



## **Reopening the Workplace: Navigating the Legal and Practical Challenges for Employers**

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As state and local governments contemplate reopening businesses, employers should consider and prepare for the risks and obligations associated with reopening the workplace. The following provides an overview of the most common issues employers will face when employees return to work.

This guide covers the following topics:

- [COVID-19 Workplace Health and Safety](#)
- [Employer Considerations under the Americans with Disabilities Act](#)
- [Employee Leave for Child Care under the Families First Coronavirus Response Act \("FFCRA"\)](#)
- [Employee Mental Health Considerations](#)

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### **COVID-19 Workplace Health and Safety**

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The Occupational Safety and Health Administration ("OSHA") is reminding employers that OSHA requirements apply to preventing occupational exposure to COVID-19 and cites its General Duty Clause, which requires employers to furnish each worker "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654. To assist employers and workers in addressing COVID-19 in the workplace, OSHA has recently issued several guidance documents.

#### *OSHA's Guidance on Preparing Workplaces for COVID-19*

In March 2020, OSHA, with the assistance of the Department of Health & Human Services, issued its Guidance on Preparing Workplaces for COVID-19. The 35-page guidance document is intended to assist employers in planning their response to COVID-19, to identify risk levels in workplace settings, and to analyze the appropriate control measures to put in place.

Importantly for all employers, the guidance includes steps that all employers should take to reduce workers' risk of exposure to COVID-19. These steps include developing an infectious disease preparedness and response plan; implementing basic infection prevention measures (*i.e.*,

promoting good hygiene, encouraging sick workers to stay home, implementing flexible work schedules, etc.); and developing policies and procedures for the identification and isolation of sick people. Further general recommendations include frequent cleaning of commonly touched surfaces using chemicals approved for destroying the coronavirus. All employers should also monitor public health communications, including those from the Centers for Disease Control and Prevention ("CDC"), regarding COVID-19 recommendations for the workplace and ensure that workers have access to and understand that information.

The guidance also identifies job classifications based upon exposure risk to COVID-19.

- Very high exposure risk jobs are those with high potential for exposure to known or suspected COVID-19 during specific medical, postmortem, or laboratory procedures. Very high exposure risk jobs include healthcare workers performing aerosol-generating procedures on known or suspected COVID-19 patients, laboratory personnel collecting COVID-19 test specimens, and morgue workers performing autopsies on COVID-19 victims.
- High exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19. High exposure risk jobs include healthcare workers and support staff exposed to known or suspected COVID-19 patients, medical transport workers moving known or suspected COVID-19 patients in enclosed vehicles, and mortuary workers involved in preparing the bodies of the victims of COVID-19.
- Medium exposure risk jobs include those that require frequent and/or close contact with (*i.e.*, within 6 feet of) people who may be infected with COVID-19, but who are not known or suspected COVID-19 patients. Medium exposure risk jobs include workers in areas with ongoing community transmission that have contact with the general public (*e.g.*, schools, high-population-density work environments, some high-volume retail settings).
- Lower exposure risk jobs are those that do not require contact with people known to be, or suspected of being, infected with COVID-19 nor frequent close contact (*i.e.*, within 6 feet) with the general public.

The guidance focuses on the need for employers to implement engineering, administrative, and work practice controls and distribute personal protective equipment ("PPE") based upon the worker's exposure risk to COVID-19. Thus, for example, workers in very high and high exposure risk jobs must be provided with PPE that abides by OSHA's PPE standards which require using gloves, eye and face protection, and respiratory protection "wherever necessary by reason of hazards of...environment...encountered in a manner capable of causing injury...through absorption, inhalation, or physical contact." 29 CFR 1910.

