



COVID-19: U.S. Employment
Considerations for Returning to Work

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As the U.S. begins to relax nationwide shutdown orders and business restrictions, employers are faced with new legal challenges when planning to reopen. This Q&A discusses key issues employers should consider in formulating and implementing their return-to-work plans. In addition to this guidance, employers must be sure to continuously monitor developments from public health authorities and relevant government entities to ensure the health and safety of their employees and the workplace.



1. How do employers determine if they are ready to reopen?

When determining whether to reopen, employers must first consider federal, state, and local government business restrictions. On April 16, 2020, the White House issued the Opening Up America Again guidelines to provide states with a three-phase approach for reopening their economies.¹ Pursuant to these guidelines, state and local governments may relax their individual shutdown orders in phases based upon achieving the following criteria:

- 14-day period in which the state or region has seen a downward trajectory of reported “influenza-like illnesses” (ILI) and “covid-like syndromic cases”;
- Downward trajectory of documented COVID-19 cases or positive tests as a percent of total tests within a 14-day period;
- Hospitals are able to treat patients without crisis care; and
- There is a robust testing program in place for at-risk healthcare workers, including antibody testing.

In addition, on May 20, 2020, the CDC released detailed guidance in support of the White House guidelines and reopening the U.S. The White House’s and CDC’s guidelines are not binding, however, and state and local governments may revise their applicable restrictions with more lenient or stringent criteria. Employers will need to consider and comply with these requirements when formulating their own reopening plans.

Components of the CDC’s new guidance work in conjunction with its “workplaces decision tool” to assist employers in navigating the reopening process.² Among other things, the guidance includes “Interim Guidance for Employers with Workers at High Risk,” that outlines a three-step process that employers should follow in gradually scaling up their operations based on the “scope and nature of community mitigation” in the areas in which an employer operates. The Interim Guidance recommends, among other actions, that employers encourage employees at higher risk of severe illness, including those 65 and older and employees with underlying medical conditions, to self-identify and take particular care to reduce those workers’ risk of COVID-19 exposure.

Because this is a rapidly evolving area, employers must continuously monitor the requirements of the jurisdictions in which they operate, as well as the guidance issued by the CDC and other public health authorities, such as the Occupational Safety and Health Administration (OSHA) and the World Health Organization (WHO). Furthermore, when implementing new policies, employers will need to comply with relevant anti-discrimination laws, such as the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA).

Employers must also assess their individual readiness to resume operations based on their ability to put in place procedures and processes to protect employee safety and comply with applicable government orders and guidelines concerning, among other things, social distancing, employee screening, and the response to positive cases of COVID-19 among employees.

1 White House, *Opening Up America Again*, available at <https://www.whitehouse.gov/wp-content/uploads/2020/04/Guidelines-for-Opening-Up-America-Again.pdf>

2 CDC, *Workplaces During the COVID-19 Pandemic Decision Tool*, available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/workplace-decision-tree.pdf>

2. What steps should employers take before reopening?

In addition to the considerations discussed above, the CDC has advised that employers should assess whether “recommended health and safety actions” and procedures for “ongoing monitoring” are in place. As part of making these determinations, employers should conduct an assessment of their facility and working conditions to determine the level of risk of COVID-19 exposure that employees and others might face. They should then identify the steps that are necessary to protect employees and the employer’s business. This risk assessment should be conducted in accordance with the recently released OSHA guidance, which classifies workplaces as presenting very high risk, high risk, medium risk or low risk of exposure.³ The OSHA guidance provides the minimum standards employers should implement to mitigate potential liability upon reopening the workplace, and must be considered in conjunction with all relevant state and local government orders, as these may impose additional requirements depending on the workplace conditions. Employers may be required to provide employees with Personal Protective Equipment (PPE), including gloves and face coverings (masks).

Employers should then develop an operational plan for implementing and maintaining new policies and procedures to ensure a safe and healthy workplace. Many employers are choosing to designate a task force or working group to manage this process and oversee the employer’s response to confirmed or suspected cases of COVID-19 within the workplace. This plan should focus on issues such as:

- Providing employees with adequate PPE based on the risk of exposure;
- Updating the facility with safety measures to promote social distancing and employee protective measures, such as physical barriers and partitions, automatic doors and trash bins, high-efficiency air filters, and equipment to increase ventilation rates;
- Adopting social distancing procedures, including limiting the number of people in common areas and elevators, closing or restricting access to cafeterias and break rooms, and limiting or eliminating group meetings and activities;
- Increasing cleaning and disinfecting protocols in compliance with CDC guidance;⁴
- Adopting protocols for responding to confirmed or suspected cases of COVID-19 among employees, including procedures for isolating employees and conducting contact tracing to identify other potentially exposed employees;
- Managing the disinfection of the premises after persons with a suspected or confirmed case of COVID-19 has been in the facility;
- Training employees on the signs and symptoms of COVID-19, heightened hygiene practices to prevent the spread, and social distancing measures within the workplace; and
- Training Human Resources or safety personnel concerning these practices and protocols.

