

Employers' Guide to Return-to-Work Considerations During the COVID-19 Outbreak

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On April 16, 2020, the White House issued "Opening Up America Again," a set of federal guidelines for reopening the U.S. economy with a three-phase, state-by-state approach (the "White House Guidance"). See generally THE WHITE HOUSE, *Guidelines: Opening Up America Again*, April 16, 2020 (available at <https://www.whitehouse.gov/openingamerica/>). Some state governors are now beginning to relax their "stay-at-home" orders, and others are discussing plans to do so. As a result of these developments, many employers nationwide are considering how to prepare their workplaces and workforces for a return to work. This article outlines actions that employers may want to consider in planning a return to in-person workplace operations. As with all COVID-19-related guidance, employers should continue to monitor the developments, including from federal, state and local officials as well as public health authorities, and consult with counsel for specific guidance tailored to the particulars of their workplace and workforce.

ADVANCE PLANNING MEASURES

Many employers are creating internal teams to help coordinate efforts to reopen workplaces, return employees to their worksites and communicate updates to employees. Team members often include individuals from human resources, legal, operations, technology, building facilities and security. Employers may also want to consider involving line managers in such groups to better understand the concerns and perspectives of employees.

Internal teams should stay up-to-date on governmental guidance. Teams could also be charged with communicating with relevant landlords, property management companies and vendors that provide supplies and services to the workplace to coordinate with them in reopening workplaces.

Clear and consistent communication will help alleviate employee anxiety. Employers may therefore want to consider notifying employees of such teams and providing regular updates on their work and decision-making.

PREPARATION OF THE WORKPLACE(S) FOR REOPENING

The Occupational Safety and Health Act requires employers to provide employees with a workplace "free from recognized hazards

that are causing or are likely to cause death or serious physical harm" to employees. 29 U.S.C. § 654(a)(1). The Occupational Safety and Health Administration ("OSHA") has issued advisory guidance on preventing exposure to and preparing workplaces for COVID-19 that can assist employers in return planning (the "OSHA Guidance"). See generally U.S. DEPARTMENT OF LABOR, *Guidance on Preparing Workplaces for COVID-19*, March 2020, <https://www.osha.gov/Publications/OSHA3990.pdf> (last visited April 23, 2020).

Risk Assessment. As a threshold matter, employers should consider conducting a risk assessment of their worksites as outlined in the OSHA Guidance. As part of this risk assessment, employers should categorize the COVID-19 exposure risk level of the various employee roles at each worksite and take appropriate steps to protect employees based on their exposure risk level. The OSHA Guidance sets forth minimum standards for the various exposure risk levels, and employers may opt for more stringent protections.

Workplace-wide Preparations. In addition to adopting safeguards based on employees' specific exposure risk, employers may wish to consult the U.S. Centers for Disease Control and Prevention's ("CDC") recommendations for maintaining a healthy work environment. See generally U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19) Interim Guidance for Businesses and Employers*, March 21, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited April 22, 2020). These measures include:

- **Worker Hygiene.** Employers should consider ways to support respiratory etiquette and hand hygiene for employees. Such measures could include: providing soap and water in the workplace and posting signs to encourage frequent handwashing; providing hand sanitizer at multiple locations in the workplace; discouraging handshakes and other contact methods of greeting; and providing tissues and no-touch trash bins.
- **Personal Protective Equipment.** Many state or local orders currently require individuals to wear face coverings in public if

they cannot maintain social distancing. Some orders also require employers to provide face coverings to employees in certain workplace conditions. For example, a New York Executive Order requires employers to provide face coverings to employees who are in direct contact with customers or members of the public. Employers should consider requiring or encouraging the use of such face coverings, and providing face coverings for employees to use. If employees decline to wear a face covering for medical or other reasons, employers should engage in the interactive process with such employees as required by the Americans with Disabilities Act (“ADA”), Title VII and similar state and local laws.