### OSHA's Industry Specific Alerts

As shelter-at-home orders expire and employees begin to return to work, OSHA has also released Alerts for keeping workers of specific industries safe during the COVID-19 pandemic. Alerts have been issued for employers operating businesses in the retail, construction, manufacturing and package delivery industries, among others. We anticipate more Alerts will be published in the coming days and weeks. The following is a brief summary of the industry specific recommendations contained in each alert:

### *Retail*

- Practice social distancing, by maintaining six feet of space between coworkers and customers. Demarcate six-foot distances with floor tape in checkout lines. Consider opening every other cash register, temporarily move workstations to create more distance, and install plexiglass partitions.
- Use a drive-through window or curbside pick-up.
- Provide workers and customers with tissues and trash receptacles.
- Train workers on proper hygiene practices and use of workplace controls.
- Allow workers to wear masks over their nose and mouth to prevent them from spreading the virus.

### *Construction*

- Allow workers to wear masks over their nose and mouth to prevent them from spreading the virus. Continue to use other normal control measures, including PPE, necessary to protect workers from other job hazards associated with construction activities. Train workers on how to properly put on, use/wear, and take off PPE.
- Advise workers to avoid physical contact with others and direct employees/contractors/visitors to increase personal space to at least six feet, where possible. All workers should maintain social distance while inside work trailers.
- If workers do not have immediate access to soap and water for handwashing, provide alcohol based rubs containing at least 60% alcohol.
- For shared tools, provide and instruct workers to use alcohol-based wipes to clean tools before and after each use.

### *Manufacturing*

- Establish flexible work hours (*e.g.*, staggered shifts), if feasible.
- Practice social distancing, by maintaining six feet of space between coworkers, where possible.
- Allow workers to wear masks over their nose and mouth to prevent them from spreading the virus. Train workers how to properly put on, use/wear, and take off PPE.
- If workers do not have immediate access to soap and water for handwashing, provide alcohol based rubs containing at least 60% alcohol.
- Discourage workers from using other workers' tools and equipment.

### *Package Delivery*

- Establish flexible work hours (*e.g.*, staggered shifts), if feasible.
- Practice social distancing, by maintaining six feet of space between coworkers, where possible.
- Minimize interactions between drivers and customers by leaving deliveries at loading docks, doorsteps, or other locations that do not require person-to-person exposure.
- If workers do not have immediate access to soap and water for handwashing, provide alcohol based rubs containing at least 60% alcohol. Provide tissues, as well as

- disinfectants and disposable towels, workers can use to clean work surfaces, including vehicle interiors.
- Allow workers to wear masks over their nose and mouth to prevent them from spreading the virus.

### *A final note on OSHA enforcement*

OSHA continues to enforce its standards. However, OSHA has stated that it will exercise discretion in enforcement of OSHA standards given the ongoing health emergency. During the course of an inspection, if an employer is not in compliance with an OSHA standard, inspectors are to assess the employer's "good faith efforts" to comply, and exercise discretion accordingly.

### *Texas-Specific Guidance*

On April 27, 2020, Governor Greg Abbott issued an Executive Order outlining the plan to reopen Texas businesses in phases. As part of the Executive Order, Governor Abbott also published [\*Texans Helping Texas: The Governor's Report to Open Texas\*](#), which details minimum standard health protocols for employers and businesses choosing to operate in Texas. The minimum standard health protocols include, among other things, screening employees for COVID-19 symptoms, maintaining social distancing, and having employees wash or sanitize their hands before entering the business. Governor Abbott's report cautions that "public health guidance cannot anticipate every unique situation." Therefore, employers are encouraged to "stay informed and take actions based on common sense and wise judgment that will protect health and support economic revitalization." Employers should review the standards outlined in Governor Abbott's report and implement those measures and, if appropriate, adopt additional measures consistent with the company's specific operational needs.

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## **Employer considerations under the Americans with Disabilities Act ("ADA")**

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### *Screening Employees*

Before employees return to the workplace, employers should decide if and how it will screen employees for COVID-19, such as measuring employee temperatures or asking employees whether they are experiencing symptoms of COVID-19. On April 23, 2020, the Equal Employment Opportunity Commission ("EEOC") provided employers the green light to screen employees for COVID-19 without violating the ADA.

