



GUIDANCE TO EMPLOYERS ABOUT RETURNING EMPLOYEES TO THE WORKPLACE

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Overview

In mid-March of this year, to address the escalating number of confirmed cases of COVID-19, San Francisco took the bold step of issuing a shelter in place order, prohibiting residents from leaving their homes except for “essential” activities. Following this unprecedented move, within a few weeks, every state in the country and hundreds of municipalities took similar steps to curb the virus’s spread. In response to both these orders and widespread health concerns about COVID-19, employers readily: identified “essential workers” (as defined by the orders) and implemented safety precautions; moved employees into different roles in response to changing business models; hired employees to address increased demand in some sectors; made difficult decisions about lay-offs and furloughs of some non-essential employees; and, moved daily work for millions of employees from their workplaces to their homes. In addition, for the essential workers who are still reporting to workplaces, employers have had to keep track of the evolving scientific knowledge of how COVID-19 spreads and continually update safeguards to minimize the workers’ exposure to the virus. Now, with jurisdictions relaxing shelter in place orders, employers face the daunting task of determining when and how to return employees to the workplace.

It is important to stress that this will not be an easy or direct reopening. In planning how to reopen their businesses, employers should recognize that there is not a one-size-fits-all approach. The White House has unveiled Guidelines for Opening Up America Again, a three-phased approach based on the advice of public health experts. These Guidelines instruct employers to:

- Continue to **ENCOURAGE TELEWORK**, whenever possible and feasible with business operations;
- If possible, **RETURN TO WORK IN PHASES**;
- Close **COMMON AREAS** where personnel are likely to congregate and interact, or enforce strict social distancing protocols;
- Minimize **NON-ESSENTIAL TRAVEL** and adhere to CDC guidelines regarding isolation following travel; and
- Strongly consider **SPECIAL ACCOMMODATIONS** for personnel who are members of a **VULNERABLE POPULATION**.¹

Together with this guidance, a few basic concepts will serve as a roadmap for employers. First and foremost, employers should focus on addressing employee physical and mental health, regardless of whether the employee is reporting to the workplace or working from home. Flexibility and rapid response are imperative; on top of understanding regulatory guidance, employers should work to develop policies and procedures around employees who have contracted the disease, reported their illnesses, and taken time away from work.

As Winston Churchill said during World War II, “Now, this is not the end. It is not even the beginning of the end. But it is perhaps, the end of the beginning.” This article provides practical guidance to employers in analyzing critical issues at this juncture.²

Introduction

Although many states are starting to relax restrictions on travel and the operation of non-essential businesses, employers must ensure compliance with regulations that are in effect at any given time. This requires the daily monitoring of virus-related restrictions wherever employees work. Several organizations have published 50-state trackers, which can be invaluable for employers, especially employers with multi-state operations.³

However, these jurisdictional requirements are merely a baseline. Employers must understand and implement best practices for ensuring the safety of all employees and exercise caution in

¹ <https://www.whitehouse.gov/openingamerica/>.

² This article does not provide, nor should it be interpreted as providing, legal advice. The article will continue to update as more information becomes available.

³ See, e.g., <https://www.dentons.com/en/insights/alerts/2020/march/31/announcing-our-covid-19-50-state-tracker>; <https://www.akingump.com/en/experience/industries/national-security/covid-19-resource-center/50-state-survey-coronavirus-related-stay-at-home-orders.html>; <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>.

returning non-essential workers to the workplace. This is not an easy feat. Some employees are protesting perceived unsafe working conditions and staging work stoppages, while other employees are adamant about returning to work, regardless of the health concerns, because not working is simply not an option due to their personal finances. Some employees are terrified of being exposed, and in turn exposing loved ones to, COVID-19, and many employees are emotionally fragile because of the extreme stress caused by this extraordinary situation. With these many competing, complicated emotions at play, employers will need to carefully balance their approaches to their specific situations. Thus, employers should weigh not just business need and customer demand but also scientific evidence, regulatory guidance, and sensitivity to the heavy strain that the pandemic has placed on their employees.

Before making the decision to have employees who have been working from home return to the workplace, employers should collect data to analyze how working from home has impacted and will continue to impact business operations. How effectively and productively are employees working from home, and what is the impact on their morale? Employers should avoid making any assumptions. Instead, they should compare the number of hours worked before and after working from home was implemented. Employers also should ask employees for feedback and document their responses through surveys or informal discussions. These responses may be valuable in the future when considering a phased return to the workplace and for requests for accommodations.