- **Increased Environmental Cleaning.** Steps can be taken to implement frequent cleaning and disinfecting of frequently touched surfaces in the workplaces, such as workstations, door handles, bathrooms, pantries and elevator panels. Employers may also want to provide disinfectant wipes and hand sanitizers to enable employees to maintain a safe workstation.
- **Shared Workspaces.** Employers may want to take steps to discourage employees from sharing workstations, phones, desks, offices, etc. In workspaces without assigned workstations, which have become more prevalent in recent years, employers may want to consider temporarily assigning employees to specific workstations for a specified period. Employers may also want to consider temporarily closing or restricting use of communal spaces such as pantries, conference rooms and discussion areas.
- **Social Distancing Measures in the Workplace.** Employers likely will want to implement means to encourage social distancing in the workplace. Ideas include:
 - Limiting the number of employees per floor and spreading out workstations to allow more space between employees;
 - Reducing the number of and staffing at reception or security desks throughout the workplace;
 - Implementing “one way” hallways or paths through the workplace so that employees need not walk past each other;
 - Limiting the number of employees allowed in the elevators or bathrooms at any given time;
 - Assigning time slots for each department to visit on-site cafeterias or coffee stations; and
 - Closing in-house fitness centers or establishing guidelines for their use. (Note that certain state or

local orders may separately address fitness centers. For example, a New York State Executive Order required the closing of “[a]ny gym, fitness center or classes.” See New York Executive Order No. 202.3, March 16, 2020 (*available at* <https://www.governor.ny.gov/news/no-2023-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>).

- **Floor-by-Floor Management.** In addition to these CDC recommendations, employers may want to designate certain individuals as “community managers” or “floor contacts.” These employees could serve as the point of contact for a certain workspace area or floor, monitor the current protocols and suggest improvements based on observations and feedback from others. Employers may also want to consider ways to make the workplace feel more welcoming and vibrant because, at least initially, the workplace may feel empty and awkward if fewer employees are present.

DETERMINATION OF WHO SHOULD RETURN TO WORK AND WHEN

Employers may also want to consider options for phasing employees back to the workplace as stay-at-home restrictions loosen. State and local officials may limit the proportion of the workforce that may return in person and may require employers to continue to have some employees work remotely. As such, employers may want to assess their workforce to determine which employees to prioritize returning to the workplace.

Employee Availability. Employers may want to gauge employees’ willingness and ability to return to work. Some employees may be eager to return to the workplace while others may be more reticent. Also, employers may need to consider whether employees reside in a locality that is subject to certain restrictions, such as nightly curfews, that may impact their availability to work certain shifts. Employers may also want to consider whether employees who have temporarily relocated their residences are able to return to the workplace at this time, and whether accommodations are appropriate. Employers should also determine how to accommodate employees who have caretaking obligations as a result of COVID-19, such as caring for children whose schools are closed. Employees may also be entitled to leave for COVID-19 related reasons, including caring for children. (*See infra*, “Updating Employee Leave Policies.”)

Staggered Shifts. Employers may want to consider implementing staggered work schedules to reduce the number of employees in the workplace at any given time. Relatedly, employers may want to consider phasing employees back to the workplace in waves or for certain days

each week and gradually build towards having the entire workforce back to the workplace in any given day.

Requiring or Prohibiting In-Person Attendance. Employers should be prepared to respond to employees whom they may want to have return to the worksite, but who may be unable to return or feel uncomfortable doing so. Employers should also consider how they will respond to employees who would like to return to the workplace but whose roles do not make them a priority for returning in person.

High-Risk Employees. Employers may also need to engage in dialogue with employees who may be at higher risk if they contract COVID-19. The CDC has issued guidance concerning those who are at higher risk for severe illness from COVID-19, including “older adults and people of any age who have serious underlying medical conditions.” See generally U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19) People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited April 22, 2020). During the first two return-to-work phases, the White House Guidance advises “all vulnerable individuals” to continue to shelter-in-place and notes that “[m]embers of households with vulnerable residents should be aware that by returning to work. . . they could carry the virus back home.” Therefore, “[p]recautions should be taken to isolate from vulnerable residents.” This Guidance also encourages employers to “[s]trongly consider special accommodations for personnel who are members of a vulnerable population.” When determining whether to grant accommodations for high-risk employees, employers should also bear in mind the requirements and prohibitions contained in the ADA.

