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Best Practices for Returning to Work in a Vaccinated World:
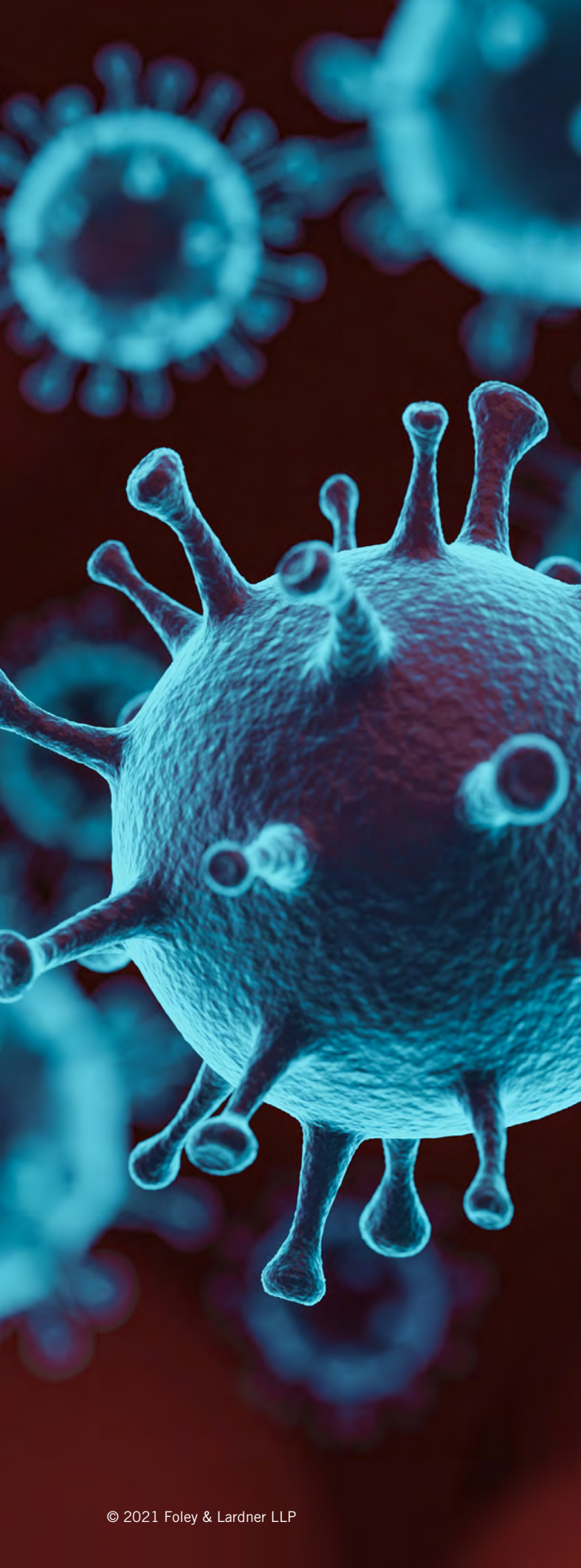Getting Back to Business

PREPARED BY THE FOLEY & LARDNER TEAM IN THE AREA OF:

LABOR & EMPLOYMENT

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Introduction

For more than a year, the world has reacted to and adjusted for COVID-19. Now, with the arrival of COVID-19 vaccines, there is light at the end of the tunnel and individuals and companies can start moving forward and planning for a new normal. As companies in all industries have undoubtedly been affected, employers must remain cognizant of various issues as offices and facilities reopen and employees return to work.

At this critical juncture, it is important to recognize that guidelines and best practices are still changing. Regulatory agencies have issued protocols and guidance, and local, state, and federal governments have passed laws and issued executive orders to guide this process. Identifying and incorporating various safety precautions based on those recommendations may help protect employers and employees alike.

This Best Practices "Guide" is not meant to be an exhaustive analysis; rather, it should be used as a starting point for employers to create or update their policies and practices in conjunction with a thorough analysis of all applicable laws, ordinances, and guidance. This guide covers the following key topics to consider when opening back up or continuing operations:

- **A Revised Understanding of COVID-19: One Year Later**

- **Considerations for Reopening**

- **Preparing for Reopening a Facility**

- **Working with Employees**

- **Vaccinations**

- **Indemnification Laws/Developments**

- **Operating in a Changing Regulatory Environment**

Understanding COVID-19: One Year Later

On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a global pandemic. At that time, everyone knew much less about the symptoms, transmission, and impact associated with the virus. One year later, while there are still unknowns about COVID-19, there is more developed data on the effects, a more robust understanding of how it spreads, and more options for minimizing its transmission.