Another prudent idea would be for employers to have a committee develop and apply a Return to the Workplace (“RTW”) plan. Due to the risk of a “second wave,” many companies are not bringing all employees back at the same time. Frequent communications with employees is key; to this end, employers should consider educating employees about COVID-19, to combat the staggering amount of misinformation that exists about the virus.⁴ This education can go a long way in helping employees make educated decisions about their actions.

At a minimum, employers should follow best practices by:

- Providing adequate personal protective equipment for employees at increased risk of exposure;
- Installing barriers such as sneeze guards and social distance markers at customer interaction points;
- Implementing, promoting, and enforcing social distancing guidelines and employee training to prevent transmission;
- Developing a workplace flexibility policy to guide employees on how and when they can and should work remotely;
- Providing an avenue for employees to report COVID-19 symptoms and a response/isolation protocol for such reports; and
- Increasing the cleaning and sterilizing of surfaces.

⁴ The World Health Organization has published an excellent paper about these myths: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters>.

An employer's liability when an employee in the workplace tests positive for COVID-19 is unclear. Even though cases have been filed against employers for virus-related illnesses and deaths, the outcomes of these cases are not certain. Arguably, it will be difficult for many plaintiffs to show that they contracted the virus in the workplace and had no other contacts for the 14 days before developing symptoms.⁵ State workers' compensation laws are one potential protection against civil lawsuits by sickened employees, serving as the exclusive remedy for employees injured in the course of their job duties. In general, such laws preclude an employee from recovering in tort for claims involving workplace exposure to communicable diseases in situations where a workers' compensation remedy was available. For example, Washington State recently issued guidance stating that, in most cases, contraction of COVID-19 is **not** a work-related condition compensable through workers' compensation laws. Even in circumstances in which a workers' compensation remedy is not available for COVID-19 infection, whether or not tort remedies are barred will be determined by the law of the state in question. Tort claims are available in very limited circumstances and the burden of proof is high—i.e., an employee may have to prove that the employer intended to cause the injury.

Following federal and state regulatory guidance regarding workplace health and safety, sick time and time off of work is one of the best and most effective practices in minimizing both employee exposure to the virus in the workplace and the risk of litigation. Employers should also be mindful of conducting all actions, such as hiring furloughs, terminations, and returning employees from furlough in a non-discriminatory manner. The Center for Disease Control ("CDC") has provided guidance regarding the practices which will minimize exposure to COVID-19. Also, the Occupational Safety and Health Administration ("OSHA") has provided guidance regarding how to prepare workplaces for COVID-19 based on the risk of exposure of the virus to employees. And, the Equal Employment Opportunity Commission ("EEOC") has provided guidance regarding how to address COVID-19 issues in a manner that does not violate anti-discrimination statutes such as ADA.

Summary of CDC Guidance

The CDC has published numerous tips with respect to how employers can prepare for the effects of COVID-19.⁶ According to the CDC, during an infectious disease outbreak, employers must prepare for disruption in their business and work towards protecting their employees' health and safety in the workplace. All employers should consider how best to decrease the spread of COVID-19 and lower the impact of the virus in their workplace.

The CDC emphasizes that leave policies should be flexible and non-punitive, allowing sick employees to stay home and away from coworkers. They should account for employees who need to stay home with their children if there are school or childcare closures, or to care for

⁵ See, e.g., <https://news.yahoo.com/reopen-and-get-sued-some-small-business-owners-fear-exposure-to-liability-issues-upon-reopening-their-doors-170221368.html>.

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-small-business.html>.

sick family members. Additional flexibilities might include giving advances on future sick leave and allowing employees to donate sick leave to each other. Employers should ensure that employees are aware of and understand these policies. Alternatively, if an employer does not currently offer sick leave to some or all of its employees, it may want to draft non-punitive “emergency sick leave” policies. When feasible, employers also should implement flexible worksites (e.g., telework) and work hours (e.g., staggered shifts) to establish policies and practices for social distancing.

Employers should not require a positive COVID-19 test result or a healthcare provider’s note for employees who are sick to validate their illness, qualify for sick leave, or return to work. Healthcare provider offices and medical facilities may be extremely busy and thus not in a position to provide such documentation in a timely manner. Consequently, employers should anticipate absenteeism spikes from increases in sick employees and therefore should develop plans to continue essential business functions in the event of experiencing such spikes.

To reduce transmission of COVID-19 among employees, sick employees should follow CDC-recommended steps. For example, employees should not return to work until the criteria to discontinue home isolation are met (i.e., 14 days symptom-free, earlier if tests are negative), in consultation with healthcare providers and state and local health departments. Employees who appear to have symptoms—such as fever, cough, or shortness of breath—upon arrival at work, or who appear to become sick during the day, should immediately be separated from other employees and sent home. If an employee is confirmed to have COVID-19, the employer should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (“ADA”) (see EEOC Guidance, below).

