



EMPLOYER GUIDELINES

# Reopening the Workplace

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# Reopening the Workplace

For those employers working remotely or shut down, in whole or in part, now is the time to begin planning for reopening the workplace. Some states have started to ease COVID-19 related workplace and business restrictions, while others are developing evaluative processes for such action in the coming weeks or months.

There are many factors that warrant consideration to ensure employers strike the correct balance between worker health and safety and the ability to resume business operations in an efficient and effective manner. [A checklist](#) to assist employers in considering these factors as they contemplate reopening preparations, along with other resources regarding COVID-19 issues, are available at Ballard Spahr's COVID-19 [Resource Center](#) under the Labor and Employment section.

On Monday, May 11, we will host the first webinar in a two-part series on *Resuming Workplace Operations: The Long March Back from Pandemic Isolation*. You can register for this webinar [here](#). We will offer the second part in the series on May 19, 2020.

## LEADERSHIP & PLANNING

Reopening and safely reintegrating employees back into the workplace will take careful planning and regular adjustments in accordance with federal, state, and local orders, the latest guidelines from the Centers for Disease Control and Prevention (CDC), as well as the unique circumstances of the business.

The first step is to create a leadership planning team to oversee and direct the workplace reopening process, including the planning, execution, monitoring, and documentation of the decisions and process. The team should conduct a risk and hazard assessment to identify COVID related issues and challenges specific to each workplace. Based on that assessment, create the reopening plan to address issues such as:

- Safety mitigation measures
- COVID-19 response process
- Staffing (*e.g.*, security, janitorial)
- Workplace screening and testing issues
- Leave and other employee concerns
- Balancing remote and in-person operations
- Recall and rehiring issues
- Communications plan
- Media and public relations

The planning team should meet frequently to assess and reassess the decisions, and the impact and effectiveness of those decisions. The reopening plan should be updated, as needed, with a careful eye to the near-daily changes occurring among the CDC guidance, state and local public orders, jurisdiction-specific COVID-19 leave and other laws, and regulatory guidance from the federal agencies. The team will need a point person to monitor and notify the team when changes in these mandates and guidance occur.

All measures and decisions should be documented. If there are legal challenges flowing from the employer's decisions, it will be important to demonstrate the care, consideration and attention paid to planning, the options evaluated, and the basis for the direction ultimately taken.

## **HEALTH & SAFETY PROTOCOLS**

Employers should become familiar with CDC, Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA) regulations and guidance. In addition, many states have adopted specific health and safety protocols under executive and public health orders and accompanying regulatory guidance. Some guidance is [industry-specific](#).

It is important that workplace health and safety protocols be developed with these sources firmly in mind, as it may be argued that they establish the "standard of care" expected of employers. OSHA has already [stated as much](#). Most importantly, these sources issue revised rules and guidance frequently, sometimes multiple times per day. As noted above, employers should have a point person(s) to monitor developments on a daily basis and alert the planning team when changes occur.

### **Cleaning and Disinfecting**

Employers should establish updated and enhanced cleaning and disinfection protocols, particularly for high-use and high-touch areas. This may be done through the employer's regular workforce and/or through outside vendors. It may be necessary to hire additional staff or to expand cleaning contracts. Some public health orders mandate consideration of janitorial staffing.

For employers in leased space and/or in buildings with shared common space, such as elevators, halls, lobbies, etc., the employer should consult with the landlord or building management about how cleaning and disinfection will be handled.

Additional information on the joint guidance issued by the EPA and CDC regarding proper cleaning and disinfection of public spaces, workplaces, businesses, schools and homes is available [here](#).

### **Social Distancing**

Employers should develop social distancing protocols for the workplace. Social distancing protocols can address a broad range of issues. For example, employers should consider engineering controls and administrative practices to provide at least six feet of space among workers, whether in motion or stationary in their work areas. This may include reconfiguration of workspaces, erection of barriers such as Plexiglas shields, marking floors for directional movement and spacing, and limiting the numbers of individuals who can congregate in common areas. It also may include new schedules and staggered shifts, different and staggered breaks and meal periods, and greater use of virtual meetings.

## **Handwashing and Sanitizing**

Employers should instruct employees to wash their hands regularly. The CDC and OSHA recommend that employees frequently wash their hands for at least twenty seconds. If soap and water are not available, hand sanitizer (with at least 60% alcohol content) is acceptable. (See, CDC, "[When & How to Wash Your Hands](#)"). Employers should make sure that employees returning to the work site have sufficient time and access to facilities to allow for regular hand washing.

