

Professional Perspective

Considerations for Employers as Business Reopens

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As employers continue to adjust to a new reality brought on by the coronavirus pandemic, many are now planning for the future. That future raises many difficult questions for employers, including— the true economic impact of the pandemic, when and how employees will return to work, and what steps employers should take to protect their workforce and their business. These are just some of the questions employers are asking as states across the country lift or plan to lift their stay-at-home orders and other Covid-19 restrictions.

On April 16, 2020, President Donald Trump announced [guidelines](#) calling for a phased approach to reopening the country at a state-by-state or even county-by-county level. The guidelines—although delegating ultimate decision-making authority to state governors—provide a framework for reopening the country's economy. For their part, many states have announced plans to coordinate their reopening effort so as to mitigate the risk of the virus resurfacing in different geographic regions of the country.

In the first phase of reopening under the guidelines, strict social distancing protocols would be followed (e.g., allowing telework where possible and feasible with business operations, returning to workplaces in phases, closing common areas, etc.), non-essential travel would be discouraged, and people would be encouraged to avoid groups of 10 or more. Schools and bars would remain closed, but other venues—such as restaurants, theatres, sports venues, churches, and gyms—would be allowed to reopen under strict social distancing and cleaning protocols.

If there is no evidence of a resurgence of Covid-19 cases, the state or locality would enter the second phase, in which non-essential travel would resume and people would be encouraged to avoid groups of 50 or more. Schools, bars, and other facilities would be allowed to reopen or increase density under social distancing protocols. In the third and final phase, most businesses would return to normal operations, while specific types of employers—including senior care facilities, hospitals, large venues, gyms, and bars—would be required to adopt limited social distancing and sanitization protocols.

While it remains to be seen how quickly the reopening process will unfold, and how (and when) states and localities will permit businesses to reopen, there is no question that bringing millions of employees back to work will present logistical and legal challenges that employers have never seen before. The following addresses our top 10 employment law considerations for employers to keep in mind as they plan to return to a new normal.

Temperature Screening of Employees

Upon reopening, many employers may wish to implement measures to ensure those infected with Covid-19 do not enter the workplace. Fever is a commonly-reported symptom of Covid-19, so conducting temperature checks is one way employers may try to keep the workplace free of infection. However, employers should consider a number of legal and practical issues before implementing such measures.

First, the Americans with Disabilities Act places limitations on employers' ability to make disability-related inquiries and to require medical examinations of employees, such as temperature taking. However, the ADA allows such inquiries and examinations when the employer reasonably believes an employee will pose a "direct threat" due to a medical condition. The Equal Employment Opportunity Commission (EEOC) [announced](#) that Covid-19 meets the "direct threat" standard.

Thus, during the pandemic, employers are permitted to take employees' temperatures and bar those who have a fever from entering the workplace. Employers can also bar employees who refuse to have their temperature taken from entering the workplace. However, not all employees who have Covid-19 will have an elevated temperature, meaning that temperature screening will not eliminate the risk of infected persons entering the workplace.

When conducting temperature checks, employers should subject all employees in the same job category to the same testing and screening requirements to avoid potential disparate treatment claims. Practically speaking, temperature checks should be conducted by a medical professional, or if that is not possible, by a member of human resources (or someone in a similar role) in order to maximize confidentiality. In addition, all medical information must be maintained confidentially and stored in a separate medical file from the employee's personnel file, in accordance with the ADA. Employers also need to consider the logistics of such testing, including privacy and social distancing issues.

Finally, temperature checks will not be permissible indefinitely. The EEOC indicated that any revised assessment by the Centers for Disease Control and Prevention and state/local public health authorities regarding the spread and severity of Covid-19 may affect whether a direct threat still exists. Therefore, employers who implement temperature checks or other medical screenings should consult legal counsel and monitor CDC, local health department, and EEOC guidance to assess the continued permissibility of these measures.

Employee Questionnaires

As noted above, not all people with Covid-19 develop a fever. In fact, research suggests that those without a fever, or without any symptoms, may carry and be able to spread the virus. Therefore, employers may wish to implement additional measures to reduce the chance that contagious individuals enter the workplace.

Employers may consider requiring employees to complete questionnaires asking them to report whether they have tested positive for Covid-19, experienced Covid-19 symptoms, believe they have been exposed to someone who has tested positive, and/or have any other reason to believe that they may have been exposed to the virus. Based on the answers to these questions, employers may seek additional information, such as the time period when such symptoms or exposure took place.

To the extent these questionnaires solicit employee medical information, again employers should remember that such inquiries may only be permitted so long as Covid-19 poses a direct threat and any information obtained through such a questionnaire must be maintained as a confidential medical record. Also, employers should not screen employees on the basis of a protected characteristic, such as their perceived race, age, pregnancy, or disability.