Summary of OSHA Guidance

*Guidance on Preparing Workplaces for COVID-19 (“Guidance”)*⁷, issued by OSHA, encourages employers to develop a plan of action to deal with the ongoing impact of COVID-19. The Guidance contains advisory recommendations as well as descriptions of mandatory safety and health standards pursuant to the Occupational Safety and Health Act (the “Act”).

OSHA developed the Guidance based on traditional infection prevention and industrial hygiene practices, and it focuses on the need for employers to implement engineering, administrative, and work practice controls along with personal protective equipment (“PPE”). The Guidance does not create new legal obligations or alter existing obligations under the Act or relevant OSHA regulations. However, it does emphasize that the Act’s General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

⁷ See <https://www.osha.gov/Publications/OSHA3990.pdf>.

Employee risk of occupational exposure to SARS-CoV-2, the virus that causes COVID-19, may vary from very high to high, medium, or low risk. This level of risk depends on several factors, including the industry, the need for contact within 6 feet of people known to be—or suspected of being—infected with SARS-CoV-2, or the requirement for repeated or extended contact with such persons. OSHA believes that most American employees will fall in either the low or medium exposure risk levels. Regardless, the Guidance outlines that all employers should take steps to reduce employee risk of exposure to SARS-CoV-2. This includes developing an infectious disease preparedness and response plan, implementing basic infection prevention measures and workplace controls, promptly identifying and isolating sick individuals, and readily communicating workplace flexibilities and protections to employees.

Lower exposure risk jobs are those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with the general public. In other words, employees in this category—such as individuals who frequently telework—have minimal occupational contact with the public and other coworkers. OSHA does not recommend implementing additional engineering controls to protect these employees, nor does it recommend additional PPE. Workers should continue to use the PPE, if any, that they would ordinarily use for other job tasks. With respect to administrative controls, the Guidance suggests that employers collaborate with employees to designate effective means of communicating important COVID-19 information.

Medium exposure risk jobs include those that require frequent and/or close contact with people who may be infected with SARS-CoV-2 but are not known or suspected COVID-19 patients. In areas where there is ongoing community transmission, employees in this category may have frequent contact with the general public (e.g., schools, high-population-density work environments, and some high-volume retail settings). They also may have frequent contact with travelers returning from international locations with widespread COVID-19 transmission. OSHA recommends installing physical barriers, such as clear plastic sneeze guards, to protect these employees, as well as offering face masks or reusable face shields to ill employees and customers. Via in-store posters and automated messages, sick customers should be informed about COVID-19 symptoms and urged to minimize contact with employees until healthy again; further, where appropriate, public access to the worksite should be limited or restricted. When considering PPE options, employers should select the combination of PPE that protects workers specific to their workplace (e.g., gloves, a gown, a facemask or face shield, or goggles). Actual PPE ensembles will vary based on job duties, potential on-the-job exposures, and the results of the employer's risk assessment.

High exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19 (e.g., medical transport workers moving known or suspected COVID-19 patients in enclosed vehicles). Similarly, very high exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures (e.g., healthcare workers who directly treat known or suspected COVID-19 patients). For these employees, employers should make sure appropriate air-handling systems are installed and maintained in healthcare facilities. Patients with known

or suspected COVID-19 should be placed in an airborne infection isolation room, if available. If working in a healthcare facility, employees should follow existing guidelines and facility standards of practice for identifying and isolating infected individuals and for protecting workers (e.g., grouping COVID-19 patients together when single rooms are unavailable). All employees should be provided with job-specific education and training on preventing transmission of COVID-19, as well as psychological and behavioral support to address stress. With respect to PPE, these employees likely will need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks.

Finally, regarding employees who are living abroad or travelling internationally, the Guidance suggests that employers communicate that the U.S. Department of State cannot provide these individuals with medications or supplies, even in the event of a COVID-19 outbreak. In addition, as outbreak conditions change, travel into or out of a foreign country may not be possible, safe, or medically advisable. Employers and employees should plan appropriately, as travel restrictions likely will be implemented very quickly in the event of worsening outbreak conditions in certain areas.

Summary of EEOC Guidance

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (“Preparedness”)⁸, issued by the EEOC, provides information about the ADA and the Rehabilitation Act in the context of pandemic planning in the workplace. The Preparedness originally was issued in 2009 during the spread of H1N1 virus, and it has been reissued to incorporate updates regarding the COVID-19 pandemic. It identifies established ADA principles that are relevant to questions frequently asked about workplace pandemic planning.

