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Coronavirus/COVID-19: Update for Employers

Tyler Hibler, Thomas Godar, and Avi Meyerstein
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Presenters



Thomas Godar

Partner
Madison, WI
608.234.6064
Thomas.godar@huschblackwell.com

Tom advises employers on issues such as wage and hour claims, discrimination claims, confidentiality and noncompete agreements, independent contractor relationships, recruiting and retention, policy development, training and discipline. He represents clients before the National Labor Relations Board, the Wisconsin Employment Relations Commission, and other state and federal administrative agencies. [Full Bio](#)



Tyler Hibler

Senior Counsel
Kansas City, MO
816.983.8325
tyler.hibler@huschblackwell.com

A fierce advocate for labor and employment clients, Tyler aims to protect clients—inside and outside the courtroom. Tyler has a decade of experience defending clients against administrative complaints and investigations issued by government enforcement agencies, such as the EEOC, NLRB, OSHA, and Department of Labor. He also routinely conducts workplace investigations on behalf of clients. [Full Bio](#)



Avi Meyerstein

Partner
Washington, DC
202.378.2384
Avi.meyerstein@huschblackwell.com

Avi focuses his practice on complex investigations, workplace safety and health matters, and litigation. When a crisis or accident occurs, Avi and his team provide rapid-response crisis management. He brings years of experience managing complex investigations, interacting with government agencies, and preparing for potential litigation to address serious and fatal accidents and white collar issues. [Full Bio](#)

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Key Considerations

- The information provided is based upon our current understanding of the COVID-19 pandemic, and employers should remember that guidance is likely to change.
- Employers need to prepare for extended business interruption.
 - When asked when life might go back to normal by ABC News on March 15, Dr. Anthony Fauci, the nation’s leading expert on infectious diseases, stated that it will likely be several weeks to a few months.
- Due to the fluidity surrounding COVID-19 and the response, it is strongly recommended that companies seek legal counsel on key decisions.

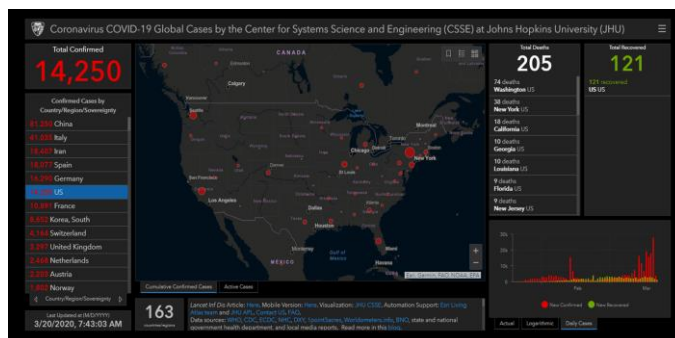
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Current Spread of the Virus

- There is a confirmed case of the virus in every US state.
- The CDC has noted that four states, Washington, California, Florida, and New York are experiencing sustained community spread.



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Emergency Orders

- On March 11, 2020, the World Health Organization declared COVID-19 to be a pandemic.
- National
 - President Trump declared a National Emergency on March 13, 2020.
 - On March 16, 2020 the CDC issued recommendations to avoid gathering in groups of 10 or more people and to avoid all non-essential travel.
- State
 - As of March 17, 2020, all 50 states have declared a state of emergency.
 - California has issued a statewide, mandatory Stay-At-Home Order.
- Local
 - Numerous cities and counties have ordered residents to shelter-in-place.

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Recent Legislative Actions

- Families First Coronavirus Response Act
 - Emergency Family and Medical Leave Expansion Act
 - Allows employees affected by school closures to be eligible for protected leave.
 - Emergency Paid Sick Leave Act
 - Allows employees two weeks of paid sick leave, regardless of how long the employee has been employed.
 - The Act will go into effect on April 2, 2020.
- Colorado Health Emergency Leave with Pay
 - Provides four days paid leave for individuals presenting with symptoms to give them the opportunity to be tested.
- Several other states have begun considering similar laws to assist affected employees.

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Families First Coronavirus Response Act

- Emergency Family and Medical Leave Expansion Act
 - An eligible employee may take up to 12 weeks of leave if the employee must care for a child whose school or place of care has closed due to the COVID-19 public health emergency.
 - Employee must have worked for the employer for at least 30 calendar days.
 - Applies to employers with fewer than 500 employees.
 - The first 10 days of the leave may be unpaid.
 - Employee is generally entitled to 2/3 of their regular rate for days off after the first 10, not to exceed \$200 per day and \$10,000 in the aggregate.
 - Employee is entitled to return to the same or an equivalent position.
 - Unless the employer has fewer than 25 employees, then the employer is not required to reinstate the employee.

