

Return-to-Work Best Practices During the COVID-19 Pandemic

Alert

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As the curve of COVID-19 infections begin to level off, employees recover from infections, and as government shelter-in-place and similar orders begin to expire, businesses are confronted with the complexities of returning employees to work in a manner that is safe and ensures business continuity. Businesses must implement a plan that is tailored to their corporate mission and responsive to the culture and unique dynamics of their industry. This guide is intended to provide a summary of the most salient issues businesses will face when shelter-in-place ends, returning employees to work, and continuing to manage the workforce to create some semblance of normalcy during the pandemic. Universal to any successful RTW plan, however, is being intentional with policy development and ensuring effective communication with the workforce about what change is occurring, why it is happening, and the employee's role in making it successful.

While it is not possible to create a one-size-fits all approach to RTW issues, most businesses will want to at minimum take the following measures (which are discussed in more detail in our full article below):

1. Create an Infectious Disease Preparedness and Response Plan
2. Conduct a Hazard Assessment for new protocols/equipment put in place consistent with OSHA rules
3. Create or update existing policies on issues impacted by COVID-19 and RTW issues, such as remote work, leave of absence and travel policies
4. Craft communications to returning workers ensuring that they are aware of the safety measures in place and how to comply with them

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5. Ensure that proper personal protective equipment (PPE) (if needed) and general cleaning materials such as soap and hand sanitizer are available
6. Designate who within the company will be a resource for RTW questions

View the best practices sections below:

GENERAL RTW POLICY DEVELOPMENT AND FACILITY PREPARATION

In evaluating onsite return to work and implementing social distancing policies, employers should pay attention to regulations and guidance issued by governmental agencies, such as OSHA and the CDC. Since the pandemic outbreak in March, OSHA has received thousands of complaints from employees concerning workplace safety. Many of these complaints relate to lack of or inadequate PPE, lack of soap and hygiene products, and working in close proximity to other workers. These employee complaints may result in greater scrutiny from OSHA and ensuing inspections.

On April 13, 2020, OSHA issued an [Interim Enforcement Response Plan](#) discussing how it plans to prioritize responding to complaints and conducting inspections, and how it plans to respond to hazards generally. Importantly, this response includes not only enforcement of specific regulations, but also OSHA's General Duty Clause, a catch-all enforcement provision that requires employers to keep a workplace free of recognized hazards that cause or are likely to cause death or serious harm, if there is a feasible method to correct it.

Employers need to be cognizant of both the existing workplace safety regulations and the overarching General Duty Clause. In addition, employers need to stay up to date on OSHA requirements/guidance, CDC guidance, state and local orders, and develop plans that are living documents that can be adapted and implemented as new information becomes available.

INFECTIOUS DISEASE PREPAREDNESS AND RESPONSE PLAN

In its Guidance on Preparing Workplaces for COVID-19, OSHA recommends development of an [Infectious Disease Preparedness and Response Plan](#). OSHA recommends the plan consider and address steps to reduce employee risk of exposure to COVID-19 including:

- An assessment of where and how employees might be exposed to COVID-19
- Risk factors at home and in community settings
- Workers' individual risk factors
- Control measures necessary to address those risks

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The plan is a business-specific assessment and strategy for addressing COVID-19 in the workplace that should consider both worker safety requirements and practicalities to provide business continuity. This can include how to implement social distancing, as well as dealing with increased absenteeism or cross-training. Each of the sections below could be incorporated into an Infectious Disease Preparedness and Response Plan.

SOCIAL DISTANCING

The CDC and the [World Health Organization](#) have focused on social distancing, and OSHA has also included it in its policies. The [White House Guidelines for Opening Up America Again](#) includes social distancing as a key component for employers throughout the phases of re-opening. Social distancing is also a requirement of almost every state and local shelter-in-place or similar order, as well as orders permitting re-opening of non-essential businesses. As orders are amended to account for re-opening, provisions should be scrutinized to confirm whether there are social distancing requirements that must be implemented in the workplace.