Based on current CDC guidance on COVID-19 (see above), ADA-covered employers can send home employees who are infected with COVID-19 or exhibit symptoms associated with infection. Employers may ask employees who report feeling ill at work or who call in sick whether they are experiencing symptoms associated with COVID-19 (e.g., fever, chills, cough, shortness of breath, or sore throat). Similarly, if an employer suspects that an employee has been absent from work for a medical reason, the employer is entitled to ask the reason for the absence. Also, because the CDC and state/local health authorities have acknowledged the community spread of COVID-19, employers may measure the body temperature of employees. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

When an employee returns from travel during a pandemic, ADA-covered employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit the employee’s return to the workplace. Thus, asking the employee questions about his or her exposure to COVID-19 would not be disability-related inquiries. Employers may **not** ask employees whether they have medical conditions that could make them particularly vulnerable

⁸ See https://www.eeoc.gov/facts/pandemic_flu.html.

to COVID-19 complications, unless the pandemic becomes sufficiently severe or serious per the assessment of federal, state, or local public health officials. If an employee voluntarily discloses that he or she has a specific medical condition or disability that puts him or her at increased risk of COVID-19 complications, the employer must keep this information confidential. Employers should not assume that all disabilities increase the risk of COVID-19 complications.

ADA-covered employers can encourage employees to telework as an infection-control strategy. In addition, employees with disabilities that put them at high risk for complications of COVID-19 may request telework as a reasonable accommodation to reduce their chances of infection. With respect to other infection-control practices—e.g., regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal—an employer’s adoption of such practices does not implicate the ADA. Furthermore, an employer may require employees to wear PPE during a pandemic.

An employer covered by the ADA and Title VII **cannot** compel employee inoculation. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him or her from taking the vaccine. This would be a reasonable accommodation barring undue hardship (i.e., significant difficulty or expense). Similarly, under Title VII, once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him or her from taking the vaccine, the employer must provide a reasonable accommodation, unless it would pose an undue hardship as defined by Title VII (i.e., “more than de minimis cost” to the operation of the employer’s business, a lower standard than under the ADA). Employers instead should consider encouraging employees to get the vaccine themselves rather than requiring them to take it. As of the date the Preparedness was issued, no vaccine is available for COVID-19.

During a pandemic, an ADA-covered employer must continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship. Only when the employer can demonstrate that someone with a disability poses a “direct threat,” even after reasonable accommodation, can it lawfully exclude him or her from employment or employment-related activities. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Consequently, these extraordinary circumstances may result in delay in discussing accommodation requests and in providing accommodation where warranted, necessitating the use of interim solutions to enable employees to keep working.

With respect to hiring during the COVID-19 pandemic, employers may screen job applicants for symptoms of COVID-19 after making a conditional job offer, provided that such screening is performed universally for all entering employees in the same type of job. Screening may include taking an applicant’s temperature, though employers should be aware that some people with COVID-19 are asymptomatic and/or do not have a fever. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.

According to the CDC's guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace. Pursuant to this, employers may delay the start date of any job applicants who have, or exhibit symptoms associated with, COVID-19. Furthermore, if such applicants cannot safely enter the workplace despite an immediate start date, the employer may withdraw the job offer. The ADA does not interfere with employers following recommendations of the CDC or public health authorities. Thus, employers should feel free to continue following the most current information on maintaining workplace safety.

An ADA-covered employer may require employees who have been away from the workplace during the COVID-19 pandemic to provide a doctor's note certifying fitness to return to work. However, as a practical matter, 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 email to certify that an individual does not have the pandemic virus.

Leave and Safety Policies

The [Families First Coronavirus Response Act \("FFCRA"\)](#) requires an employer to provide paid leave to employees.⁹ Employers should develop policies and forms in connection with requests for leave under the FFCRA and update attendance, leave-of-absence, and Family Medical Leave Act and PTO policies to prepare for COVID-19 absences. In addition, employers should create a policy or procedure for when employees diagnosed with COVID-19 or suspected of having COVID-19 can return to work. Other policy considerations include:

- Updating procedures for reporting any safety issues;
- Updating working-from-home policies or procedures, such as reemphasizing cybersecurity policies;
- Providing training on all new and/or updated policies; and
- Reviewing time-keeping procedures to ensure that employees consider any time spent for social distancing or temperature checks.

⁹ See the summary of the FFCRA and guidance provided by the U.S. Department of Labor: <https://www.dol.gov/newsroom/releases/osec/osec20200320>