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Families First Coronavirus Response Act

- Emergency Paid Sick Leave Act
 - Applies to employers with fewer than 500 employees.
 - There is no minimum tenure of employment for an employee to be eligible.
 - Must provide employees with two weeks (10 days) of emergency paid sick leave benefits to be used for COVID-19 related absences.
 - Full-time employees, this means 80 hours.
 - Employees who work a part-time or irregular schedule are entitled to the average number of hours per week the employee worked for the six months prior to taking paid sick leave.
 - This leave is immediately available for use by the employee.
 - An employer cannot require employees to exhaust other forms of paid leave before using this new COVID-19 paid leave.
 - The COVID-19 paid leave is in addition to any paid leave the employer already provides.
 - Employers are not permitted to discriminate or retaliate against any individual taking leave under the Act.

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Families First Coronavirus Response Act

- Emergency Paid Sick Leave Act
 - An employee may use paid sick leave if the employee is unable to work for any of the following reasons:
 1. The employee is subject to a federal, state, or local quarantine or isolation order for Coronavirus;
 2. The employee is advised by a health care provider to self-quarantine due to Coronavirus concerns;
 3. The employee is experiencing symptoms of Coronavirus and seeking a medical diagnosis;
 4. The employee is caring for an individual who is under a quarantine or isolation order or has been advised to self-quarantine;
 5. The employee is caring for a child whose school or child care has been closed due to Coronavirus; or
 6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

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Families First Coronavirus Response Act

REASON FOR LEAVE	RATE OF PAY	DAILY AND AGGREGATE CAP
Federal, State, or Local Quarantine or Isolation Order For Coronavirus	Regular Rate of Pay	\$511 Per Day and \$5,110 In The Aggregate
Advised By A Health Care Provider To Self-Quarantine Due To Coronavirus Concerns	Regular Rate of Pay	\$511 Per Day and \$5,110 In The Aggregate
Experiencing Symptoms of Coronavirus and Seeking A Medical Diagnosis	Regular Rate of Pay	\$511 Per Day and \$5,110 In The Aggregate
Caring For An Individual Who Is Under A Quarantine or Isolation Order or Has Been Advised To Self-Quarantine	2/3 of Regular Rate of Pay	\$200 Per Day and \$2,000 In The Aggregate
Caring For A Child Whose School or Child Care Has Been Closed Due To Coronavirus	2/3 of Regular Rate of Pay	\$200 Per Day and \$2,000 In The Aggregate
Experiencing Any Other Substantially Similar Condition Specified By The Secretary of Health and Human Services	2/3 of Regular Rate of Pay	\$200 Per Day and \$2,000 In The Aggregate

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Families First Coronavirus Response Act

- Emergency Paid Sick Leave Act
 - Employee's ability to use paid sick leave for these purposes ceases upon the termination of the qualifying event.
 - Paid leave provided under this law does not carry over year to year and any unused leave does not need to be paid out on termination of employment.
 - Employers are required to post a notice in the workplace of paid sick leave rights under the new law. The Secretary of Labor is to publish this notice within 7 days.
 - Failure to comply with the new paid sick leave law will be deemed a failure to pay minimum wages under the FLSA.

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Families First Coronavirus Response Act

- Tax Benefit for Employers
 - Employers are entitled to a refundable tax credit equal to 100% of the qualified leave wages paid for each calendar quarter in adherence with the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.
- Employer Qualification – Counting to 500
 - It is our expectation that the Department of Labor will issue regulations and guidance on this issue prior to the April 2nd effective date.
 - Apply traditional FMLA and FLSA standards to count the number of applicable employees based on the law in the jurisdictions where you operate.
 - Foreign workers likely will not count toward the total number of employees under the EFMLEA or EPSLA, as they do not count under FLMA.

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Employers with 500+ Employees

- An employee qualifies for FMLA leave if:
 - They have been employed by the employer for at least 12 months;
 - They have worked 1250 hours in the last 12 months;
 - The employer has 50 or more employees within 75 miles of the employee's job site; and
 - The employee is unable to work because of the employee's spouse, child, parent, or the employee's own serious health condition.
- If the employee is merely attempting to avoid exposure to the virus, the leave would not be covered by the FMLA.