According to the EEOC, employers are allowed to administer a COVID-19 test before allowing employees to enter the workplace. The EEOC cautioned that employers should ensure "that the tests are accurate and reliable" and encouraged employers to review guidance from the U.S. Food and Drug Administration ("FDA") regarding safe and accurate testing.

Of course, administering COVID-19 tests may not be feasible, due to their limited availability and/or expense. Alternatively, employers are allowed to screen employees for symptoms of COVID-19 through temperature checks or inquiring about COVID-19 symptoms. For example, because COVID-19 is a global pandemic, employers are allowed to measure an employee's temperature before the employee enters the workplace. If the employee has a fever, the

employer may exclude the employee until the employee seeks medical attention. Additionally, employers may ask employees if they are experiencing symptoms of COVID-19, such as shortness of breath, chills, sore throat, or coughing. Employers should avoid broad questions about the employee's overall health, as these types of questions may reveal non-COVID-19 health conditions that are protected by the ADA. Therefore, employers should narrowly tailor health inquiries to symptoms of COVID-19 as established by the CDC or other public health officials. To the extent the employer records any medical information (*e.g.*, test results, temperatures, or symptoms), the employer should maintain these records in the employee's separate confidential medical file.

If employers decide to screen its workforce for COVID-19 symptoms, we recommend the following best practices:

- Advise employees in advance that their temperatures will be taken and/or they will be screened for COVID-19
- Consistently apply screening procedures to all employees
- Appoint a member of management (such as an HR professional) to administer and oversee any screening procedures to ensure consistency and confidentiality
- Limit the health or medical inquiries to symptoms related to COVID-19
- Be aware of the potential of false-positive tests and re-test employees as appropriate
- Store any employee medical or health information, including employee temperatures, in the employee's separate confidential medical file
- Continuously monitor guidance from federal, state, and local health officials

Previous guidance we authored about what to do if an employee is diagnosed with COVID-19 is available [here](#).

### *Reasonable Accommodations*

As employees return to work, employers should be prepared to address requests for reasonable accommodations relating to COVID-19. For example, employers may be required to provide employees with personal protective equipment ("PPE") including gloves and masks. If an employee has a medical condition that interferes with the use of PPE, such as a latex allergy, employers must engage in the interactive process with the employee to identify a reasonable accommodation that would allow the employee to perform the essential functions in a safe manner. The EEOC recommends employers consult the Job Accommodation Network ("JAN") for information regarding types of accommodations ([www.askjan.org](http://www.askjan.org)).

Additionally, employers should also be mindful of the class of employees protected under the ADA and, therefore, entitled to a reasonable accommodation. The ADA protects individuals: (i) with an actual disability; (ii) with a record of a disability; or (iii) regarded as disabled. Although the CDC has declared certain individuals as vulnerable to COVID-19, including people over the age of 65 and pregnant women, being vulnerable to COVID-19 does not automatically trigger the ADA. For example, an employee over the age of 65 is not entitled to a reasonable accommodation, unless the employee has an underlying medical condition that is protected under the ADA. Similarly, pregnancy does not automatically trigger a need for a reasonable accommodation

because pregnancy itself is not a disability under the ADA. However, a pregnancy-related medical condition may require an accommodation under the ADA.

Regarding reasonable accommodations, we recommend:

- Documenting any request for reasonable accommodation
- Engage in and memorialize the interactive process, including documenting the reason a particular request was denied and the accommodation ultimately provided
- Consider whether an unpaid or paid leave of absence may be an appropriate accommodation
- Store information relating to reasonable accommodations and the interactive process in the employee's confidential medical file
- If appropriate, specify the duration the accommodation will be provided and the reason the accommodation is temporary

**Best Practice Alert:** If an employee expresses reluctance to return to the business, have a conversation with that employee to determine what is the cause of the employee's resistance. If the employee is concerned due to an underlying health condition that could place them at a higher risk for severe illness from COVID-19, engage in the reasonable accommodation process with that employee to determine if a reasonable accommodation exists.

