



# THE WORLD AFTER COVID-19

THE CASE FOR INFECTION CONTROL AND RETURN TO WORK STRATEGIES FOR NON-HEALTH CARE BUSINESSES



# INTRODUCTION

The coronavirus pandemic has revealed, among other things, a critical vulnerability in organizations across the nation. Businesses simply lack the capacity to manage mass sick leaves, infectious disease mitigation, and, perhaps most importantly, a safe return to work. While traditional HR processes around reductions in force, leave administration, turnover, eNPS, performance management and culture are designed, ultimately, to mitigate financial risk, the coronavirus pandemic introduced a new risk profile to this design - workforce destruction. That is, the risk that infectious disease becomes so prevalent in a given workforce that such workforce is no longer able to perform any of the functions required by the business. The magnitude of the risk presented by infectious diseases in the workplace is so severe, now demonstrably so, that businesses must stop relying solely upon risk likelihood in the calculation of risk tolerance. It is time for HR, Legal, and Risk teams to: (i) adopt internal infection control standards, and (ii) adopt safe return to work processes that will, in combination, mitigate the potential for the spread of infectious disease, and enable a manageable standard to ensure the continued safety of the workforce free from the risk of illness, epidemic or otherwise.

## A WORD ABOUT RISK

The relative risk appetite of businesses, while tempered by overall risk tolerance, has historically been driven by an understanding of the upside and downside of a risk combined with an intentionality around taking risks in line with measurable financial consequences.<sup>1</sup> This approach has allowed businesses to become comfortable handling risk/reward/penalty decisions in many situations. Disaster preparedness, incident response planning, and cybersecurity all contribute to business continuity in the face of the very real risks businesses face every day. Many of these tools can be used to great effect to manage, on a reactive basis, the needs of business balanced against the safety of its workforce.

When measuring risk likelihood, however, past

practice should not necessarily inform future planning. At the start of the current crisis, recent historical outbreaks were used as a proxy for what risks to expect, and therefore, which risks to manage. As a result, governments and businesses around the globe missed out on precious days and in some cases weeks, which could have materially altered the trajectory of COVID-19.<sup>2</sup> Since the perceived likelihood of infectious disease was deemed accounted for in the narrative of the collective HR, Legal and Risk playbooks in this nation, little to no steps were taken to balance the magnitude of risk presented by infectious disease against its likelihood. Businesses and the HR, Legal, and Risk business units that serve them have been forced to rethink risk in the context of an event that, until now, was deemed akin to the seasonal flu.

The fallout of business action, and, more to the point, inaction, are already manifesting. Recently, the family of a Chicago-area Walmart employee filed a wrongful death action against the big box retailer for allegedly failing to keep its employees protected against the coronavirus. Had Walmart instituted infection control and safe return to work protocols, it is highly unlikely that this individual risk of high potential magnitude would have occurred.

<sup>1</sup> See, *Risk Appetite & Tolerance Guidance Paper*; The Institute of Risk Management (2011).

<sup>2</sup> See *Understanding the Economic Shock of Coronavirus*; Harvard Business Review, Carlsson-Szlezak, et al. (March 27, 2020).

# INFECTION CONTROL

For years, OSHA has considered various regulatory mechanisms to require an infectious disease standard beyond the health care setting. While OSHA's Bloodborne Pathogen standards yielded meaningful action in hospitals and other health care settings, suggestions to vertically apply such standard to other high-risk environments, such as K-12 schools, has been one option considered. Other approaches have included: risk-based assessments, cost/benefit analysis, and hazard assessments.<sup>3</sup> Adding to the complexity are other considerations such as length of exposure, defining populations, and even role specific considerations for occupations such as flight attendants, teachers, corrections officers, and independent contractors.<sup>4</sup> In the Spring of 2017, OSHA added an Infectious Disease Notice of Proposed Rulemaking to its agenda for long term action.<sup>5</sup>

While it remains to be seen where OSHA will settle on its approach, it is reasonable to assume that the coronavirus will act as a catalyst for action. HR, Legal and Risk teams should be on the lookout for new developments from OSHA related to infectious disease standards and should be proactive in engaging executive leaders to discuss the appropriate response. In the meantime, these teams will be well served to proactively champion internal infection control and infection mitigation standards.

**From an infection control perspective, the following topics are consistent with best practice:**

- Hand hygiene
- Methods of disease transmission
- Methods of sterilization, disinfection, and cleaning
- Isolation procedures
- Remote work policies and procedures<sup>6</sup>

Infection control for non-health care businesses should not be viewed as a political or a policy issue. If businesses do not act and set the standard for themselves, OSHA will intervene. By instituting an internal infection control standard, businesses across the nation will finally be taking proactive steps to address the spread of infectious disease in the workplace. Aside from the risks recently manifested by the coronavirus pandemic, businesses in the United States lose over \$178 billion every year on sick leave.<sup>7</sup> As such, infection control will have a secondary effect on mitigating the day to day infectious diseases that impact workers every year. That said, even the best infection control plans cannot eliminate all illness. Therefore, infection control by itself is only half of the solution to the magnitude of risk presented by infectious disease.