Transmission of COVID-19

- Thought to spread person-to-person and primarily through close contact and close physical proximity
    - When someone with COVID-19 produces "respiratory droplets" (e.g., when coughing, speaking, breathing, sneezing), small droplets form
    - Infections can occur when those respiratory droplets are inhaled by, or deposited on "mucous membranes" (e.g., inside the nose and mouth) of someone else
    - The further the respiratory droplets travel from the person with COVID-19, the less concentrated the droplets are and the less likely someone else will be infected
- "Airborne transmission" of COVID-19 is possible, but much less common than through close personal contact
- Contact with contaminated surfaces is not thought to be a common way that COVID-19 spreads
- People can transmit the virus even if they are not showing any symptoms (i.e., if they are "asymptomatic")

COVID-19 Vaccines

- Before the U.S. Food and Drug Administration (FDA) approves a vaccine or authorizes its emergency use, clinical trials are conducted
- Studies show that COVID-19 vaccines are effective at preventing someone from getting the virus, and from getting seriously ill if that person gets COVID-19
- It usually takes two weeks after vaccination for the body to build immunity against the virus
- The vaccines may have some side effects including chills or tiredness, but they should go away in a few days
- Scientists are still learning about the vaccine (e.g., how well it prevents spread, how long it protects people, and how it protects against variants of the virus)
- **Under current guidance (as of March 15, 2021), even someone who has been vaccinated should still wear a mask, practice social distancing, avoid crowds and poorly ventilated spaces, and frequently wash their hands.**

Considerations for Reopening

As restrictions are lifted, employers face the critical task of balancing reopening against reducing the risk of COVID-19 transmission. Understanding that there is no perfect equilibrium with this complex scale, this section outlines various suggestions for employers to consider when opening or reopening the workplace.

Set up a Task Force

- The task force, if one does not already exist, should consist of a small group of individuals within each company location, including representatives from all work shifts, who will help prepare a Preparedness and Response Plan. In some states, such a plan is required by executive order or state law as a condition of operation. As this list is constantly changing, we recommend reviewing current state law at the time the employer is considering reopening and regularly reviewing applicable law throughout the reopening process.

- Individuals on the task force should assume specific roles to ensure the plan is being properly executed. Examples of such roles include:

  — **Team Lead:** overall responsibility for ensuring the plan is being executed and followed by employees; coordinate with other team leads of other offices.

    — The team lead, along with company executives, should determine the proper phase at which the company should reopen. (See below)

  — **Logistics Coordinator:** oversee and direct employee and third-party arrivals/departures and visitor sign-ins; identify specific social distancing options for company adoption.

  — **Facilities Coordinator:** oversee and direct the update and maintenance of safety measures to the physical building, including ventilation modifications and updates, air filter changes, separation of workspaces, installation of physical barriers, etc.

  — **Disinfection and Materials Coordinator:** oversee and direct the creation and monitoring of housekeeping schedules and activities, including the cleaning of common areas requiring sanitation and disinfection; ensure necessary supplies and materials are properly stocked and ordered (e.g., hand sanitizer dispensers, etc.).

  — **Task Force Liaison:** works with employees, management, and task force to solicit feedback and ensure compliance with the plan.

  — **Training/Update Coordinator:** oversee and direct the development of training programs for employees and others for compliance with the plan; review and report on updates to regulatory requirements and guidance; and propose updates and modifications to the plan, as necessary.

- The task force, or smaller subsets of the task force, should meet periodically to discuss updates and provide feedback.

Develop a Plan for Opening or Reopening

- Create a Preparedness and Response Plan to help guide protective actions against COVID-19. The plan should consider such issues as:

  - Where, how, and to what sources of COVID-19 might employees be exposed?

  - Which employees should be brought back to work on-site, and when?

  - Controls to address nonoccupational risk factors at home and in the community.

  - Contingency plans that consider:

    - Increased employee absence

    - Need to downsize operations or transition to remote services

    - Options for conducting essential operations with a reduced workforce

    - Interrupted supply chains or delayed deliveries

  - Changes to the workplace that should be practically implemented, including:

    - Installing additional hand sanitizer dispensers

    - More frequently cleaning often-touched surfaces and common areas

    - Managing shift changes

    - Staggering meal and rest breaks to thoroughly disinfect common areas

    - Rearranging office space if possible to promote social distancing

    - Considering modifications of production groups to create "pods" to address possible outbreaks

    - Placing additional signage around building to remind employees of preventative measures (including regular and frequent hand-washing)

    - Temporarily closing facilities or areas with confirmed COVID-19 cases for deep cleaning and disinfection