#### Selecting Employees to Return to Work

Employers should also avoid a temptation to protect perceived "vulnerable populations" in selecting which employees should return to work and which employees should remain home. For example, if an employer returns perceived "healthy" employees while excluding others based on an actual or perceived health vulnerability, the excluded employees are likely to be negatively economically disadvantaged (*e.g.*, lost earnings) which may result in allegations of disability discrimination.

Rather, in selecting which employees to return to work, employers should focus on job functions—not on particular individuals. In other words, employers are advised to examine the legitimate business needs of the organization and which positions can fulfill those needs. If necessary, the company should wait to address any actual or perceived disability or requests for accommodation at the appropriate time.

In deciding which employees should return to work, we recommend:

- Establishing clear and objective criteria for selecting which employees will return to work
- Documenting the reason(s) certain employees will remain at home
- Advise employees that because the company has yet to resume its full operations, it is asking a limited group of employees to return to work based on the company's current business needs

**Best Practice Alert:** Notify employees in writing of their expected return date. If applicable, also document any changes to rate of pay, job title and job duties.

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## Employee Leave for Child Care under the Families First Coronavirus Response Act (“FFCRA”)

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As the nation begins to reopen and the workforce begins to return to work, it is likely that the most common reason for employees requesting leave will be related to child care concerns. This is especially so, considering many schools in Texas and across the country will not reopen until the next academic school year.

The recently-enacted Families First Coronavirus Response Act (“FFCRA”) provides an avenue for eligible employees working for covered employers to request paid sick leave and expanded family and medical leave for specified reasons related to COVID-19 and the current global pandemic, including child care. The FFCRA’s new paid leave requirements will be in effect until December 31, 2020, unless otherwise extended.<sup>1</sup>

Generally, under the FFCRA, employers must provide employees with two (2) weeks of paid sick leave (up to 80 hours) at 2/3 their regular pay if the employee is unable to work because of a need to care for a quarantined individual, or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19. In addition, employers must provide up to ten (10) additional weeks of expanded family and medical leave, paid at 2/3 their regular pay, if a qualifying employee is unable to work due to a need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

However, as the regulations to the FFCRA explain, an employee may only take paid sick leave to care for his or her child when the employee needs to, and actually is, caring for the child. If another suitable individual, such as a co-parent, co-guardian, or usual child care provider is available to care for the child’s needs, the employee does not need to take such leave. Employers may inquire into, and an employee requesting such leave to care for a child must provide, the following: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became otherwise unavailable due to COVID-19, and (3) a statement from the employee representing that no other suitable person is available to care for the child during the period of requested leave. It is important to note that an employee who is able to telework while caring for the needs of their child is not “unable to work.”

While teleworking, the FFCRA provides that paid sick leave or expanded family and medical leave, including to care for a child, may be taken intermittently (*e.g.*, in 1 hour increments, or whatever the employer and employee agree upon). However, once an employee returns to work, any such leave must be taken in full-day increments, even leave to care for a child. For example, an employee, assuming he or she has a need to care for a child as outlined above, could request 2/3 paid leave for Tuesdays and Thursdays to care for a child, while working Mondays, Wednesdays, and Fridays—thus receiving full pay for those worked days. The DOL will support any voluntary agreements for an employer to provide intermittent leave once an employee returns to work, but

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<sup>1</sup> The DOL’s temporary abstention from enforcement actions under the FFCRA has expired, and the DOL will now fully enforce violations of the FFCRA.

this is not required under the FFCRA. The above highlights just a few of the new issues employers face as the nation returns to work.

For more information regarding the FFCRA and related regulations, please visit our prior guidance on this topic:

- [Emergency Paid Leave Update](#)
- [U.S. Department of Labor Announces Temporary Rule and Issues Regulations Regarding the Families First Coronavirus Response Act \(FFCRA\)](#)

**Best Practice Alert.** Before employees return to the workplace, make sure the required FFCRA Notice is posted in a conspicuous place where notices to employees are customarily posted. A copy of the notice can be found [here](#).