- **Older Employees.** While the Equal Employment Opportunity Commission’s (the “EEOC”) guidance concerning the ADA notes that employers are not required to grant an accommodation to an older employee simply because he or she is at greater risk of serious illness if he or she contracts COVID-19, in light of the White House Guidance, employers may want to consider providing accommodations to such employees.
- **Pregnant Employees.** Although “certain pregnancy-related medical conditions sometimes can be ADA disabilities” and therefore trigger ADA accommodation rights, pregnancy itself is not considered an ADA disability. Although employers are not required to grant an accommodation to a pregnant employee due to the fact that the potential increased risks associated with COVID-19 are unknown, certain state and local laws, such as the California Pregnancy Disability Leave Law, the New York State Human Rights Law and the New York City Pregnant Workers Fairness Act may require an employer to engage in an interactive process with a

pregnant employee to determine an effective, reasonable accommodation to allow the employee to perform the essential functions of the job while pregnant.

Updating Employee Leave Policies. Employers should also make sure that they have professionals who are familiar with new federal, state and local leave policies that provide for paid or unpaid leave for certain COVID-19-related reasons. Employers should also determine how their existing leave policies interact with these new obligations, and may want to consider updating their employee handbooks and guidance accordingly.

Non-Discriminatory Application. As with all policies and procedures, employers should ensure that any return-to-work protocols are implemented in a fair and non-discriminatory manner. To ensure such implementation, employers may want to consider having one individual or group be responsible for all communications and requests related to these policies.

Employee Support Channels. Employers may want to consider a channel through which employees can seek clarification, voice concerns or ask for exceptions to certain procedures. In addition, employers may want to remind employees of the availability of employment assistance programs and remind them how to locate these resources.

Communication. As employers implement their return-to-work protocols, clear communication to employees of their plans and expectations is important. Most federal, state and local guidance to date has encouraged employers to remain flexible and to work with employees to develop interim solutions.

POTENTIAL GUIDELINES FOR HOW WORK IS DONE

After employers prepare the workplace and determine which employees will return in person, employers may also want to consider establishing guidelines for certain workplace behaviors that were considered routine before the COVID-19 pandemic.

Meetings. Employers may choose to adopt guidelines for employee meetings and prohibit or restrict in-person meetings for the time being. Such guidelines could include a limit on the number of in-person gatherings in the workplace on any given day, an option to attend virtually and a cap on the number of people permitted in a conference room at once.

Business Travel. Employers may want to review their travel policies and establish guidelines to determine which travel, if any, is appropriate. Employers may also want to impose new limits on business travel, including a requirement that the employee demonstrate business necessity for each proposed trip. Employers may choose to make business travel optional for the time being and permit employees to virtually attend meetings or conferences that would otherwise be in person.

Employers should continue to monitor the CDC's guidance on domestic and international travel.

Expansion of Virtual Meetings. The new technologies employed during the work-from-home restrictions are likely here to stay, and employers may wish to continue using them even as many employees return to the workplace.

INTERACTIONS WITH EXTERNAL CUSTOMERS OR VENDORS

In addition to addressing employees' potential exposure to COVID-19, certain employers also may need to consider interactions with customers, clients, vendors, contractors and other visitors to the workplace.

Attending Customer or Client Events. Employers should consider whether they will require or allow employees to attend work-related events hosted by third parties, such as customers or clients. If employers decide to permit employees to attend such events, they may want to consider limiting the number of employees from each team or department who can attend a specific event to decrease the risk of exposure of an entire team or department.

Visitors to the Workplace. In addition to determining whether to allow or require their employees to attend off-site events, employers will also need to determine whether to allow visitors to the workplace, and how best to notify visitors of the need to adhere to new workplace policies. For example, employers may choose to establish new parameters for visitors, including visits only for business-related, as opposed to social or familial, purposes, as well as limits on the number of visitors and the length of their stay. Employers may also consider restricting visitor access to only certain floors or conference rooms for the time being.

Privacy. In determining whether to restrict or screen visitors to the workplace, employers should consider visitors' privacy. To that end, employers should post their screening policies so they are clearly visible to potential workplace visitors. If employers choose to collect information or forms from visitors, they should establish protocols for collecting and maintaining this information, including measures to protect personal information.

WORKPLACE SCREENING

The EEOC has provided guidance regarding certain types of workplace screenings currently considered lawful as a result of the COVID-19 crisis, as described below. (Note: The EEOC's guidance is silent as to whether employees may be excluded from the workplace based on contact with infected persons. CDC guidance provides that "employees who are well but have a sick family member at home with COVID-19 should notify their supervisor and follow CDC recommended precautions." U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19), Interim*

Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited March 31, 2020).

