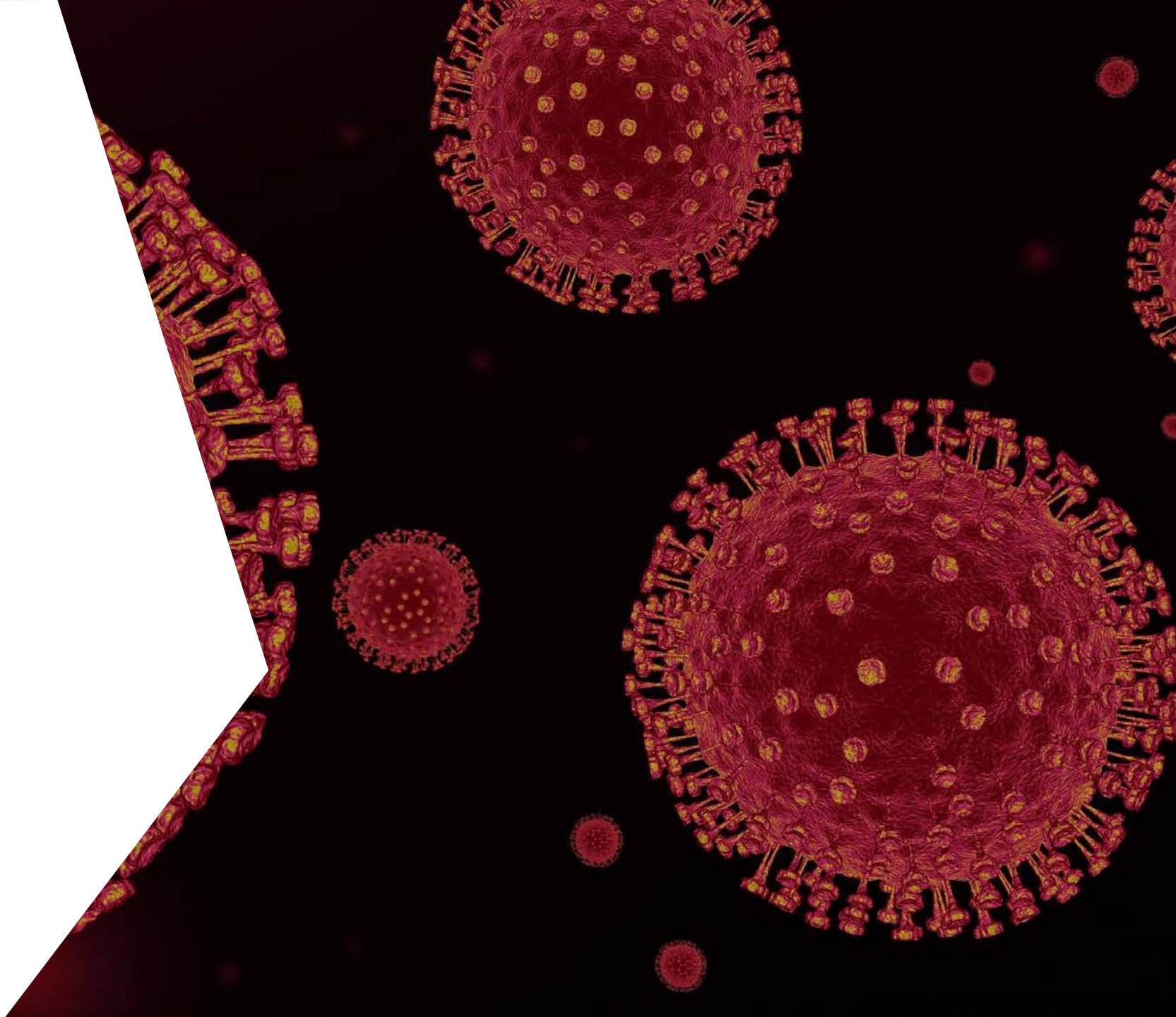
Idaho State experience

(2) Direct Threat (cont.)