    - Limiting participants at in-person meetings

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— Enforcing proper social distancing and wearing of face coverings

— Designating isolation areas to separate employees suspected of having COVID-19

— Limiting shared supplies and tools to reduce potential exposure

— Administrative actions, including:

— Requiring sick workers to stay home (irrespective of whether employee has or has not been vaccinated)

– Consider enhanced sick leave to encourage such reporting

— Discontinuing nonessential travel; developing plan for slowly re-implementing work-related travel (consider limiting to those who are fully vaccinated)

— Requiring employees to report when they travel (for personal or work reasons)

— Employee temperature testing and/or symptomology inquiries; should continue through vaccination process and even after "herd immunity" has been achieved

— Providing training to employees on all COVID-19 requirements, including proper wearing of face coverings; identification of COVID-19 symptoms; recordkeeping and reporting obligations; cleaning procedures to ensure best workplace infection-control practices; and how to report unsafe working conditions

— Identifying and planning for contact tracing as necessary

▪ Employers should expect to periodically revise the Preparedness and Response Plan based on changing demands, pandemic developments, state orders and regulations, and new guidance.

▪ Absent clear revisions to the Preparedness and Response Plan, employers should adhere to the plan and follow it as closely as possible.

▪ Employers should conduct daily and weekly audits to ensure employee compliance with COVID-19 policies and procedures, and maintain records of audits to comply with applicable laws, regulations and rules.
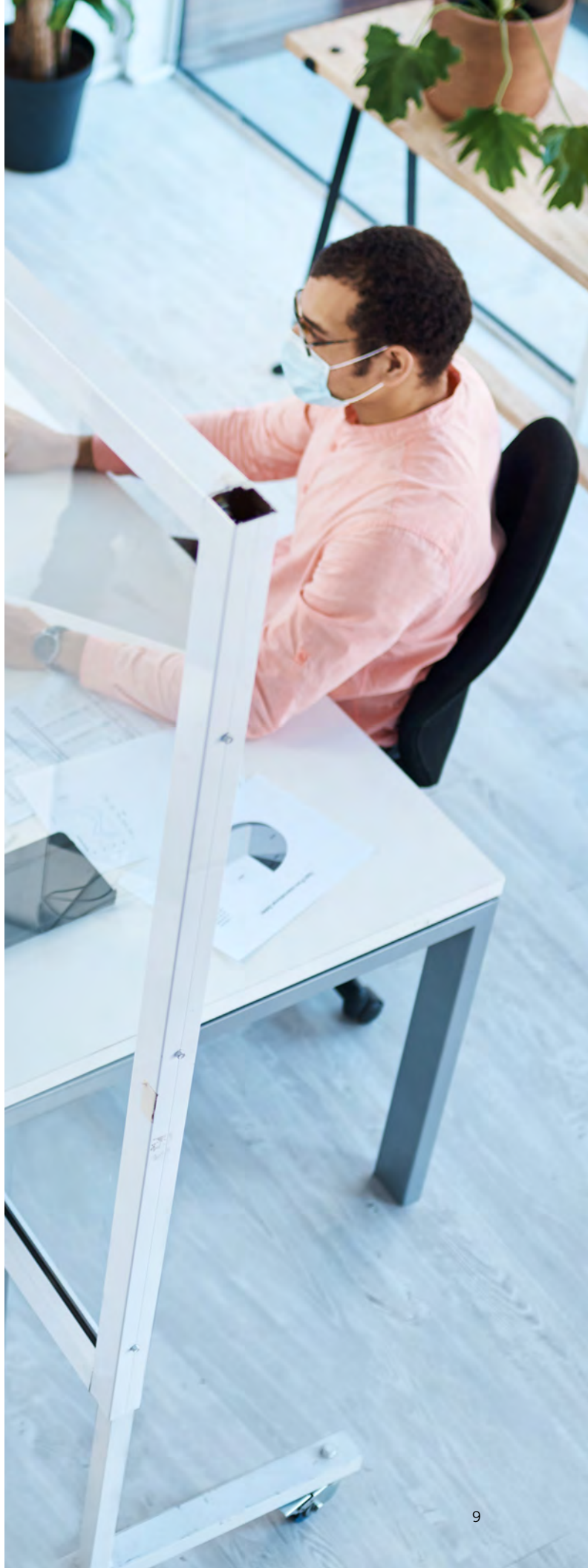
Preparing for Reopening a Facility

For companies and facilities that were closed and have not reopened, or companies and facilities that have been operating at limited capacities, it is important to consider various sanitation procedures and future processes that will make reopening (or expansion of operations) as safe as possible. These processes and procedures should be communicated to the workforce prior to reopening.