## **Personal Protective Equipment**

Face coverings or shields, respirators, gloves and other personal protective equipment (PPE) may be mandated, depending on the state and industry. For example, some states, including Pennsylvania and New Jersey have adopted public orders mandating face coverings, both for [employees](#) and for customers. Others have issued guidance on what are appropriate face coverings and how to make them. Usually, the employer is responsible for providing PPE. Some workers may have health or religious objections to use of PPE, giving rise to the need to consider accommodations under the ADA or Title VII.

## **Employee Training**

Employees should be trained on the use and adherence to new health and safety protocols, including the consequences of not following them. OSHA also recommends employers train workers (during the employees' scheduled shift) at a higher risk for occupational exposure about "how to isolate individuals with suspected or confirmed COVID-19 or other infectious diseases, and how to report possible cases."

## **Signs**

OSHA and CDC both have made available a wide variety of signs that can be posted in the workplace to remind employees about health and safety protocols. These or workplace-specific versions should be printed and displayed prominently throughout the workplace.

## **Emergency Response Planning**

Many employers already have emergency response plans in place addressing measures to be taken if an employee begins to exhibit symptoms of COVID-19 in the workplace. Employers should continually review CDC, OSHA, and other related health administration guidance to ensure these plans are up to date. At this time, the CDC recommends that employees exhibiting symptoms should immediately be separated from others and sent home. Sick employees should not be permitted to return to work until they have met the CDC's latest criteria to discontinue home isolation. (See, CDC, "[Suspected or Confirmed Cases of COVID-19 in the Workplace](#)"). Employees who have had close contact with someone who is infected, but are not exhibiting symptoms of COVID-19, should remain at home or in a comparable setting and practice social distancing for 14 days.

## **Addressing Employee Fears**

All employees, especially those more susceptible to falling ill from COVID-19 or who live with someone deemed high risk, may have trepidations about returning to work. The best way to ease concerns is through transparency

and education—employers should tell employees about all the steps they are taking to keep the facility clean and ensure that staff members who are symptomatic are permitted to stay home, thereby decreasing the risk of infecting coworkers. Appointing visible COVID-19 coordinators and adopting Open Door policies/complaint procedures also will help to allay individual fears about workplace exposures.

## **SCREENING AND TESTING**

Employers may consider implementing temperature screenings, health questionnaires, and/or infection or antibody testing for COVID-19 (when available). Screening, if done, generally should take into account all persons entering the workplace, including employees, contractors, vendors, and visitors.

Some states, under public health orders, require screenings, especially after a positive COVID-19 incident in the workplace. Any screening and testing measures or health assessment policies should be implemented thoughtfully, with consideration of issues related to the Americans with Disabilities Act (ADA), including confidentiality of medical information, as well as other privacy concerns.

Any testing or screening measures should be applied to all employees consistently, to prevent any inference of discrimination. If an employee is singled out for testing or questioning about symptoms, the employer must have a “reasonable belief based on objective evidence” that the employee may have the disease. (EEOC, “Pandemic Preparedness in the Workplace”). Employers should also be mindful of federal and state anti-discrimination laws, which may apply. Also, some [state agencies](#), including Pennsylvania, have advised employers that its state anti-discrimination statute may be interpreted more broadly than its federal counterpart.

In addition, employers will need to assess whether time spent undergoing screenings (or waiting in line for screening) will be considered compensable time under wage and hour laws. Finally, employers should establish clear guidelines for when employees will be sent home based on screening and when they can return to work. The CDC has issued guidance on these issues.

Finally, consideration of who will conduct screening is important. This may be done by staff or an outside vendor, or a combination of the two. Also, the configuration of the screening location(s) must be considered, particularly in light of social distancing protocols. High-traffic screening locations also merit special cleaning and disinfection procedures.

## **POLICIES, PROTOCOLS, WORKFORCE EDUCATION, AND COMMUNICATION**

The planning team should evaluate the need for COVID-19 specific policies and protocols. The issues appropriate for workplace policies span many health and safety considerations, such as cleaning and disinfection, hand washing and sanitization, social distancing, temperature screening, infection testing, face coverings, infection response, scheduling and shifts, use of common space and cohorting, and leave policies, among others.

Employers should anticipate that there will be issues, complaints, and disputes about steps being taken or not taken and compliance with protocols. Some employees may be fearful about returning to work and may perceive that strict adherence to appropriate health and safety measures is literally a “life and death” matter.