COVID-19 Testing. The EEOC has advised that in light of the COVID-19 pandemic, employers may administer COVID-19 testing to employees before they are permitted to enter the workplace. *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm (last visited April 23, 2020). Employers should ensure that the tests are accurate and reliable, including by referencing guidance from the U.S. Food and Drug Administration regarding what may be considered safe and accurate testing, as well as guidance from the CDC and other public health authorities. Employers should bear in mind the incidence of false-positives or false-negatives, and should note that testing may only reveal if the virus is currently present. As with other medical information, test results and related employee certifications should be kept confidential. (*See infra*, "Confidentiality.")

Temperature Screening. While "[g]enerally, measuring an employee's body temperature is a medical examination, . . . [b]ecause the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020," at present, employers are permitted to measure the body temperature of employees (and also, presumably, visitors) who physically enter the workplace. Employers who choose to conduct temperature checks before allowing individuals to enter the workplace may maintain a log of the results, as long as this information is kept confidential. (*See infra*, "Confidentiality.")

Soliciting Health Information from Employees. Employers may ask all employees physically entering the workplace certain questions to determine if they have or may have COVID-19, including whether they have COVID-19 or symptoms of COVID-19, and whether they have been tested for COVID-19. The EEOC has taken the position, however, that employers should refrain from asking employees whether they have family members who have COVID-19 or who exhibit symptoms of COVID-19. Instead, the EEOC recommends asking whether the employee has had contact with anyone who has been diagnosed with COVID-19 or who has symptoms of the virus. Again, any medical information obtained during this process must be kept confidential. (*See infra*, "Confidentiality.")

Exclusion from the Workplace. Given the current pandemic, at this time, employers may lawfully exclude individuals with COVID-19, or those exhibiting its symptoms, from the workplace for health and safety reasons. Additionally,

employers may send employees home if they have been diagnosed with COVID-19, or are displaying symptoms associated with COVID-19, such as fever, chills, cough, shortness of breath and sore throat, new loss of smell or taste, or gastrointestinal problems. Employers should rely on the CDC and other public health authorities or other reputable medical sources for guidance on symptoms of COVID-19.

Employee Refusal. Should employees refuse to answer health questions or submit to medical examinations, employers may bar those employees from the workplace. Employers may wish to ask employees for their reasons for refusal, and if the reason is a concern about confidentiality, offer reassurance that the information is being requested to maintain safety in the workplace and will be kept confidential. Employers should also consider providing talking points to the individuals conducting the screenings on how to address such refusals.

Confidentiality. The ADA requires that employers keep all medical information confidential, including information related to symptoms of COVID-19 or a diagnosis of COVID-19, such as COVID-19 test results, temperature screening logs and other medical information solicited from employees. Employers should limit this information to those who need to know the identity of an individual who is diagnosed with or exhibiting symptoms of COVID-19, and should ensure that the employees understand that such information must be kept confidential. Employers should also be mindful of the requirement that medical information be stored separately from personnel files and the importance of maintaining confidentiality of this information. Employers may disclose certain employee health information related to COVID-19 to the CDC and other health authorities. Employers should also review state-specific privacy laws, which may require the implementation of additional safeguards.

Identification and Isolation of Sick People. Employers may want to instruct and remind those conducting the screening

of employees how to handle employees who are infected with or are exhibiting symptoms of COVID-19 after they return to work. Employers should also determine the steps to take to trace other employees who may have had contact with the infected individual while maintaining compliance with privacy and non-discrimination laws. Employers may inform employees who were in contact with the infected individual that they may have had close contact with someone who has or may have COVID-19; however, employers may not reveal the identity of the individual. Employers should also keep in mind various privacy considerations related to medical diagnoses. (*See supra*, "Confidentiality.")

Returning Infected Individuals to the Workplace. Employers may also want to determine the protocols for permitting an infected or potentially exposed individual to return to the workplace. The CDC has published guidance regarding discontinuing isolation of infected or exposed individuals. Certain states have also issued guidelines for returning essential workers to the workplace after infection with, or potential exposure to, COVID-19, and we anticipate that more state and local governments will also release guidance as stay-at-home orders are eased.

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