Sanitize and Disinfect

- According to the CDC, routine cleaning is critical for limiting the transmission of COVID-19. CDC guidelines provide that standard cleaning of common areas should include:

  — Dust and wet mop or autoscrub concrete, tile, and wood floors

  — Vacuum entryways and high-traffic carpeted areas

  — Remove trash

  — Thoroughly clean and disinfect high-contact surfaces (door knobs, tabletops, etc.)

  — Clean restrooms

  — Wipe heat and air conditioner vents

  — Spot clean walls

  — Spot clean flooring

  — Dust horizontal surfaces and light fixtures

  — Clean spills

- Frequency of cleaning and cleaning product use will differ based on area and place (ex., workplaces/desks, computers at least three times daily).

- Prevent employees from entering/exiting during disinfecting.

Selecting and Using Cleaning Products

- The CDC breaks down cleaning product types as follows:

  — Cleaner: removes germs, dirt, and impurities from surfaces or objects.

  — Sanitizer: reduces germs on surfaces to levels considered safe for public health. Products must be registered with the EPA.

  — Disinfectant: destroys almost all infectious germs when used as the label directs. Products must be registered with the EPA.

- Sanitizers and disinfectants are regulated as pesticides by the EPA. Consider using disinfectants and sanitizers that contain ethanol, isopropanol (isopropyl alcohol), hydrogen peroxide, L-Lactic acid, or citric acid.

  — Reference the EPA's List N: Disinfectants for Use against SARS-CoV-2.

- During use of chemicals, ventilate the space with outside air by opening doors and windows, or by bringing in outside air with your air handling system.

- Wear PPE and face coverings, as needed.

- Refer to the product label of Safety Data Sheet (SDS) for proper use and disposal of the product. Each chemical used in cleaning should have an SDS that is readily accessible to employees.

- Consider whether outsourcing to a contractor is appropriate, especially after instances where employees have tested positive.

Face Mask Use

- The CDC and most state healthcare departments continue to recommend the use of face coverings when indoors and when interacting with persons from outside one's home.

- Face covering use is recommended whether fully vaccinated or not (as there are presently insufficient studies and data to know whether vaccinations are impairing the spread as well).

- The CDC recommends two or more layers of washable, breathable fabric; completely covering the nose and mouth; fit snugly against the sides of face to eliminate gaps; and, with a nose wire to prevent air from leaking out of the top of the mask.

  — If a gaiter is used in lieu of a mask – it should also have two layers, or be folded over to create a double layer

  — Face shields are not recommended as a replacement for a mask or gaiter at this time by the CDC.

- Consider having on-site supplies of face coverings for all employees.

- Review appropriate face-covering practices with employees.

  — Mask should fit snugly and cover mouth **and** nose

  — Hands should be washed prior to putting on and taking off face covering

  — Masks can be maintained by "folding" inside-out so the outside is enclosed

Social Distancing Measures

- Employers should require employees maintain a social distance of more than **six feet** when possible. In efforts to do so, employers should consider the following:

  — Reorganize and redesign office spaces to increase space between employees

  — Use markings on the ground to clearly designate safe distances and desired positions of employees in various common areas

  — Require staggered reporting to each shift and for breaks

  — Reduce staffing levels per shift

  — Make training rooms or additional areas available for lunches and breaks so workers can keep safe distances

  — Limit attendance at in-person meetings or consider prerecorded or telephonic meetings

  — If meetings are necessary, limit group size to less than 10

  — Increase transportation options to reduce number of employees in buses and vans, or having to use public transportation

  — Post visible reminders around the workplace

  — Increase ventilation, such as opening windows and propping doors open when possible

- Supervisors should enforce these rules if employees are found to be breaking them.

Workplace Reconfigurations and Changes

- An employer can implement various temporary and permanent changes to facilitate a safe return to the workplace.

- Temporary changes may include:

  — Providing or encouraging employees to wear cloth or disposable face coverings depending on availability, local requirements, and employee's position

  — Using alcohol-based hand sanitizer that contains at least 60% ethanol or 70% isopropyl alcohol

- Posting signage limiting occupancy in common areas, including break rooms and restrooms

- Providing paper towels and trash cans near doors that require opening

- Removing high-contact amenities, including coffee makers, vending machines, and bulk snacks

- Limiting employees from sharing equipment, when feasible

- Permanent changes may include:

  - Transitioning to touch-free faucets, soap dispensers, towel dispensers and trash bins

  - Installing additional fans and other air-circulation devices to increase ventilation.

