PRESENTER INFO

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Please note that this presentation is a general summary only and does not attempt to cover your specific situation or detail the obligations you have under your state or provincial dealer law. Before determining a course of action, we encourage you to review this with the attorney of your choice for a specific assessment of your situation.
Strategies and Suggestions

With the virus becoming more and more widespread every day, we are trying to provide Employers with a range of strategies for dealing with the Coronavirus and the risks it creates.

It is vital to note that this information can change daily, and it is important to check the CDC and EEOC guidance pages frequently.

- [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm)
Objective: Keep Your Dealership Safe

- Guidance provided by the CDC for Businesses and Employers
General Guidance

Employers are permitted to (and should!) send home employees who come to work visibly sick, whether from Coronavirus or any other contagious illness.

Discrimination Prevention:
- Treat all employees who are similarly situated the same.
Establish Point(s) of Contact

Assign an individual or small team of individuals to monitor the latest developments, report to management, and keep employees informed.

The ever-changing recommendations from local, state and Federal entities and health experts makes having a designated person to do this critical.

When major developments require changes in operation, this team or individual should be ready to inform employees of any necessary changes. Delivery may vary depending on operational considerations.
Consider Implementing Policies

Employers should consider establishing a written action plan and policies specifically tailored to their own needs and a system for communicating internal policies related to the Coronavirus to employees.

Employers may have different needs when responding in an epidemic depending on the operational demands and local/state regulations.

These plans need to be flexible and modifiable while allowing for consistent treatment of similarly situated employees.
Absenteeism

- Implement plans to continue essential business functions even if key staff members are absent.
- Assess your essential functions and the reliance that others and the community have on your services or products.
- Be prepared to change your business practices if needed to maintain critical operations.
- Employers with more than one business location are encouraged to provide local managers with the authority to take appropriate actions as outlined in the dealership’s written policies and plans.
Workplace Safety

- Under OSHA, employers have a duty to provide their employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

- The CDC’s (current) guidance states that Coronavirus is spread mainly through person-to-person in close contact situations (up to 6 feet) through respiratory droplets produced when coughing or sneezing. Consider social distancing policies to mitigate the spread where possible.

- It is not clear whether a person who touches a surface where the virus is located, and then touches their mouth or nose will contract the virus but precautions are advisable.

- Note also that, unlike the common cold and flu, OSHA has determined that the Coronavirus is a recordable illness when a worker is infected on the job, and OSHA recordkeeping requirements apply.

- Many states and localities impose similar or additional safety requirements that may also apply to the Coronavirus.
CDC Recommendations

• Actively encourage sick employees to stay home and seek prompt medical attention

• Send employees home immediately if they exhibit signs of acute respiratory illness such as cough or shortness of breath

• Educate employees about the employer’s sick leave policy as well as respiratory and hand hygiene

• Provide tissues and no touch disposal receptacles for use by employees

• Perform frequent cleanings

• Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol, or wash hand with soap and water for at least 20 seconds. Preferably, if an employee’s hands are visibly dirty, they should wash their hands.
Do I need to purchase Facemasks?

• The CDC does not recommend that anyone who is well should wear a facemask.

• However, if you are showing symptoms, caring for someone showing symptoms, a health worker, or are instructed by a health professional then you should wear a mask.
Worker’s Compensation?

• If an employee contracts the Coronavirus at work or during a work-related activity (such as business travel), the employer should notify its workers’ compensation carrier immediately.

• Workers’ compensation may provide coverage for employees, but bear in mind that unpaid interns, independent contractors and third-party vendors are typically not covered by workers’ compensation and may present greater liability risks.
What to do if an employee tests positive?

• Make sure they do not come to the workplace to prevent a further infection of your employees

• Instruct your employee to follow orders they are given from healthcare professionals regarding their diagnosis

• The recommended time away from the office is 14 days, after a quarantine for 2 weeks your employee is most likely allowed to come back to work

• Take all necessary precautions and continue to clean the workplace as recommended by the CDC
Don’t Forget - Unionized Employers

• Before taking any actions, employers should check with the Unions they associate with as to whether they have any obligation to Notify or Due Process with the Unions over any planned action.
Travel Restrictions

• Employers should consider prohibiting or strictly limiting business travel especially to high-risk areas.

• Employers should also consider discouraging employees from personal travel to countries and areas where there are coronavirus outbreaks.