Creating channels for employees to express their concerns or to file complaints will help to ensure that issues are aired, addressed, and resolved in a timely manner. Consider appointing one or more COVID-19 coordinators as the point people for pandemic issues across facilities and departments. Employers also should consider the

creation of an “Open Door” COVID-19 Policy to encourage employees to report concerns, triggering appropriate investigation and remediation where needed, similar to a harassment prevention policy. Employee complaints about workplace safety may be covered by “whistleblower” laws.

Workforce education around new policies and protocols should be part of a comprehensive communication plan to establish compliance expectations. Specific education of supervisors and managers, especially those tasked with enforcing the new policies and protocols, is advised. Media relations should also be considered. In the event that there is a COVID related incident (for example, a public complaint about workplace safety or a customer who contracts the disease) who will be responsible for communications with the media?

## **EMPLOYEE LEAVE**

Returning employees may be entitled to job-protected leave under a variety of sources, including the Family and Medical Leave Act (FMLA); state and local paid sick, family, and disability laws; the Families First Coronavirus Response Act (FFCRA); special COVID-19 public health emergency laws adopted during the pandemic; and employer-provided paid time off policies and programs. In addition, employees may request leave as a reasonable accommodation under the ADA and similar state and local laws. Administration of these leave programs and how they interact with each other (*i.e.* concurrent usage) can be complicated.

### **FMLA**

The FMLA grants leave for up to 12 workweeks to employees who are suffering from a serious health condition, caring for a qualifying family member experiencing a serious health condition, or to care for a new child. Generally, employees must have 12 months of service or 1250 hours or more of actual work in the 12 months preceding the leave. If employees were laid off or furloughed over the past few months, that time will not count towards the 1250 hours requirement. In addition, whether COVID-19 infection qualifies as a serious health condition depends on the severity of the illness.

### **FFCRA**

The FFCRA requires employers with fewer than 500 employees to provide Emergency Paid Sick Leave Act (EPSL) and amends the FMLA to create a new category of public health emergency (FMLA-PHE) leave related to COVID-19, which is also paid. To learn more about the FFCRA leaves, please read our FFCRA Update [here](#).

FMLA-PHE Leave applies only to employees unable to work, including telework, due to a need for leave to care for the employee’s son or daughter under 18, if the son or daughter’s school or place of child care has been closed, or the child care provider is unavailable due to a public health emergency. The usual FMLA eligibility criteria do not apply to FMLA-PHE Leave. Several states have closed schools for the rest of the year, and summer camps and childcare providers may soon implement the same measures. Therefore, although businesses may be ready to reopen, employees may face the same challenges with working and finding childcare and may seek to use this leave.

Employers should prepare an FFCRA Leave Policy to address COVID-19 related absences. See our model policy [here](#).

## State and Local COVID-19 Leaves

Some jurisdictions have adopted special COVID-19 leave laws or amended existing paid leave laws to extend benefits to COVID-19 situations. For example, [New Jersey](#) allows up to 12 weeks of unpaid job-protected leave over a 24 month period for an employee to care for (1) a child whose school or childcare facility is closed as a result of a pandemic; (2) a family member who is sick as a result of an epidemic or suspected exposure to a communicable disease; or (3) a family member required to self-quarantine as a result of a suspected exposure to a communicable disease.

[New York](#) also enacted a law providing additional sick leave benefits to employees required to quarantine or isolate, the scope of which depends on the size of the employer. Leave required under the new law must be granted without loss of an employee's accrued sick leave.

## REMOTE WORK

As part of the reopening plan, employers with employees working remotely should consider the extent to which ongoing remote work will be part of the plan or an option for employees. For example, employers may allow employees to transition back to in-person operations on certain days of the week. (Staggering on-site and remote workdays or shifts can be part of the social distancing protocol as well.) Having this option available, even for a limited duration, may help employees make the transition back to in-person work, especially for those individuals who are nervous or fearful about commuting and working on-site.

Some employees may not want to resume in-person work, preferring instead to work remotely. According to the CDC, people of all ages with certain underlying medical conditions, particularly if not well controlled, are at high-risk for severe illness from COVID-19. Such conditions include: chronic lung disease, moderate to severe asthma, serious heart conditions, immunocompromised, (*e.g.*, cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications); severe obesity; diabetes; chronic kidney disease undergoing dialysis; and liver disease. Most, if not all, of these conditions are likely ADA-covered disabilities.