  - Adding touchless payment options for employee cafeterias or customer-interfacing employers.

  - Updating technology to support virtual workers.

Allowing Visitors, Contractors and Vendors

- Employers should create a policy for recording and screening nonemployees on the property or worksite, which could require:

  - Limiting the number of people who can enter the facility at one time to abide by social-distancing requirements

  - Encouraging telephonic or electronic meetings when possible

  - Using designated meeting and work spaces that can be disinfected after each use

- Requiring visitors to answer COVID-19 symptomology questions and prohibiting access to those that have COVID-19 symptoms

- Requiring visitors to answer questions relative to COVID-19 recent close contact inquiries (have you been with someone who tested positive or is believed to have COVID-19 within the past 10 days), and prohibiting access to those that have positive responses

- Providing visitors with readily available hand sanitizer, soap and water, or effective disinfectant

- Providing visitors with face coverings for use when in the facility or on facility grounds

- Directing visitors to meeting and work locations using the most direct path

- Practicing social distancing at all times

- Encouraging visitors to take safety precautions, including frequent hand-washing

- Directing visitors to a single, monitored sign-in location

- Separating delivery areas from visitor sign-in areas

- Employers can decide who is allowed on site and which policies to implement when allowing visitors.

  - An employer may require a visitor to show proof of vaccination as a condition to entering the site

  - An employer may also ban visitors who have not been vaccinated

Working with Employees

Due to companies allowing employees to work from home, operating at reduced capacities, and temporarily closing, many employers will be confronted with different return-to-work scenarios. In all scenarios, employers should clearly inform employees of expectations, and should refer to local and state orders and regulations, and any of the employer's existing policies, for additional guidance.

Returning to Work

- State and local public health orders will dictate when returning to work will be permitted.

  — Employers should comply with any state- and local-mandated reopening requirements.

  — Even after employees can return to the workplace, employers may want to consider work-from-home options, staggering work shifts, and other forms of schedule flexibility to allow for social distancing.

  — Employers must comply with all state and local laws requiring reporting of COVID-19 positive employees, customers, and visitors. Some states have implemented an "assumption" of work-relatedness for positive development of COVID-19; know your state's rules on such determinations.

- Compliance with OSHA reporting and recording obligations as well as other requirements.

  — OSHA has published Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace for all employers.

    — The guidance suggests that employers should: implement COVID-19 prevention programs; educate employees on COVID-19 spread and conditions; assess workplace exposure concerns and possibilities; implement workplace engineering and administrative changes to assure social distancing as much as possible and to prevent the spread of COVID-19; and add signage and other posters relative to hand-washing and face coverings.

  — OSHA's injury and illness regulations require documenting on the employer's OSHA Injury and Illness Log (OSHA 300 Log) all workplace-related COVID-19 cases.

    — All hospitalizations of an employee with COVID-19 must be reported to OSHA within 24 hours **IF** the hospitalization occurs within 24 hours of the workplace exposure to COVID-19

    — All employee fatalities due to COVID-19 must be reported to OSHA within eight hours of learning about the fatality **IF** the fatality occurs within 30 days of a workplace exposure to COVID-19

- As new workplace policies and changes are implemented, employers should notify employees of these changes and train employees accordingly, when necessary.

- Communicating changes with employees on an ongoing basis will help employees feel better prepared and welcome. It will also allow employees the opportunity to address concerns about returning and the employer to address those issues.

- Encourage and reassure employees of policies designed to protect against the spread of COVID-19, including any required wearing of face coverings, social distancing, teleworking policies, shift flexibility, and vaccinations.

- When employees may be asked to stay home:

  - If an employee is visibly ill, an employer has the right to instruct that employee to stay home to prevent the spread of COVID-19.

    - The CDC and OSHA have both issued guidance advising companies to immediately separate and send home any employees, volunteers, or other individuals who appear to have symptoms of COVID-19

    - The EEOC has also issued guidance allowing an employer to ask employees to stay home when exhibiting COVID-19 symptoms, without violating the Americans with Disabilities Act (ADA) and corresponding regulations

      - An employer may consider telework options for visibly ill employees, if the employee's job allows for telework

  - Generally, employers cannot categorically exclude employees from returning to the workplace based on an employee's disability that puts him or her at "higher risk for severe illness" if he or she contracts COVID-19.

    - However, the ADA allows an employer to exclude an employee from returning to the workplace where the employee's disability poses a "direct threat" to his/her health that cannot be eliminated or reduced by reasonable accommodation.

  - An employer cannot exclude an employee from the workplace involuntarily due to pregnancy— even if the employer is motivated by concern for the employee.