• Employers should advise employees that if they travel to one of the high-risk countries identified by the CDC, they are required to advise HR and stay home in self quarantine for a period of 14 days from the time they left such a country.
Self-Quarantine upon return from another Country

The CDC advises that employer should consider a 14 day period of quarantine, it is important for the employee to monitor his/her health and practice social distancing by doing the following:

- Take your temperature with a thermometer two times a day and monitor for fever.
- Also watch for cough or trouble breathing.
- Stay home and avoid contact with others. Do not go to work or school for this 14-day period. Discuss your work situation with the Company before returning to work.
- Do not take public transportation, taxis, or ride-shares during the time you are practicing social distancing.
- Avoid crowded places (such as shopping centers and movie theaters) and limit your activities in public.
- Keep your distance from others (about 6 feet or 2 meters).
Other Event and Travel Considerations

• Consider whether in-person conferences or similar events in all locations should be postponed or conducted via teleconference or videoconference.

• Employers are increasingly postponing such events since attendees may be reluctant to travel in the current environment, and to avoid risks associated with potential Coronavirus exposures.
Potential Liability from Travel Restrictions

• Although employers can restrict work-related travel and can generally require employees to stay away from work if they have traveled to an area of high risk of being infected by COVID-19, prohibiting personal travel to certain areas is problematic and is illegal in some states.

• Employers should also keep in mind that for-cause termination provisions in union or other contracts or policies may be implicated if an employee is terminated for not following a personal travel restriction.

• Employers should consider requiring employees to advise HR if they or a member of their household has traveled to a country or area where COVID-19 is widespread.
Work From Home Policies

• Employers should review any existing work from home policies and modify them if appropriate.

• Employers should at least plan for the possibility that certain offices or facilities might be closed or forced to operate with reduced staff and should plan if employees may be required to work from home.

• If non-exempt employees work from home, employers must have in place a system to track all hours worked.
How will compensation work during the outbreak?

The answer to this question will depend on, among other things, whether employees are considered exempt or non-exempt under the Fair Labor Standards Act ("FLSA"), applicable state or local laws, and employer policies or contracts (including collective bargaining agreements if any).

- Nonexempt employees generally do not need to be paid for time not worked for Coronavirus-related or other absences.
- Exempt employees generally must receive their full weekly pay for any week in which they perform more than a \textit{de minimis} amount of work (although depending on the specific facts, state laws, and employment policies, it may be permissible to deduct paid time off for time not worked because of sickness).
- As a general rule, if an exempt employee has exhausted his or her PTO days, that employee’s pay cannot be docked \textit{unless} the employee is absent for a full day because of illness, disability, or personal reasons. Moreover, an exempt employee need not be paid for a full week absence.
Non-Exempt Employees

If non-exempt employees are permitted to work from home special care should be taken to ensure that they are

- accurately tracking their hours worked
- paid for all hours worked
- complying with the employer’s policies including meal and rest break policies
- understanding whether they need to seek authorization before working overtime
Are Employers allowed to lay people off in response to Covid-19?

• Litigation for retaliation is possible if an employer decides to lay off employees.

• Despite the risk of litigation, it may be necessary to lay employees off to keep a dealership financially viable.

• Before making decisions regarding lay offs your dealership should perform a business and risk analysis and make the decision based upon the that completed analysis.
Changes In Unemployment and Paid Leave Policies

• Employers concerned with retaining key personnel need to consider that some employees may not be able to afford to go for any length of time without a paycheck.

• Consider whether some modification of current policies on paid leave need to be instituted, at least on a temporary basis to prevent a sick employee from coming to work and infecting co-workers.

• Some states have announced that they will allow employees to collect unemployment benefits if they are absent from work for illness caused by the Coronavirus or because they are caring for a sick family member suffering from this virus.

• Consider coordinating company benefits with any available government or short-term disability benefits in order to discourage such employees from coming to work and infecting others in your workforce.
ADA Concerns

Notably, employers should remember that the ADA generally does not permit employers to make inquiries about a current employee’s medical information or status or ask employees to submit to medical examinations except in narrow circumstances, such as when an employer has a reasonable belief, based on objective evidence, that the employee poses a “direct threat due to a medical condition” to themselves or others.

Any information that an employer does obtain from an employee or the employee’s health provider about an employee being infected with the Coronavirus must be kept confidential and apart from the employee’s personnel file, and the employer should not distribute information beyond those who have a need-to-know this information.