A high risk employee may request an accommodation to avoid the risks of exposure and infection, real or perceived, in connection with using public transportation to commute and/or being present at the workplace. They may ask to continue a remote working situation or for leave time as accommodations. These requests for accommodation should be treated like any other non-COVID accommodation request: employers should engage in the interactive process to determine if an accommodation is feasible without an undue hardship. Remember that accommodations are intended to provide employees with the means to perform the essential functions of the job and that unlimited leave time is not viewed as a reasonable accommodation.

Employees who are "high risk" because of their age, and who do not have an underlying ADA-covered condition, may not be legally entitled to an accommodation. Employers should consider carefully whether they will grant accommodations to such employees.

Read more about the EEOC's guidance regarding "Pandemic Preparedness in the Workplace and Americans with Disabilities Act" [here](#).

## RECALL AND REHIRING

### Selection Processes

When employees are recalled to work, there may be a selection process, either because the employer does not need all employees back or may prefer to recall only the stronger performers, or both. For union employees, the collective bargaining agreement may mandate the order of recall. For non-union employees, the employer has discretion to select those who will be recalled. Opting not to rehire an employee is an “adverse action” which may be challenged or scrutinized as discriminatory. Employers should adopt and follow non-discriminatory, business-based criteria for selecting whom to recall. The criteria and selection process should be documented, in the same manner as the employer would create and document a selection process for reducing the workforce.

### Unemployment Compensation (UC)

Although the CARES Act greatly expands unemployment eligibility, employees who refuse to return to work may cease to be eligible for continued unemployment benefits. Some states have developed forms and processes for notifying the state UC bureau that an employee has declined work. Other states are considering whether employees, for good cause, should be permitted to decline a recall offer and still remain eligible for unemployment. For example, Texas allows continued receipt of UC benefits for those at high risk based on age or medical condition, those diagnosed with COVID-19, and individuals with no childcare available, among other reasons.

In return to work communications, employers may wish to remind employees that refusal to accept employment may jeopardize continued receipt of UC benefits (after checking the state of the law for any exceptions).

### Compensation & Benefits

Over the past few months, with reduced client and customer demands coupled with declining revenues, many employers have implemented reduced work schedules or employee compensation. As business returns to normal, employers should consider relevant wage and hour laws. Notably, state or local wage and scheduling requirements may dictate how much notice employers must provide employees before adjusting their wages or work schedule. Employers should also assess what impact, if any, recent furloughs or layoffs will have on bonus or incentive programs.

Some employers may have converted exempt, salaried employees to non-exempt over the past few months and paid them on an hourly basis to reflect altered job duties. Before converting qualifying employees back to exempt status, employers should consider whether this change will be permanent—frequent switching back and forth may jeopardize the exemption.

## COLLECTIVE BARGAINING & OTHER CONTRACTS

As noted above, some of the workplace changes brought about by COVID-19 implicate bargainable subjects for union workplaces. Whether a decision must be bargained depends on the terms of the collective bargaining agreement. In evaluating this issue, keep in mind the recent NLRB decision in *MV Transportation, Inc.* (NLRB, Sept. 10, 2019). There, the NLRB overruled the “clear and unmistakable waiver” test, instead adopting the “contract coverage” standard in assessing whether a CBA permits an employer’s unilateral action. Under *MV Transportation, Inc.*, if the employer action “falls within the compass or scope of contract language,” then the



employer may act unilaterally. Still, depending on the terms of the bargaining agreement, employers may have a duty to bargain over the effects of COVID-19 related decisions.

Employers should also review their vendor agreements closely and communicate with vendors and other partners such as landlords and independent contractors to ensure compliance with applicable agreement terms and other policies. Services required now under some agreements may be different than those outlined for the pre-COVID workplace, and contract amendments may be needed.

Insurance coverage issues should also be considered. Employers should review their insurance agreements to determine the scope of their workers' compensation coverage and assess whether their general liability coverage includes potential infection of customers, vendors, and other third parties.

## **CONCLUSION**

Employers that plan thoughtfully and proactively for the challenges associated with reopening will be better positioned to manage the risks associated with in-person operations during the pandemic. Although it may seem counterintuitive, part of planning to reopen should also include plans to close or modify operations again if a spike in COVID-19 cases in the vicinity causes governments to reissue shelter-in-place orders. Keep those furlough notices and remote working plans handy ... you may need them again.

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