- Title VII of the Civil Rights Act makes clear that an employer cannot single out workers based on pregnancy, including involuntary leave, layoff, or furlough.

- However, pregnancy does serve as a basis for an employee to seek accommodations. Pregnancy-related medical conditions may be considered disabilities under the ADA, and pregnant employees may be entitled to job modifications if the same modifications are available to other employees.

Employees Who Would Rather Stay Home

- In general, unless work can be performed remotely, an employer may require an employee to return to work on-site despite an employee's fear of contracting COVID-19 at work. **HOWEVER,** employees may have certain protections under the Americans with Disabilities Act (ADA), the National Labor Relations Act (NLRA), the Labor Management Relations Act (LMRA), or the Occupational Safety and Health Act (OSH Act).

  - Employers should recognize that in addition to obvious physical disabilities, an employee may have mental health conditions (including anxiety, obsessive-compulsive disorder, post-traumatic stress disorder, and depression) that entitle him/her to reasonable accommodations under the ADA.

  - Employers should follow the same interactive process as with other disability accommodation requests.

  - The NLRA, LMRA, and OSH Act all contain similar provisions that prevent employers from retaliating against employees.

    - The NLRA may protect employees who act in concert and refuse to return to work because they believe, in good faith, that their health and safety are at risk

    - The LMRA requires that there be objective evidence that an individual employee would be subject to "abnormally dangerous" workplace conditions

    - The OSH Act allows employees to refuse to perform work in different dangerous situations

- If an employee has a disability—or a pre-existing risk factor that constitutes a disability under local, state, or federal law—and that employee requests a reasonable accommodation, then the employer would need to provide a reasonable accommodation unless doing so would create an undue hardship.

  — The employer must also engage in the interactive process with the employee to determine what a reasonable accommodation would be.

    — Teleworking, alternative work assignments, and relocating desk/workspaces may be reasonable accommodations depending on the situation

    — Notably, however, an employer is NOT required to provide the employee with specific accommodation requests if there are other reasonable accommodations that accommodate the employee's disability

  — The employer should be careful to not treat employees differently based on protected characteristics.

- An employer is not required to provide reasonable accommodations to employees based *solely* on age. There are additional considerations if the individual has a qualifying disability under the ADA.

- Employees who are sick due to COVID-19 may, in some circumstances, qualify for FMLA leave due to required absences. Employers should carefully analyze leave requests to determine whether the time off is protected.

- Employers should be flexible in dealing with employee absences related to COVID-19.

Permanent Teleworking Requests

- If an employee asks to work remotely as an ADA accommodation whether related to COVID-19 or not, and claims that remote work is a proven reasonable accommodation because it was provided during the pandemic, an employer should:

  — Engage in the interactive process with the employee to first determine if the employee has a disability, what restrictions are caused by the disability, and the length of time such restrictions will be applicable to the employee.

  — Analyze whether telework is an option - can the individual perform the essential functions of the job from home, without creating an undue hardship to the business?

    — To this end, it may be useful to document NOW why/when teleworking is not effective, or how working from home during the pandemic was not "as effective" as working from the workplace

  — Consider alternative accommodations to telework; remember, a qualified employee with a disability is entitled to an accommodation, but not necessarily the accommodation he or she desires. Any accommodation that facilitates the performance of the essential functions and responsibilities of the position can be an effective accommodation under the ADA.

- If an employee asks to work remotely because the employee is scared to return to work for fear of exposure to COVID-19:

  - This may be a potential ADA accommodation issue, but only if there is a mental health condition that is responsible for the fear (ex., an anxiety diagnosis, etc.).

  - If a disability, then follow the interactive process to address – just like the above discussion. Even if not a disability, an employer can use an interactive process to address concerns/fears about returning to the workplace.

    - Discuss with employee workplace protocols (face coverings, social distancing, staggered shifts, hand sanitizer) to put the employee's mind at ease

  - An employer can require a medical certification to determine if there is a "disability" at issue.

    - However, be aware of overburdened medical staff, and consider teledoc note/certification

  - Attempt to put timeframe limits on the accommodation of working from home if the company does decide to allow the same.

- If an employee simply prefers to work from home:

  - This is a matter of employer policy

  - There is no legal obligation to permit remote work as long as decisions about permission for remote work are made based on legitimate, nondiscriminatory reasons (ex., an employer cannot permit all men to work from home, but not women)

Employer Policies on Safety, PPE and Face Coverings

- Any policies should be carefully drafted to include the latest guidance from federal, state, and local authorities.