Diagnostic/Antibody Testing

Another possible screening measure is to identify those employees who have the virus through diagnostic testing or those who had the virus through antibody testing.

According to new [EEOC guidance](#), employers may choose to administer diagnostic testing to employees before they enter the workplace. Before doing so, employers should consult guidance from the CDC, the Food and Drug Administration (FDA), and other public health authorities to ensure that tests are accurate and reliable. To that end, the EEOC advises employers to consider the frequency of false-positives and false-negatives associated with the test. Employers should also follow the above recommendations regarding best practices for administering temperature taking and employee confidentiality. Employers should also be aware that such testing will only be permissible for the duration of the pandemic—or more precisely, for the duration of the “direct threat.”

The EEOC has not yet specifically addressed the permissibility of antibody testing, which would also constitute a medical examination under the ADA. Nevertheless, there are some indications that such testing may be permissible if it is recommended by public health officials. As discussed above, the EEOC has approved temperature taking and diagnostic testing—which are also considered a medical examinations—so it may apply the same reasoning to affirmatively permit antibody testing.

In addition, according to [EEOC guidance](#), “employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.” Employers considering such testing should continue to monitor the latest guidance from the EEOC, CDC, and public health authorities, and consult with counsel before implementing any form of testing.

Social Distancing in the Workplace

Employers should consider ways to increase social distancing and reduce workplace density. The [CDC's](#) suggested social distancing strategies include:

- Implementing flexible worksites (e.g., telework)
- Implementing flexible work hours (e.g., staggered shifts)
- Increasing physical space between employees at the worksite
- Increasing physical space between employees and customers

- Implementing flexible meeting and travel options (e.g., replacing in-person meetings with virtual ones)
- Downsizing operations
- Delivering services remotely (e.g., phone, video, or web)
- Delivering products through curbside pick-up or delivery

Appropriate social distancing measures will vary greatly depending on the nature of the employer's business and the severity of the outbreak. For an office workplace, this may involve reconfiguring the office to eliminate shared workspaces, constructing physical barriers (such as Plexiglas shields), and developing policies limiting elevator density. Notably, jurisdictions like Rhode Island, Pennsylvania, and Washington, D.C. have issued executive orders that require, among other things, staggered work start and stop times, break times, when practicable, virtual meetings and trainings, and installation of shields or other barriers to physically separate employees and customers.

Other states that have issued reopening plans (e.g., Georgia, South Carolina, Texas, Vermont, and Wisconsin) impose similar requirements. Employers should closely monitor local orders to ensure compliance. Employers should also prepare for the possibility that as social distancing measures are relaxed, Covid-19 cases may increase, necessitating the imposition of stricter measures. Finally, employers should consider which visitors, if any, should be permitted into the workplace and under what conditions.

Additional Steps to Prevent Transmission in the Workplace

The General Duty Clause of the Occupational Safety and Health Act (OSH Act) requires employers furnish to 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." To ensure they are providing a safe workplace, employers should consider the following measures in addition to those discussed above.

First, employers should require employees who are sick to stay home. Sick employees should consult with their health-care providers and follow [CDC](#)-recommended steps, including that they should not return to work until the [CDC](#) and state and local criteria to discontinue home isolation are met. Similarly, employees who are not sick but who have household members who have been diagnosed with Covid-19 or have Covid-19 symptoms should be asked to notify their supervisor and follow [CDC](#) and state and local guidelines.

Second, employers should consider whether it is appropriate to have employees use personal protective equipment at work. The OSH Act requires employers to assess the workplace, determine if hazards are present or likely to be present which necessitate the use of PPE, and if so, have employees use PPE. Employers should consult Occupational Safety and Health Administration (OSHA) guidance, which covers each form of PPE in detail and assess whether to provide employees with PPE.

Some states and localities are now requiring that individuals use certain PPE, such as face masks or coverings, while at work or in public. For example, [New York](#) and [New Jersey](#) are among several states that have issued orders requiring in-person workforce employees wear face coverings and gloves. Some of these orders require employers to post notice about these requirements, implement policies, and/or provide these items at the employers' expense.

Finally, employers can take other practical steps, such as:

- Conducting remote training for employees on recognizing symptoms, and on best workplace practices and policies
- Providing hand sanitizer, disinfectant, and no-touch trash cans
- Routinely cleaning and disinfecting frequently touched objects and surfaces
- Placing signs in restrooms and eating areas encouraging handwashing
- Encouraging noncontact methods of greeting as an alternative to hand shaking
- Prohibiting employees from using other employees' desks, offices, and equipment

- Instructing employees to take other steps to reduce the chance of transmission, including:
 - Avoiding close contact with people who are sick
 - Avoiding touching eyes, nose, and mouth with unwashed hands
 - Staying at home when sick
 - Covering coughs and sneezes with a tissue
 - Washing hands often for at least 20 seconds, or using hand sanitizer if handwashing is not available

Employers should consider, in consultation with counsel and, possibly, infectious disease experts, which of these practices are appropriate or necessary for their particular workforce.