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## Employee Mental Health Considerations

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The full extent of the economic and emotional consequences resulting from COVID-19 remain unknown. However, as businesses begin reopening during these uncertain times, employers should consider the potential impact of the pandemic on employee mental health (*i.e.*, emotional, psychological, and social well-being). According to a recent [Kaiser Family Foundation Survey](#), 45% of adults—53% of women and 37% of men—say the COVID-19 pandemic has affected their mental health. Additionally, nearly 20% of adults say it has had a “major impact” on their mental health, including about one-fourth of women (24%), Latinx adults (24%), and black adults (24%).<sup>2</sup>

Of course, each individual has responded differently to the effects of COVID-19. Similarly, workers will have varying reactions to returning to the workplace. For some, returning to the employer’s place of business is a welcomed return to “normalcy,” as they seek a workday uninterrupted by barking dogs or restless cats, or snack times for preschoolers.

Others may have a very different reaction. For example, some employees who have been working remotely during the pandemic may be reluctant to return to the workplace after having tasted a new perspective of the work-life balance, including avoiding long commutes and enjoying meal breaks with family members. For employers, these employees who were just as or even more productive away from the standard bearer office, embody the conundrum popularized by the WWI song: “*How Ya Gonna Keep ‘em Down on the Farm (After They’ve Seen Pree?)*”

For differing rationales, other workers may also express hesitancy to return to or remain in the office:

- I am glad to be back in office, but I also have remorse because my former cubicle worker was laid off. Why them and not me?
- My co-worker is coughing. Should I report him to management?
- How do I know the nightly cleaning crew is doing an effective job disinfecting, they barely emptied the trashcans pre-COVID-19?

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<sup>2</sup> The numbers regarding Latinx and Black adults may be attributable to the documented disparate impact of the virus on those two population groups. See [Kaiser On COVID-19 Race Disparities](#).

- I am afraid to return to the work place. Is it safe yet?
- Employees with obsessive-compulsive disorder may find it stressful complying with the 20-second-hand-washing recommendations in the public workspace.

The preceding are only samples of the continuum of thoughts, feelings, emotions and reactions that returning employees may bring into the workplace which may affect productivity, attendance, office relationships, and morale. Even employees without a history of mental illness may nonetheless find it difficult to gain their emotional equilibrium as they return to the office while so many uncertainties about the virus persist.

Therefore, employers should adopt a proactive and informed approach to navigating mental health issues in the workplace. Under the ADA, if a mental health issue rises to the level of a covered disability, the employer may need to provide a reasonable accommodation, such as a leave of absence or modified work schedule. Of course, an employer should not assume an employee is dealing with a mental health issue. However, employers can adopt some of the following recommended practices:

- Encourage all employees to contact their supervisor or Human Resources representative if they are concerned about returning to work
- If applicable, remind employees of resources available to employees dealing with mental health issues, such as an Employee Assistance Program, or direct employees to resources relating to mental health, such as:
  - <https://www.nami.org/Home>
  - <https://www.nimh.nih.gov/index.shtml>
  - [https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html?CDARc\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronaviruses%2F2019-ncov%2Fprepare%2Fmanaging-stress-anxiety.html](https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html?CDARc_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronaviruses%2F2019-ncov%2Fprepare%2Fmanaging-stress-anxiety.html)
- Encourage all employees to be kind and patient with each other as the company navigates these unprecedented times
- Consider programs to boost employee morale, such as employee recognition awards

While employers should not presume to be mental health experts, they can increase their knowledge enough to provide resources to employees and create a positive work environment, free from any stigma regarding mental health.

The above information is a good starting place for employers as they review and analyze bringing their employees back to the workplace. As always, each workplace is unique based on the nature of their industry, local jurisdictions, employees and customers. For further guidance, or specific questions related to your company, please contact one of the employment attorneys at McGinnis Lochridge LLP, or your regular contact at the Firm.