  - Employers should apply these policies in a neutral and fair manner, *i.e.,* consistently among all employees who are employed in similar positions.

  - If something is discussed in a policy, the employer should consider providing the necessary supplies for the employee to comply with the policy. For example:

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- If the employer requires employees to wash their hands with soap and water, or use hand sanitizer when hand-washing is not possible, the employer will need to provide soap and water, and hand sanitizer

- If an employer requires masks or other face coverings, the employer should provide the same to the employees

  - Even if an employee has been vaccinated, the CDC recommends that face coverings should still be worn

- In jurisdictions where face coverings must be worn, due to executive order or otherwise, employers should enforce this policy to minimize the risk of spreading COVID-19 and potential liability.

■ An employer may require employees to provide certifications before allowing them to return to work.

■ Employees may also be asked to respond "no" to a questionnaire containing various questions before returning to work. An exemplar questionnaire may ask:

- Do you have any of the following common COVID-19 systems?

  - Fever or chills

  - Cough

  - Shortness of breath or difficulty breathing

  - Fatigue

  - Muscle or body aches

  - Headache

- New loss of taste or smell

- Sore throat

- Congestion or runny nose

- Nausea or vomiting

- Diarrhea

- Have you had physical exposure to a person suffering from COVID-19 symptoms or a person who has tested positive for COVID-19?

- Have you been the subject of a self-quarantine or self-isolation order from a public health official or public healthcare provider?

- Have you recently traveled more than 50 miles from your place of residence or this facility?

■ An employer can require and administer COVID-19 tests and temperature checks before an employee is allowed into the workplace.

- An employer **cannot** require antibody testing

- To the extent an employer is considering temperature checks—or is required by laws or orders to perform them—the employer should consider hiring a third-party to administer such tests

  - If performed by the employer instead of a third-party, be sure that whomever is responsible for conducting the temperature checking is provided with appropriate PPE or protective clothing, uses a "touch-free" thermometer and is trained on how to properly use and read the thermometer

- — The results of any such tests should be kept confidential, as with any other employee medical information

- — Employers should also note that not all carriers of COVID-19 will have a temperature that is above the acceptable threshold

- — Employers may require fitness-for-duty certifications from employees' doctors, unless prohibited by state laws

- ■ Selecting the Proper Personal Protective Equipment (PPE) and Face Covering

  - — The key to proper selection and use of protective clothing and face coverings is to understand the hazards and risks of exposure. Some of the factors important to assessing the risk of exposure in work facilities include source, modes of transmission, pressures and types of contact, and duration and type of tasks to be performed by the user of the PPE and face covering.

- — While face coverings are not categorically considered to be "PPE" under OSHA's standards, OSHA strongly encourages employees to wear face coverings when in close contact with others

- — Various regulatory agencies have published guidance and answers on different types of PPE and their suggested uses, as discussed below. Employers should reference PPE-specific instructions before use.

- — All PPE must be:

  - — Selected based upon the hazard to the worker

  - — Properly fitted and periodically refitted, as necessary

  - — Consistently and properly worn

  - — Regularly inspected, maintained, and replaced, as necessary

  - — Properly removed, cleaned, and stored or disposed of

- PPE and face coverings should not be a replacement for hand-washing or social distancing.

- Consider whether work clothing, including coveralls, boots, gloves, helmets, goggles, other personal protective equipment, face coverings, etc., is adequately cleaned and disinfected.

Additional Considerations for Changes to Existing Policies

- Paid-leave policies to reflect any new COVID-19 regulatory requirements

- Attendance polices to encourage sick employees to stay home

- Procedures for requesting time off to allow sick employees to stay home

- Scheduling flexibility to allow for social distancing

- Meal and rest break policies to encourage social distancing

- Travel policies to distinguish between essential and nonessential travel

- Telecommuting policies to allow employees to work from home

  - Treatment of confidential information for those who may be working from home

  - Time recording for those nonexempt employees who may be working from home

  - Availability expectations for those who may be working from home

  - Appropriate "attire" or appearance for those who may be working from home and who may be required to engage with customers, clients or business partners via videoconferencing

Vaccinations

With vaccinations becoming increasingly available, employers face unprecedented questions regarding their ability to require vaccinations and what corresponding documentation an employer can request. Employers should review CDC and other federal, state, and local public health guidelines regarding vaccines in connection with the specific considerations discussed below.

- Initially, employers should consider a vaccination education program – explaining the benefits of vaccinations and providing information published by the vaccine manufacturers as well as government agencies on benefits and detriments.

- Employers should understand their local prioritization level(s), and know the locations where vaccinations can be secured/obtained.