Common components of social distancing include staying at least six feet apart from others, not gathering in groups and avoiding mass gatherings, remote work, minimizing public transportation, and keeping employees exposed to COVID-19 away from others. To comply with social distancing requirements in the workplace, employers should consider:

- Six-foot separation: Adjusting desks and chairs to be six feet apart; marking the floor to denote six-foot distances; separating chairs and tables in break rooms to be at least six feet apart; designating and posting the direction of foot traffic in narrow hallways
- Avoiding groups and gatherings: Reducing and/or restricting access to common areas; holding electronic meetings when possible; staggering shifts, rotating employee work schedules or other flexible scheduling; minimizing or eliminating shared equipment (phones, desks, tools, pens)
- Remote work: Evaluating what jobs can and cannot be done remotely, and for what timeframes; allowing workers who can to work remotely
- Keeping sick employees away from others: developing a plan for identifying and quickly isolating employees who may become symptomatic of COVID-19 while at the workplace; developing protocols for employees diagnosed with COVID-19 and employees exposed to someone with COVID-19, procedures for contact tracing, and procedures for notifying other employees of possible COVID-19 exposures
- Contact logging to enhance the ability to rapidly identify employees potentially impacted by a COVID-19 exposure

A social distancing policy should also evaluate how and whether third parties (customers, deliveries, etc.) can safely come to workplaces, whether access to the workplace should be narrowed to allow employers to control the point of entry (if screening measures will be undertaken, for example), and how the employer

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plans to keep critical supplies such as hand sanitizer and soap available.

SANITATION AND HYGIENE PRODUCTS BEST PRACTICES

The CDC and [OSHA](#) emphasize the need for good hygiene in the workplace. From an employer's prospective, this includes:

- Providing soap and water for handwashing
- Placing hand sanitizer (at least 60% alcohol) in multiple locations around the business to encourage hand hygiene
- Providing employees sufficient time to conduct hand-washing
- Posting [posters](#) to encourage hygiene practices
- Regular sanitation of public spaces

Well-defined sanitation plans should be developed and implemented. Because COVID-19 can live on surfaces for hours or days, the plans may include more frequent cleaning than was previously provided, as well as protocols for cleaning of high-touch surfaces like doorknobs, workstations, keyboards, handrails, and smaller items like pens throughout the day. The Environmental Protection Agency released a [list of disinfectants](#) effective against COVID-19; these should be used in cleaning and manufacturer instructions should be followed.

If employees are tasked with cleaning requirements, OSHA obligations require an assessment be undertaken to protect them from exposure to hazardous materials, and to determine whether PPE is needed. Employees should also be trained on the cleaning materials and any PPE.

Sanitation plans should also include protocols for cleaning in the event an employee is diagnosed with or suspected of having COVID-19. The CDC has issued guidance on disinfecting after a suspected or confirmed COVID-19 case has visited or used a space. Factors to consider include:

- Determining when the facility should be immediately closed, or the infected portion
- Whether to use a third party to conduct the sanitizing
- Timing on when sanitation should occur, balanced against business operations. The CDC recommends waiting 24 hours (or as long as possible) to begin cleaning, to reduce risk of infection to personnel conducting the sanitation
- OSHA compliance with regard to PPE or cleaning chemicals used for the sanitation plan
- Opening doors and windows, or using other airflow equipment to increase airflow to remove the virus
- Identify key personnel who will be responsible for maintaining and procuring supplies for the sanitation plan, as well as implementation of it

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WORKPLACE CONTROLS

OSHA's COVID-19 guidance recommends the evaluation and implementation of workplace controls. In OSHA's [hierarchy of controls](#), OSHA prefers to eliminate workplace hazards via engineering or administrative controls, i.e., isolating people from the hazard or changing the way people work in light of the hazard as opposed to using PPE to minimize hazards.

- Engineering controls can include installing high-efficiency air filters or increasing ventilation rates. They can also include installing barriers, such as sneeze guards or drive-through windows.
- Administrative controls can include encouraging workers to stay home, implementing social distancing recommendations, keeping workers up to date on company responses to COVID-19 and providing training, and encouraging workers to raise questions or concerns about workplace safety with managers.
- Other safe work practices can include providing no-touch trash cans, providing tissues and hand sanitizer, and requiring regular handwashing to minimize risk of infection.