Response Plan for Infected Employees

Employers should prepare a plan to follow when employees are diagnosed with Covid-19. As discussed below, the plan should address employee notification, cleaning the workplace, and any applicable recording and reporting obligations under the OSH Act or local law.

When employers learn of an employee infection, they should immediately communicate with the affected employee to obtain information to assist with its response. For example, employers should attempt to determine when the symptoms first appeared, if the employee has any sense of when they may have been exposed, when the employee was last in the workplace and the areas of the workplace the employee visited, and whom the employee had close contact with, including customers or clients.

If the affected employee has recently been in the workplace, a communication should be sent to all employees at that location. The communication should assure employees that health and safety is top priority, be based on objective facts, and be drafted to reduce unnecessary fear and panic. In addition, employees who had close contact with the infected employee may be separately informed of their potential exposure.

Depending on the level of risk, employers may wish to advise or require potentially exposed employees to work from home for 14 days, monitor for Covid-19 symptoms, and notify the employer if they experience symptoms. Notably, [CDC guidance](#) regarding critical infrastructure workers who have been exposed to someone with the virus but are asymptomatic does not recommend quarantine, but instead advises that, in addition to facility cleaning measures, such employees should be prescreened before they enter the work facility (including temperature tests and assessment of symptoms), be advised to continually self-monitor for symptoms, wear a mask, and maintain social distancing.

Employers should not disclose the name of an infected employee in any communication, including in communications to other employees, because the ADA requires that employers keep employee medical information confidential. Instead, the employer should provide information that will allow employees to assess their personal level of risk, such as the dates that the employee was in the workplace and areas of the workplace the infected individual visited. Even if other employees may be able to ascertain the employee's identity based on facts in the employer's communication or the employee's absence from the workplace, the employer should not confirm the identity of the diagnosed employee.

Any response plan should also address closure and cleaning of the workplace. Employers should follow guidance issued by the [CDC](#) and state and local health departments, such as the [New York City Department of Health](#), around cleaning the workplace after an infected employee has been at work.

Employers should also determine whether any reporting or recording obligations are triggered as a result of the infection. At the federal level, the OSH Act requires employers report and record certain work-related infections. Employers should consult the latest OSHA guidance, and be aware that the agency recently relaxed recording obligations for most employers, instructing that until the agency notifies employers otherwise, no employer—except emergency response organizations, correctional institutions, or those in the health-care industry—will be required to record cases of Covid-19 unless there is objective evidence that a Covid-19 case may be work-related, and the evidence was reasonably available to the employer.

Employers should also consult guidance issued by their state and local health departments regarding any reporting obligations in the jurisdictions in which they operate. For example, in New York, only certain enumerated employers—such as physicians, laboratories, and nursing homes—are required to report Covid-19 cases.

Finally, employers should consider [CDC](#) and local guidance, such as that issued by the [New York State Department of Health](#), on returning employees to work after they have been diagnosed positive. The CDC has published a number of strategies that can be taken to end home isolation in the event of a positive diagnosis, including guidance on when an individual with Covid-19 may safely return to the workplace.

Policy and Handbook Modifications

As employees return to the workplace, employers should consider which policy and employee handbook modifications are necessary. For example, employees should be given new leave policies reflecting new federal, state, and local law requirements, to the extent applicable. Employers should consult official guidance and employment counsel regarding their obligations under these laws, including mandatory notice or posting requirements.

Employers should also consider whether changes are needed to business-related and personal travel policies. At the outset of the Covid-19 outbreak, many employers imposed business-related travel restrictions based on [CDC](#) and [State Department](#) travel warnings and advisories. Similar restrictions may remain advisable, depending on the geographic distribution of cases over time.

Finally, employers should consider which modifications to work-from-home policies are necessary (including whether policies are needed around reimbursement of expenses while working from home) while keeping in mind the myriad workforce reduction orders and social distancing recommendations, which will certainly have an impact on these policies.

Onboarding Furloughed Employees

When business conditions enable employers to bring back furloughed employees, employers should consider the extent to which a re-onboarding process is needed. Because employees on furlough generally remain employed, a complete re-onboarding will probably not be necessary. Depending on the circumstances and the length of the furlough, the employer might need to return access cards, credit cards, and electronic devices. The employer might also want employees to update personal information forms, emergency contact forms, and direct deposit authorization and payroll documents.