- Employers considering implementing a workplace COVID-19 vaccination program (that is, administering vaccinations on-site) should seek guidance from the health department in its jurisdiction.

- At present, all available vaccines have been approved by the FDA (Food and Drug Administration) under an EUA (Emergency Use Authorization) only. That means the vaccines do not, at this time, have final, unqualified FDA approval.

- Vaccination is also not mandated by the FDA. However, it may be required in different jurisdictions, and employers can generally mandate that employees get vaccinated. Mandatory vaccination programs may be more likely in certain industries (such as healthcare and food production).

  — If an employer requires employees to be vaccinated, employers cannot require employees to provide any medical information as part of the proof of vaccination.

  — In addition, there are certain "exceptions" where an employee may request exemption from a mandatory vaccination program:

    — Under the ADA, employers must recognize that employees who have medical conditions that limit their ability to obtain a vaccine cannot be penalized or face adverse employment actions for refusing a vaccination

    — Under Title VII and similar state nondiscrimination laws, employers are prohibited from taking adverse employment actions against an employee who seeks a religious exemption because of a sincerely held religious belief

- In lieu of mandating vaccines, employers may consider encouraging employees to get vaccinated by adopting certain incentives, such as:

  — Offering the vaccination at no charge (when available) and during working hours.

  — Allowing employees to take paid leave to receive a vaccine.

  — Using promotional flyers and posters.

  — Providing bonuses, gift cards, or other incentive compensation. Remember that any remuneration offered in such a program **must** be included in the regular rate computation for nonexempt employees for overtime compensation purposes.

- Employers who are contemplating incentive programs for employees to encourage vaccination must also remain aware of the prohibition against implementing unilateral changes that affect the terms and conditions of employment where employees are represented by a union.

- Tracking Vaccinations

  — Employers may track whether employees have received a COVID-19 vaccination.

    — Employers should **not** ask for pre-screening vaccination questions, as this may be considered disability-related inquiries under the ADA.

  — Employers should treat this information as protected health records or medical records subject to state and local confidentiality requirements.

    — Employers may consider using a spreadsheet or tracking system that is cost-effective to keep track of who has been vaccinated or will be receiving vaccinations.

    — Employers should consider:

      – Using a password to protect the document

      – Limiting the number of individuals with access to the spreadsheet

      – Not emailing the document as an attachment

      – Having a written plan in place in the event of a breach

- Human Resources staff, or someone familiar with handling employee-health related information should manage the records.

Indemnification Laws / Developments

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Employers should also be aware of statutory changes in many states creating indemnification from liability for COVID-related claims associated with employees who contract COVID-19 in the workplace.

- The indemnification laws generally protect employers who are operating in good faith and complying with law

- The employer's actual protection will vary by state, and not all states have passed legislation providing indemnity for employers

    — Some legislation protects employers from specific tort claims

    — Some legislation only protects certain types of employers

    — Some legislation has expanded workers' compensation protections

- Indemnification laws do not protect employers from employment discrimination claims

- Given recent legislative developments and changes, employers should look to their state laws for further guidance

Operating in a Changing Regulatory Environment

Executive orders, ordinances, guidelines, and laws at all levels are regularly issued and passed to respond to the changing circumstances of COVID-19. These laws and guidance are constantly changing, and it is imperative for employers to stay current on changing obligations. Also, there may be industry-specific requirements (e.g., restaurants and bars, health care, manufacturing, etc.) that employers must follow.

In addition to using this Best Practices Guide as a starting point, employers should continually monitor applicable guidelines, including those issued by the WHO, the CDC, and OSHA; and federal, state, and local laws and orders. Foley's Coronavirus Resource Center: Back to Business is another resource to monitor, as it effectively addresses the short- and long-term impacts on business interests, operations, and objectives.

Other resources that may be helpful include the following:

https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html

https://www.cdc.gov/vaccines/covid-19/effectiveness-research/protocols.html

https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html

https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html

https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/returning-to-work.html

https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html

https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/covid-19-back-to-work-checklist.aspx

https://www.epa.gov/pesticide-registration/list-n-disinfectants-coronavirus-covid-19

https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/managers-and-covid-vaccine.aspx

http://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html

https://www.osha.gov/coronavirus

https://www.osha.gov/news/newsreleases/national/11182020

https://www.osha.gov/coronavirus/faqs

https://www.osha.gov/coronavirus/safework

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Visit Our Coronavirus Resource Center at

FOLEY.COM/CORONAVIRUS

Offers insights from across Foley's many practice disciplines to provide timely perspective on what companies can do now and how they can prepare for the future.

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