Employers may tell other employees that they may have been exposed to the Coronavirus and thus should seek medical attention but may not reveal the name of the employee who has already contracted the virus. It is not unlawful to tell an employee that he or she may voluntarily reveal to others in the workplace that he or she has contracted Coronavirus.
Is Covid-19 a disability under the ADA?

• A Coronavirus infection does not (ALONE) constitute a disability under the Americans with Disabilities Act ("ADA") or similar state or local laws because of its temporary nature.

• The ADA, however, protects employees who are “regarded as” disabled.

• Thus, perceptions of employees who have been exposed to the Coronavirus or are thought to have been exposed, or as discussed below, who have disabling conditions that make them more vulnerable to the Coronavirus may still be entitled to protections.

• Employers should seek legal advice before taking adverse action related to confirmed or assumed Covid-19.
Do employers have to accommodate individuals diagnosed with Covid-19?

Q: I have an employee who tested positive for COVID-19. Am I required to accommodate them under the ADA?

The answer: it depends.

- In considering such requests, the employer should focus on, among other things, whether the employee is seeking accommodation for some other condition that makes them particularly vulnerable to COVID-19, or because of a diagnosed anxiety or other mental or emotional issue triggered by concern over the Coronavirus.

- Such preexisting conditions may themselves be disabilities for which potential accommodation may be required.

- If the request is not due to some other underlying condition, the employer should treat the request within the parameters of its existing policies, including any new policies developed especially for addressing the Coronavirus, taking care to ensure that those policies are consistently enforced.
Paid Leave and FMLA

• Now is a good time to remind employees of current policies related to paid and unpaid leave.

• Coronavirus-related absences, both for employees who are sick and employees caring for sick family members, may qualify as “serious health conditions” triggering the FMLA and similar state or local laws guaranteeing unpaid leave.

• Some jurisdictions have paid sick leave laws that may cover absences for the illness of an employee or family member and may also cover absences due to closures of an employee’s child’s school or daycare facility.
ADA Concerns – EEOC Guidance

How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

➢ During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
ADA Concerns – EEOC Guidance

When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

➢ Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

➢ According to the CDC, a fever is a temperature of 100.4°F/38°C or higher
ADA Concerns – EEOC Guidance

Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?

➢ Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
ADA Concerns – EEOC Guidance

When employees return to work, does the ADA allow employers to require doctors’ notes certifying their fitness for duty?

➢ Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.
Avoiding Discrimination

Although an employer may send an employee home based on a reasonable belief that the employee has been in contact with the Coronavirus, it is important to treat all similarly-situated employees equally.

Employers should also take care to follow existing policies when employees request leave or report workplace safety issues related to the Coronavirus to reduce exposure to potential retaliation claims under OSHA, the FMLA, or other applicable laws. In fact, employers should consider proactively reminding its workforce, and, in particular, its supervisors, about obligations to refrain from Coronavirus-related discrimination or harassment, and to report instances of same.
Families First Coronavirus Response Act

• Passed by the Senate on March 18, 2020
• Signed by President Trump on March 18, 2020
• Goes into effect on April 2, 2020
• An employee is entitled to 80 hours of paid sick time. Unlike the payroll requirement, employees are immediately eligible for this leave.
• The bill includes refundable tax credits for employers that are required to offer emergency FMLA or paid sick leave.
• Phase 3 of this legislation is anticipated in the coming month which will include additional tax relief and other small business supports.
State Laws Relevant to Covid-19 Layoffs

Before laying off an employee/employees, check with your legal counsel to determine, what (if any) your WARN obligations are and any equivalent state or local legislation OR legislation passed specifically in response to Covid-19.

- Must meet the employee threshold for full time/part time employees to fall within the purview of Warn. For the federal WARN obligations, there are exceptions which may apply.
- There are notification and process requirements set forth under WARN.
- Ensure your HR department is aware of these federal obligations and is up to date with new requirements state by state if you are a multi-state employer.
EDA – Your Industry Resource

EDA Legal Hotline

Legislative Updates
  ◦ Federal Bill Summary
  ◦ State By State Updates on Legislative Action

Legal Experts

Online Resource Center
  ◦ https://www.equipmentdealer.org/covid-19-resources/

FOLLOW UP: ahoffman@equipmentdealer.org