<sup>3</sup> *Summary of Report of Stakeholder Meetings on Occupational Exposure to Infectious Diseases*; OSHA, (July 29, 2011).

<sup>4</sup> See *Id.*, pp.5-6.

<sup>5</sup> [www.osha.gov/dsg/id/](http://www.osha.gov/dsg/id/)

<sup>6</sup> *Medical Employer's Guide 16th Ed.*, 4.12 Infection Control, (2008).

<sup>7</sup> [www.ibiweb.org/poor-health-costs-us-employers-530-billion-and-1-4-billion-work-days-of-absence-and-impaired-performance](http://www.ibiweb.org/poor-health-costs-us-employers-530-billion-and-1-4-billion-work-days-of-absence-and-impaired-performance); Integrated Benefits Institute (2017)



## SAFE RETURN TO WORK

It is likely that a vaccine for Covid-19 will not widely be available for **12 to 18 months**. Returning workers to their jobs now, before widespread immunity can be demonstrated, risks a second wave of infection.<sup>8</sup> This begs the next question faced by HR, Legal and Risk teams -

### How do we ensure that workers coming back are not re-infected and/or do not re-infect others?

Not only that, we now recognize that the magnitude of risk for a future epidemic or pandemic is just as great, if not greater than the coronavirus. An effective Safe Return to Work protocol can enable HR, Legal, and Risk teams to ensure the right procedures, for the right workers, at the right time. The framework of Safe Return to Work should be broad enough to be used now for COVID-19 and should also be designed to address Return to Work following other infectious diseases. A certification of an individual worker's clearance to work will be an essential element of Safe Return to Work. A thorough "Certification to Work" methodology will enable businesses to return workers to their jobs effectively and will likewise enable businesses to place workers on leave if any signs of infectious disease are identified. In its most simple iteration, a Certification to Work is a self-attestation by a worker that he or she is not exhibiting any signs or symptoms of infectious disease. Such an approach can be utilized daily to

(i) ensure that no signs of infectious disease are

present in the workforce and

(ii) to create a record that can be used defensively by the business in the event it is challenged on a workman's compensation claim, an alleged OSHA violation, or even a civil lawsuit for personal injury.

Such data could also be aggregated and used to identify hotspots for infectious disease and ramp up the use of personal protective equipment, sanitization, hand hygiene, and any other re-training that may be beneficial to that geography. Clearly, some workers will require a more nuanced approach. In certain situations, businesses will need to balance confidential health information with the need to ensure the safety and health of the overall workforce. Understanding the demographics and, if appropriate, underlying health conditions of workers will allow businesses to categorize those workers into risk categories that can each be managed as appropriate through an HR approved confidentiality bound partner or business process.

<sup>8</sup> *A Detailed Plan for Getting Americans Back to Work*; Harvard Business Review, Chandra, et al. (April 1, 2020).

Fundamentally, Certification to Work is also a new way to manage an old problem. Sick leave management, outside of federal or state mandated leave for underlying conditions, has been somewhat of a non-sequitur. By asking workers to certify their lack of an infectious disease, businesses can begin to have more control over sick leave generally, through measurement combined with management action. Certain early adopters in the Total Worker Health movement are already beginning to use connected devices, such as FitBits, Apple Watches, and Bluetooth enabled thermometers to begin to track the health of worker populations. By enabling Certification to Work, businesses will be preparing for the next wave of infectious disease, thereby minimizing the impact such an event can have on the workforce.



## CONCLUSION

HR, Legal and Risk teams are well positioned, at the intersection of business and worker risk, to champion a novel approach designed to ensure the risk of workforce destruction is materially mitigated. Without question, businesses and workers are on notice that infectious diseases, unchecked, will result in business failure. Businesses and workers are aligned and incentivized to enable the other to do everything possible to ensure the continuity of the business, and the health and safety of the workforce. By employing the concepts of infection control, and safe return to work, businesses and workers will prepare themselves to manage through the duration of the coronavirus pandemic while, at the same time, creating a structure that will provide lasting protection in the face of future epidemics, pandemics, localized illness, or individual illness in workforces across the country.



### About the Author

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Chuck Kable is Chief Legal Officer and Chief Human Resources Officer for Axiom Medical. Chuck is a 20 year attorney with over 10 years of experience serving as an executive leader over high performing Legal, HR, Talent Acquisition, and Compliance teams for private-equity backed businesses. Chuck is a pragmatic executive focused on enabling business growth. Prior to joining Axiom, Chuck was Chief Legal Officer for Emerus Holdings, Inc., the nation's first and largest operator of micro-hospitals, where he led the legal, HR, and compliance teams. Chuck has an undergraduate degree in economics from Michigan State University, and a law degree from Western Michigan University. He is licensed in Michigan and Texas.