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Caring for a Dependent 500+ Employees

- Related to an Illness
 - If an employee is taking time off to care for an individual with a serious health condition, the employee would be entitled to FMLA leave.
 - A serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
 - With the uncertainties surrounding COVID-19, an employer should err on the side of treating virus related absences as a qualifying event.
- Not Related to an Illness
 - If an employee must take off time to care for a dependent who is not ill, such as to care for children due to school closures, this would not qualify for FMLA leave.

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Can an Employee Refuse to Come to Work?

- It depends. At the present time, and depending on the location of the employer, many places of employment do not pose an imminent danger to employees.
 - OSHA's general duty clause places an obligation on the employer to provide employees with "a workplace free from recognized hazards ... likely to cause death or serious physical harm."
 - The employer should continue to consider the level of outbreak at the employer's location, the existence of an exposure at the workplace, and other circumstances to determine if there is an imminent threat to employees.
- ADA accommodations for at risk employees.
- An employee may be able to take leave from work if they qualify under the Emergency Family and Medical Leave Act.

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Reduced Work Schedule Concerns for Exempt Employees

- Employers may reduce an exempt employee's salary prospectively without risking the exemption, provided the change is bona fide and not used as a device to evade the salary basis requirements.
 - The exempt employee must still receive the relevant statutory minimum per week.
 - Employers must plan the reduction in advance and intend for the reduction to be focused on the employer's long term business need.
- If the employee works some time during the FLSA designated workweek, the employee must be paid for the full workweek regardless of the actual number of hours or days worked.

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Remote Work

- Compensation
 - Union or Contract Employees – The employee must be paid at the same hourly rate.
 - Non-Exempt Employees – The FLSA requires only that an employer pay employees for actual hours worked at the workplace or home.
 - Exempt Employees – Salaried employees must generally receive their full salary in any week in which they perform work, with limited exceptions.
- Reimbursement of Expenses
 - Employers should discuss with their employees whether they anticipate increased expenses while working from home.
 - Certain state laws may prohibit or limit businesses from requiring employees to absorb such business expenses.

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Forced Leave – FLSA Considerations

- Non-Exempt Employee
 - Employers must only pay non-exempt employees for actual hours worked.
 - The WHO is encouraging employers to be flexible with quarantined workers and to provide teleworking or other alternative work options or to extend additional paid time off to employees to prevent the spread of COVID-19.
- Exempt Employee
 - If the employee works some time during the FLSA designated workweek, the employee must be paid for the full workweek regardless of the actual number of hours or days worked.
 - Depending on the jurisdiction, an employer may require an employee to use sick, vacation, or other paid time of benefits.
- Fluctuating Work Week
 - An employer must pay the full fluctuating workweek salary for every workweek in which the employee works and is not permitted to deduct pay for less than full week increments.
- Employers should also consider applicable state wage and hour laws.

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Reductions in Force, Furloughs, and the WARN Act

- There are exceptions to the WARN Act that can lessen the amount of required notice, but not eliminate notice completely.
 - Closures of less than six months are not covered by the Act but it is difficult to know how long a closure will last due to the outbreak.
 - If the employer is not currently expecting to close for six months, the employer would likely not need to provide notice.
 - If you believe you may have to temporarily close your business, you should provide as much notice as possible.
- State mini-WARN laws.
- If the employer decides to send employees home, they should provide as much information as possible regarding the duration of the closure.
 - For non-exempt employees, the employer would need to pay the employer for time worked. Exempt employees would be entitled to a full days pay.

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The ADA and COVID-19: What Can You Ask?

- Can you take an employee's temperature?
 - Yes. The EEOC guidance now states employers may measure employees' body temperature, but employers should remember that not all infected individuals present with a fever.
- Can you ask if an employee is sick or why they cannot come into the office?
 - Yes. An employer is allowed to ask about symptoms consistent with COVID-19, including fever, chills, cough, shortness of breath, or sore throat.
 - An employer is also allowed to send an employee who is displaying symptoms home.

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The ADA and COVID-19: What Disability Inquiries Can You Make?

- The ADA and Rehabilitation Act apply even during a mass outbreak such as COVID-19.
- Disability-Related Inquiries
 - The EEOC has confirmed employers can inquire into an employee's symptoms of COVID-19 due to the "reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat."
 - Inquiries should attempt to distinguish the symptoms of COVID-19 from the common cold and the seasonal flu.
- ADA accommodations for at-risk employees.
- Duty to preserve confidentiality under the ADA and various state laws.