Aside from operational logistics, employers will also need to consider staffing requirements and structuring work arrangements. As the state and local governments relax shutdown orders, some may require employers to limit the proportion of the workforce that can immediately return to in-person operations and others may continue to require employees to work remotely. Therefore, employers should consider, among other things:

- Which employees will return to the workplace in the first instance, prioritizing those who are critical to the proper functioning of the workplace and asking other employees to volunteer;
- Employee availability based on their individual circumstances (e.g. local curfews, family or child care, underlying medical conditions that may require additional accommodations);
- Staggered and/or rotational work schedules to allow employees to commute at non-peak times and to limit contact in the workplace;
- Whether, and the extent to which, teleworking should continue; and
- What to do in relation to employees who are vulnerable to COVID-19 due to underlying health conditions, or who refuse to come back to the workplace.

3 OSHA, *Guidance on Preparing Workplaces for COVID-19*, available at <https://www.osha.gov/Publications/OSHA3990.pdf>.

4 CDC, *Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes*, available at https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/Reopening_America_Guidance.pdf.



3. How should an employer handle the initial reopening?

Prior to reopening the workplace, employers should provide notice to their employees. This notice should include information on new policies and procedures the employer has put in place to prevent the spread of COVID-19 as well as the contact information for the designated person(s) responsible for answering any questions or concerns. In addition to the notice of reopening, employers may wish to consider including a health assessment/questionnaire for employees to provide information. The employer may ask the employee whether they have experienced symptoms of, or were diagnosed with, COVID-19 or have had close contact with anyone who has a suspected or confirmed case of COVID-19. However, employers may not ask employees if they have any underlying conditions that place them at an increased risk of contracting COVID-19. All medical information must be kept confidential and in compliance with the Americans with Disabilities Act (ADA).

As employees arrive at the worksite, employers will likely need to provide extra direction and guidance for navigating the new policies and procedures. This may include providing staff to monitor and remind employees of social distancing requirements and to provide employee-PPE.

Additionally, employers may wish to consider implementing employee screening measures, such as temperature testing, COVID-19 testing, and/or antibody testing. It is important to note that not all infected individuals will exhibit a fever, so additional precautions may be necessary. The U.S. Equal Employment Opportunity Commission (EEOC) has stated that employers may conduct temperature screening of employees as a condition of returning to work and/or entering the workplace, and may also require employees to provide medical clearance before returning to work.⁵ Additionally, although COVID-19 tests may not be widely available to employers in many areas, the EEOC has confirmed that such testing will not implicate the ADA if the tests are administered in a consistent and non-discriminatory manner.⁶ Employers must be sure all testing is done in compliance with state and local requirements as well as guidance from the public health authorities. Furthermore, all results must be recorded and maintained in a log separate from the employee's personnel file. Absent an exceptional reason, employers may prohibit an employee from entering the worksite if the employee refuses to submit to a permitted screening measure.

5 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

6 *Id.* The EEOC has not provided guidance concerning the use of antibody tests and there is uncertainty about whether such tests can be required.

4. What are the key considerations in continuing operations?

As in-person operations continue, and employees adjust to the new policies and procedures, employers should remain in close communication with their employees and be sure to provide them with the most up-to-date guidance and health and safety precautions. Employees who fail to adhere to social distancing requirements can and should be disciplined in accordance with the employer's updated policies. Employers must also be prepared to respond quickly to governmental orders imposing new limitations on business operations due to an increase in the number of COVID-19 cases in an area.

Aside from maintaining new protocols in the workplace, employers must implement a process for promptly addressing employees who contract COVID-19 or exhibit signs or symptoms of the virus while in the workplace. Once an employee with a possible or confirmed infection has been identified, employers should be prepared to:

- Isolate that employee in a designated area and require that the employee go home and/or seek medical care;
- Notify the appropriate Human Resources/safety personnel or COVID-19 task force member of the situation;
- Obtain a list of individuals with whom the affected employee had close contact (typically defined as contact within 6 feet for 10 minutes or more) within the two days before the employee began experiencing symptoms, and direct those individuals to self-quarantine and/or self-monitor and take other protective measures; and
- Deep clean and disinfect all areas in which the affected employee was present (this may require temporarily closing the workplace for 24 hours).

According to the CDC, employers should monitor employee absences due to COVID-19 and be prepared to consult with health authorities if there are cases in their workplace or an increase in cases in their local areas.⁷

Furthermore, employers will need to develop and implement policies and procedures that employees with a suspected or confirmed case of COVID-19 must follow prior to returning to the workplace. The CDC has released guidance for “ending home-isolation,” which sets forth criteria to determine whether an employee may return to the workplace, depending on their particular situation and the availability of COVID-19 testing.⁸ Employers should consult this CDC guidance and their state and local orders to effectively bring an employee back to the workplace.

Finally, to the extent applicable to them, employers must adhere to the general requirements of the Family and Medical Leave Act, the ADA, and any other state and local regulations. Employers with fewer than 500 employees must continue to adhere to the COVID-19-related leave requirements set forth by the Families First Coronavirus Response Act (FFCRA). Notably, the FFCRA is in effect until December 2020 and requires that employers provide supplemental paid and unpaid leave for a variety of COVID-19-related issues.⁹ In light of ongoing developments, the CDC recommends that employers remain flexible in relation to their leave policies and practices.

7 CDC, *Workplaces During the COVID-19 Pandemic Decision Tool*, available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/workplace-decision-tree.pdf>

8 CDC, *Ending Home Isolation*, available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>.

9 A further discussion of the FFCRA provisions is available at <https://www.dechert.com/knowledge/onpoint/2020/3/families-first-coronavirus-response-act--a-legislative-response-.html>.

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