Employers should communicate with furloughed employees in writing prior to the date of return. This communication should include the date of return, the employee's rate of pay and work hours, the employee's paid-time-off accruals as of the date of return, and an overview of the re-onboarding process. The employer should also provide any new leave or other policies that have taken effect during the furlough period.

Employers should also communicate the impact of the furlough on returning employees' benefits. For example, if employees will have to repay their share of the cost of health coverage their employer paid during furlough, the employer should explain how the cost will be collected (e.g., withholding of a specified amount from future pay checks). Similarly, employees who dropped or lost benefit coverage in connection with their furlough should have an opportunity to reinstate their coverage.

Importantly, an employee's statutory leave entitlements may be impacted by a furlough. For example, the federal Family and Medical Leave Act (FMLA) has rules for leave eligibility that may be affected by furloughs, and states and localities with mini-FMLAs may have different requirements for leave eligibility. Also, in jurisdictions with paid sick leave laws, unless accrued sick time was previously paid out before the furlough period began, employees may be entitled to reinstatement of their existing sick leave banks.

Finally, employers should consult any applicable collective bargaining agreements, contracts, and policies regarding seniority rules following a furlough. These rules should be applied consistently, and relevant information should be provided to current employees and those returning from furlough.

Notice to Employees Regarding Schedule and Compensation Changes

As an alternative to layoffs or furloughs, many employers implemented pay or hours reductions during the pandemic. Before returning to a previous schedule or compensation structure, employees should be provided written notice. At a

minimum, this should provide the effective date of the change, the employee's new rate of pay and work hours, and any corresponding impact on employee benefits.

Employers should be aware that certain states, such as New York, have laws governing the timing and form of notice for rate of pay changes. Requirements vary by state, and may depend on whether wages are increasing or decreasing. Employers must also be mindful of any applicable predictive scheduling laws, which require advance notice of a change in an employee's work schedule.

For example, New York City's Fair Workweek Law, which is applicable to many fast food and retail employers, generally requires at least two weeks' notice before changing an employee's work schedule. Employers that fail to provide sufficient notice may owe additional pay to employees depending on the amount of notice ultimately given.

Preventing Discrimination and Harassment

For a variety of reasons—including the fact the outbreak of the virus was initially tied to a particular region of the world—conditions are ripe for employees to make discrimination and harassment claims. Employers should therefore pay particularly close attention to these issues during the pandemic and take proactive steps to prevent discrimination and harassment.

To this end, employers should reinforce their anti-discrimination and anti-harassment policies through training and manager communications, and when complaints are made, employers should continue to conduct prompt investigations and take remedial action, if necessary. Employers should consider using annual EEO training as an opportunity to specifically address potential discrimination issues presented by the pandemic. In addition, when making employment decisions, such as determining who will be returning from layoff or furlough or receiving a rate of pay increase, employers should ensure that managers are relying on objective, performance-based, and business-related criteria.

Employers may also be required to provide new or adjusted reasonable accommodations upon the return to work. For employees at higher risk of contracting the virus or experiencing complications, employers may consider temporarily restructuring marginal job duties, modifying work schedules, or using physical barriers to increase social distancing. However, at the same time, employers should be careful not to inadvertently take adverse action against an employee on the basis of a protected characteristic, such as disability or age.

For example, employers should not postpone the start date or withdraw a job offer of a person who is over the age of 65 or pregnant, despite the fact that these employees may be at higher risk of suffering severe symptoms if they contract Covid-19.

Likewise, recent guidance from the EEOC makes clear that the ADA does not permit employers to exclude employees from the workplace solely because they have a disability that may place them at a higher risk for severe illness, as identified by the CDC. Instead, under that guidance, the EEOC makes clear that employers must conduct an individualized assessment of whether the employee's disability poses a "significant risk of substantial harm," taking into account a myriad of factors specific to the individual and the workplace, and if such harm exists, whether that harm can be mitigated or eliminated by providing the employee with a reasonable accommodation.

Ultimately, the guidance states that an employer may bar an employee from the workplace only after undertaking those steps and concluding that "the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation."

As a final matter, the EEOC has indicated that during the pandemic, employers may learn that employees can satisfactorily perform certain essential functions remotely. Therefore, an employee who was previously denied teleworking as a disability accommodation because of concerns the employee would be unable to perform essential job functions from home, may be entitled to teleworking as an accommodation after the pandemic based on the parties' experience teleworking while the workplace was closed.

In the end, employers navigating these and other issues should reach out to counsel and keep apprised of the latest legal developments at the federal, state and local levels to help ensure the health and safety of their employees.