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The ADA and COVID-19: What Can You Do?

- Can you impose travel restrictions on employees?
 - No, an employer may not prevent an employee from traveling to a high risk area if the travel is for personal reasons.
 - An employer may inquire into an employee's travel history or travel plans but the employer must ensure these inquiries are not based on race or national origin.
- Can you impose a quarantine on an employee?
 - Yes, an employer can require an employee to quarantine for the CDC's recommended 14-day period.
- Can you require a doctor's note to return to work?
 - Yes. These inquiries are allowed to confirm the employee is free of COVID-19 and fit to return to work. However, the CDC and EEOC warn that doctors may not be readily available during a pandemic and employers may wish to identify other ways to confirm an employee is fit to work.

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The 30,000-Foot View

- This is unprecedented. Facts and guidance change daily.
- The best we can all do is try to follow CDC and OSHA guidance.
- OSHA's existing rules – and even general COVID-19 guidance – are not a perfect fit. Use judgment and care.
- Maintain calm and spread calm.
- For health, it's always the right time to do the right thing.



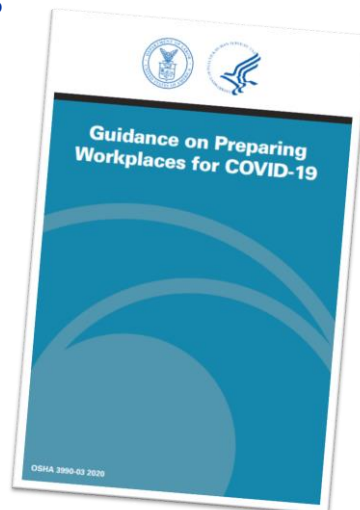
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Your Key Response Tools

- OSHA's [guidance](#)
- CDC [updates](#)
- HB [COVID-19 toolkit](#)
- *Safety Law Matters* [updates](#) (subscribe!)
- Protective controls: Engineering, administrative, work practice, PPE



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Remember The Basics About The virus – The Contact You’re Trying to Prevent



Spreads through
respiratory droplets
within six feet.



Anyone could be a
carrier – without
symptoms. Long
incubation.



Virus can linger in
the air (hours?) and
surfaces (hours or
more?).

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What Does OSHA Require?

- **General Duty Clause** – OSHA’s catchall. You must provide a workplace free of recognized hazards likely to cause death or serious harm.
- **Personal Protective Equipment (PPE)** standards ([1910 Subpart I](#)).
 - General – PPE to protect against environmental hazards ([1910.132](#)).
 - Conduct and certify hazard/PPE assessment.
 - Communicate and train employees.
- **Eye and face protection** ([1910.133](#)).
- **Gloves for hand protection** ([1910.138](#)).

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What Does OSHA Require?

- **Respiratory protection** ([1910.134](#)) – required < 6 feet from patients.
 - Respirators, not dust masks! N95 or better.
 - Written respiratory protection program.
 - Fit-testing, training, and medical exams.
- **Hazard communication** for cleaning chemicals ([1910.1200](#)).
- The **bloodborne pathogens** standard ([1910.1030](#)) does not generally apply to “respiratory secretions” but provides a “framework that may help control . . . sources of the virus.”
- [Special OSHA guidance](#) for healthcare workers.

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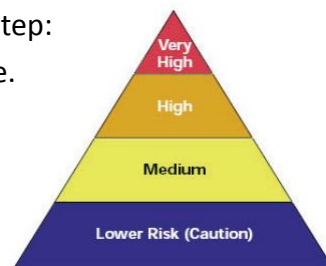
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First Step: Assess and Plan

You need a COVID-19 response plan. Take it step by step:

1. Assess exposures and risk – who, how, and where.
2. Plan to address each potential exposure.
 - General measures for everyone.
 - Job-specific modifications and responsibilities.
 - Under hierarchy of controls, PPE is last resort.
3. Set response protocols in case infection occurs.
4. Plan for business continuity in severe conditions.



See our [response plan guide](#) and [OSHA's guidance](#) to make your plan.