- ▶ Some issues faced with direct threat concerning employees?
- ▶ How about customers and visitors?
- ▶ As entities reintegrate folks back - how do we account for potential increases in managing direct threat?
 - Testing employees?
 - Medical screenings?
 - Additional sick leave benefits
- ▶ Staffing shortages and direct threat

Return to Workplace Issues

- ▶ Important to develop a return plan that is:
 - Thoughtful
 - Practical
 - Sustainable
 - Reversible



Laws to Consider

- ▶ Americans with Disabilities Act
- ▶ Genetic Information Nondiscrimination Act
- ▶ Family Medical Leave Act
- ▶ Families First Coronavirus Response Act
- ▶ Emergency Paid Sick Leave Act
- ▶ Title VII of the Civil Rights Act
- ▶ Age Discrimination in Employment Act
- ▶ Fair Labor Standards Act
- ▶ Occupational Safety and Health Act

Some Applicable Resources

- ▶ OSHA Guidance on Preparing Workplaces for COVID-19
<https://www.osha.gov/Publications/OSHA3990.pdf>
- ▶ CDC Guidance - <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- ▶ Other Sources of Information to Consult
 - Be familiar with the stages of the Stay Healthy Order
 - Be familiar with any regional reversion orders or Health District Orders
 - Be familiar with municipal requirements
- ▶ The challenges are not only legal; they are logistical and practical

Safety & Health

- ▶ All frequently touched surfaces should be cleaned, as necessary. Once cleaned, all frequently touched surfaces should be disinfected with disinfectant wipes or a bleach and water mixture. Any person performing the cleaning must be trained on the cleaning task and the Safety Data Sheet (“SDS”) of the cleaning products.
- ▶ How will this be done?

Tactical and Operational Issues



- Getting into the buildings
- Getting to office, cubicles/etc.
- Social distancing
 - ✓ *Reduce number of seats*
 - ✓ *Increase physical space among employees*
- Capacity issues?

Working on the premises vs. WFH

- Continue to WFH?
- Essential workers?
- Occupancy
- Traffic flows
- Conference rooms
- Congregation around break rooms, kitchen?
- Dealing with vulnerable populations



Compliance and Safety Challenges

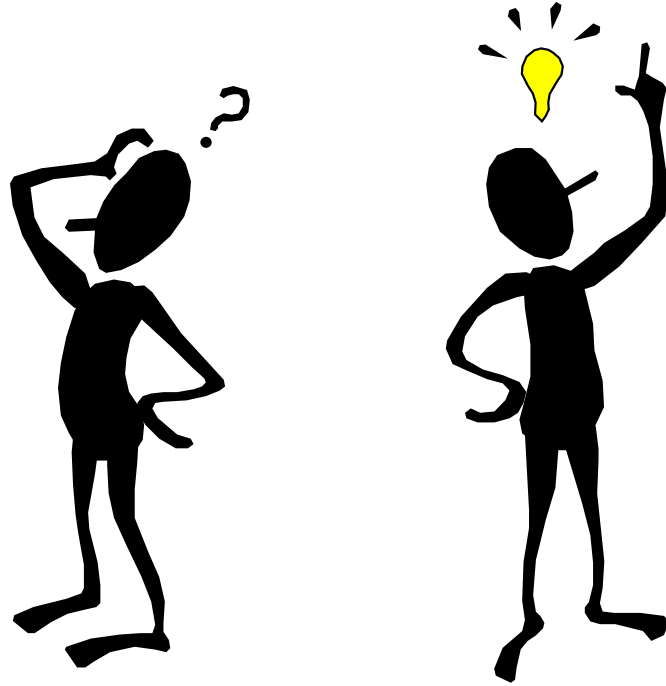
- Screening of employees, visitors, contractors?
- Obtaining supplies?
- Training?
- Who manages these issues?



Face Coverings

- ▶ According to the CDC, the use of face coverings slows the spread of COVID-19 by helping to prevent asymptomatic people from unknowingly transmitting the virus.
- ▶ The CDC lists five criteria for “cloth face coverings,” which should:
 - Fit snugly but comfortably against the side of the face;
 - Be secured with ties or ear loops;
 - Allow for breathing without restriction;
 - Include multiple layers (two or more) of fabric;
 - Be able to be laundered and machine-dried without damage or change to shape.
- ▶ NOTE: A face covering is not PPE.

Questions and Answers



Thank you