In the event controls are not sufficient for all potential exposures, PPE may be required and should be evaluated and implemented in accordance with OSHA regulations.

PERSONAL PROTECTIVE EQUIPMENT

In its [Interim Enforcement Response Plan](#), OSHA identified PPE as an area for scrutiny during inspections. PPE can include gloves, gowns, face masks, face shields and some respiratory protection. PPE should be selected after a hazard assessment is conducted for specific duties to determine if hazards are present or likely to be present. Workers must be trained on how to use PPE, including how to put it on, take it off, dispose of or otherwise maintain it, and of the limitations of the PPE. If PPE is required, in most circumstances, it must be provided at the employer's expense.

Some state and local orders require or encourage employers in certain industries to provide gloves or face coverings. For example, Colorado Governor Jared Polis released an [executive order](#) requiring face coverings be worn while working except where doing so would inhibit an individual's health, and to wear gloves provided by employers to the extent possible when in contact with customers or goods.

OSHA's respiratory protection standard applies to "respirators," a broad term that includes dust masks and other filtering face pieces. The respiratory protection standard regulates both mandatory and voluntary use of respirators, whether they are employer- or employee-provided, though different standards are involved for each. OSHA has not issued any guidance confirming that cloth face masks do not meet the definition of "respirator" under the respiratory protection standard.

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Before face masks are required or even allowed, the respiratory protection standard should be evaluated and applicable provisions implemented. Specifically, employers should consider:

- The type of mask
- Whether masks are allowed voluntarily or required and mandatory (and, if mandatory, whether they are required by state/local order or by the employer)
- Whether the employer is providing the mask
- How the masks will be disseminated to employees and communication surrounding issuance including whether masks can be reused and/or how they are sanitized
- Whether the mask will cause a hazard to individual employees or to any job requirements
- What type of training should be provided

In addition, OSHA released guidance on the use of masks given shortages of [N95s](#), which should also be evaluated in selecting the type of mask. In its [Interim Enforcement Response Plan](#), OSHA identified respiratory protection as an area for scrutiny during inspections.

OSHA has not released guidance or provided information on how to incorporate requirements from state orders into OSHA's existing requirements around PPE use. In light of OSHA's silence, employers should follow PPE requirements to the extent possible, especially with employer-provided PPE. This can also create practical concerns with obtaining the highly sought-after coverings, as well as logistical steps for implementation.

MANAGING LABOR RELATIONS WHEN RETURNING TO WORK

Employers managing a unionized workforce must walk a fine line between implementing and amending existing work policies to provide a safe work environment for their employees while ensuring adherence to the terms and conditions of their collective bargaining agreements.

On March 27, 2020, in Memorandum GC 20-04, National Labor Relations Board (NLRB) General Counsel Peter B. Robb published a summary of cases that discussed the duty of employers to bargain during public and individualized emergencies. Generally, the cases cited stood for the proposition that an exception to the duty to bargain exists where the employer can demonstrate that "economic exigencies compel[ed] prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The Board has stressed that this exception is limited to "extraordinary unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). In light of this heightened standard for unilaterally changing terms and conditions of employment without bargaining, unionized employers considering RTW issues should review the following items:

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- Review management rights provisions to determine the scope and latitude of what decisions may be made
- Determine whether there is a force majeure provision in the collective bargaining agreement (CBA) and if so, its applicability to the COVID-19 pandemic, and review no-strike clauses in the event of walkouts or work stoppage due to safety concern
- Consider the seniority, recall and bumping rights in the CBA for when employees are brought back to work
- Prepare for the union to demand negotiation over scheduling, hazard pay, PPE, social distancing policies, testing requirements, medical evaluations and paid time off for company mandated COVID-related absences. Also anticipate that the union may demand a facility be shut down if the business is non-essential
- Be mindful of contractual obligations that may trigger severance payments or other forms of remuneration due to extended layoffs
- Be cautious around disciplining for employee social media posts related to COVID-19 and anticipate demands that attendance enforcement be relaxed and high-risk populations have the right to refuse work

ON-SITE VISITORS AND VISITING CUSTOMERS

As companies attempt to return to normal business operations, employers will need to address issues concerning on-site visitors and the need to visit customers to conduct business. Defined processes and procedures should be developed to assist employees with navigating the following situations:

Businesses that caters to the public or have visitors should consider what changes to its facility it should make, including:

- Deciding whether to require or encourage face coverings for visitors
- Requiring appointments, rather than walk-in traffic. If walk-ins are allowed, consider having customers sign in for purposes of contact tracing
- Implementing policies that discourage on-site third-party visitors and require analysis of the feasibility of virtual meetings before granting on-site visits
- Screening of customers, such as asking about any symptoms
- Determining whether to deny entry to visibly ill visitors
- Consideration of site logging for visitors to identify all persons with whom they had close contact

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For employees who had previously visited customers as part of their duties, consider the following:

- Require written approval for any work travel or on-site customer visits, which should be given only after analyzing whether the meeting could be conducted virtually
- Require PPE for on-site visits that must occur
- Require site logging at the customer site
- Request review of customer social distancing and third-party visitor policies prior to visiting
- Implement policies prohibiting travel or visits of any kind if an employee is exhibiting any recognized COVID-19 symptoms

MEDICAL CERTIFICATION AND RTW

Employers may require employees who have been absent from work due to a COVID-19 diagnosis or exposure to provide a medical certification prior to returning to the workplace. Typically, the ADA only permits employers to make disability-related inquiries and require medical examinations of employees when doing so is job-related and consistent with business necessity. An employer must have a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition or an employee will pose a direct threat due to a medical condition. In the context of COVID-19, the Equal Employment Opportunity Commission (EEOC) has stated that requiring a doctor's note to certify an employee's fitness for duty is permitted by the Americans with Disabilities Act (ADA) because: (1) it is not a disability-related inquiry; or (2) because the COVID-19 pandemic currently meets the "direct threat" standard, thereby justifying the use of medical inquiries and examinations to exclude employees who may pose a direct threat to health or safety from the workplace.

Employers should exercise flexibility where possible when requiring a fitness for duty certification. Due to the pandemic's strain on the health care system, some employees may be unable to obtain formal medical certification from their primary healthcare providers. The EEOC encourages employers to consider "new approaches" to this documentation, such as allowing a local clinic to provide a form, stamp or an email to certify that an employee does not have COVID-19.

Medical Screening

As noted above, typically employers may only conduct medical examinations of employees in limited circumstances. However, because the EEOC has recognized that the COVID-19 pandemic meets the "direct threat" standard, it has stated that employers may screen employees for COVID-19 symptoms, measure employees' body temperatures, and administer COVID-19 tests to employees.

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In conducting COVID-19 screening and testing, an employer must ensure that:

- Screening and testing processes are accurate and reliable
- Procedures clearly describe the screening and testing process, how to ensure safety and confidentiality during the screening and testing process, what constitutes a “pass” or “fail,” what happens if an employee refuses to be tested, what happens to those employees who are sent home, and whether and when the employer will allow re-testing
- Screening or testing is only conducted by qualified individuals with appropriate PPE. While the EEOC has not issued guidance on who may conduct COVID-19 screening or testing, it defines a “medical examination” as a “procedure or test that seeks information about an individual’s physical or mental impairments or health” – factors that determine whether a procedure is a medical examination under the ADA include: whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional. [Based on this EEOC guidance](#), it is recommended that a health care professional conduct COVID-19 screening or testing, if possible. Other options may be available, but require further scrutiny before implementation
- A hazard assessment is conducted for the screener, including evaluation of the exposure classifications in [OHSA’s COVID-19 guidance](#), to ensure safety compliance for screeners
- Data created during the screening or testing process is kept confidential and retained according to applicable record retention requirements under federal and state law, including the ADA and OSHA

Employers who intend to conduct COVID-19 screening or testing should also be prepared to address other legal issues that may arise, including: federal and state wage and hour requirements for screening time, privacy laws, duty to provide religious accommodations, and anti-discrimination and anti-retaliation measures. We strongly recommend that employers work directly with their counsel to create a screening and testing policy that takes into account these complicated legal concerns.