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THE PLAN

General Control Measures

Educate employees about each person's role:

- Stay healthy and practice good hygiene.
- Self-monitor, report illness, & report contacts with infected people.
- Stay home when sick. Make sure policies support this!
- Get tested if COVID-19 symptoms.
- If positive test or exposed, isolate at home 14 days.



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More General Control Measures

- Reduce in-person work to minimum necessity.
- Maintain 6-foot personal space.
- Hold meetings electronically.
- Limit visitors. Isolate visitor areas.
- Cancel travel. Support tele-working.
- Plan to sanitize regularly. Re-stock sanitary supplies and collect trash. Don't forget desks, equipment, tools, radios!
- Reinforce with reminders and signs.
- Have supervisors enforce.



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THE PLAN

Job-Specific Measures and Roles

- In-person contact?
- Move workstations?
- Stagger schedules?
- Assign individual tools, radios, workstations?
- Re-assign high-risk employees?
- Need PPE? Respiratory, gloves, goggles?



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THE PLAN

Response Protocols When Infection Occurs

- Applies if anyone at your site has direct contact/positive test.
- *Question:* Presume symptoms = virus until test results?
- **Determine exposure** – which people and areas.
- Immediately **isolate** those affected. Send home or to medical care.
- **Communicate** sensitively and honestly – what happened and how will you respond? Address fears, make safe, and respect privacy.
- Safely **decontaminate** environment.
- **14-day isolation** for those exposed. Monitor. Stay in touch.
- Assign responsibilities in plan: Who's in charge?



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THE PLAN

Plan for Business Continuity

- How will you **adjust operations** with high absenteeism? Reduce processes? Idle lines? Work off inventory?
- **Who will step in?** Cross-train employees? Temps? Extend hours?
- Don't forget **training** and added hazards and stress.
- Plan **extra housekeeping** and sanitation duties.
- Plan for restrictions on goods, raw materials, or workers.
- Plans for paying workforce? Financial and insurance arrangements?



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Is a COVID-19 Infection Recordable or Reportable to OSHA?

- Theoretically, it can be recordable if:
 - It's a new case,
 - Leads to days away from work (or worse), and
 - Is work-related.
- Work-related = work was "more likely than not" the cause.
- That's impossible to know! COVID-19 is everywhere.
- Reporting also requires work-relatedness. Plus, death must be within 30 days or hospitalization within 24 hours. How to know?

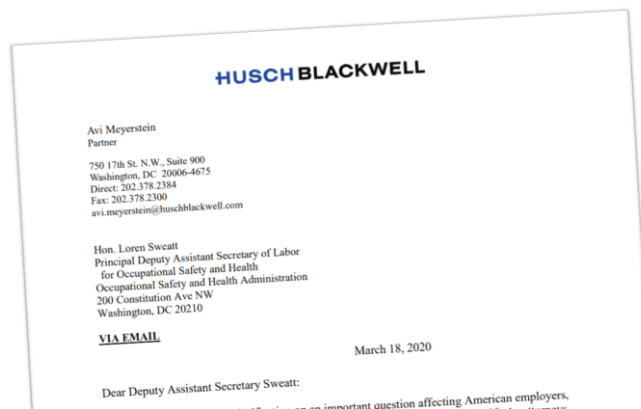


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Is a COVID-19 Infection Recordable or Reportable to OSHA?

- We wrote a [letter to OSHA](#), asking for a presumption that COVID-19 cases are not work-related or recordable.



Communication is Key

- **Update** your team regularly. Address individual and family concerns.
- Provide a channel for safety and health **concerns and complaints**.
Make employees full partners.
- **Investigate** concerns and respond promptly and reasonably.
- **Don't discriminate** or retaliate.





Will OSHA Cite Me For Violations?

- OSHA wants to be part of the solution, promote workplace health, and help solve the crisis.
- Citations seem unlikely for employers acting in good-faith, taking real action, and making tough, reasonable judgment calls.
- But, bad actors and willful violators beware!



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Important Resources

- Husch Blackwell COVID-19 Question Email Address
 - COVID19response@huschblackwell.com.
- Husch Blackwell Coronavirus Toolkit
 - <https://www.huschblackwell.com/coronavirus>
- Husch Blackwell – Workplace Issues and COVID-19
 - <https://www.huschblackwell.com/newsandinsights/workplace-issues-and-the-covid-19-virus>
- CDC - Information about COVID-19 in the United States
 - <https://www.cdc.gov/coronavirus/2019-ncov/about/index.html>
- World Health Organization
 - <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>

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Questions?