HIRING/ON-BOARDING CONCERNS DURING THE PANDEMIC

With respect to job applicants, the ADA prohibits employers from making disability-related inquiries or conducting medical examinations before a conditional offer of employment is made. However, the ADA allows employers to undertake such inquiries and examinations after a conditional job offer is made and before the individual starts working, so long as all entering employees in the same job category are treated the same. Accordingly, the EEOC has stated that employers may screen job applicants for symptoms of COVID-19 after making a conditional job offer, so long as it does so for all employees entering in the same type of job.

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If a job applicant has COVID-19 symptoms, the EEOC has stated that employers may delay the individual's start date or even withdraw the job offer, since the individual cannot safely be in the workplace. However, employers should take care not to unilaterally delay start dates or withdraw job offers of individuals who may be particularly susceptible to COVID-19, such as people who are over 65 or pregnant. In such cases, the EEOC recommends that employers engage in a discussion with the individual job applicants to determine if telework or postponement of the start date is an option.

IMMIGRATION CONSIDERATIONS

I-9 Compliance During Remote Work

Employers are required to complete I-9 forms and E-verify for all new hires, and to re-verify those employees who have expiring work authorization during the COVID-19 crisis. On March 20, 2020, the Department of Homeland Security (DHS) announced temporary flexibility for employers completing Form I-9s, by delaying in-person, physical inspection of original documents. The temporary fix allows an employer who is observing social distancing, governmental stay-at-home orders, or company remote work policies, to inspect a document remotely in the form of a scan, fax, or video link.

The relaxation of physical inspection of documents only applies to employers who have documented their telecommuting policy as a response to COVID-19. As such, to avail itself of the truly remote process, an employer must have a workforce that is entirely remote. If workers are physically present at a work location, this process is not available. There are additional requirements in documenting the review of employees' identity and authorization documents in Section 2 of the Form I-9, as well as a requirement to conduct an in-person inspection of the documents once normal business operations resume. Proper documentation of the policies and processes are important for demonstrating "good faith" efforts to comply with the temporary flexible requirements. These relaxed measures are set to expire on May 20, 2020 or within three business days after the termination of the COVID-19 as a national emergency, whichever comes first. All I-9s completed using the relaxed guidance should be noted with a "COVID-19" in the Additional Information field located in Section 2 of the I-9 form.

Perfecting I-9s Following RTW

Once an employer resumes ordinary business operations with some employees physically returning to the employer's place of business, employers will need to take steps to "perfect" I-9s for employees hired during the pandemic, within three business days. The employer will need to inform all employees with COVID-19 completed I-9s that an in-person meeting to physically review the original identity and employment authorization documents is required. As always, for remote hiring of employees, employers may use a third-party (non-employee) to act as an authorized representative to execute the responsibilities of the employer in completing the I-9. The Additional Information Field in Section 2 will be completed with

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“documents physically examined” date and initialed by the employer’s agent who examined the documents. Employers will need to consider the totality of the situation to determine the safest choice and time to perfect the I-9 with a physical review of the documents. Documenting the employer’s social distancing protocols will be critical if a business is subject to a DHS investigation.

As employers start planning to return some or all of their workforce to a worksite, employers should take the following steps to help mitigate risks:

- Draft a file memo for any I-9s, print or electronic, that were created during the period of the COVID-19 national emergency which deviated from the standard I-9 procedures, requirements, and retention protocols
- The immigration file should contain the DHS’s relaxed [compliance guidance](#), the employer’s COVID-19 work from home policy, the date the employer commenced return to work protocols, even if limited in scope, and a list of I-9s completed during COVID-19
- Maintain a list of all employees hired during the period from March 20, 2020 to May 20, 2020 or when the national emergency due to COVID-19 is declared over
- Use a spreadsheet to track employees whose verification documents are expiring and are subject to reverification for employment authorization, to help determine which employees should be contacted within three days of normal business operations or the end of the national emergency for reverification

If a business was closed and operations were fully suspended, then timeliness requirements for completing Form I-9s will be tolled until the business resumes normal operations. If the business is operational through telecommuting or working from home arrangements, however, tolling is not available.

EMPLOYEE TRAINING FOR RTW

Getting back to work after the initial COVID-19 pandemic wave is almost certainly going to bring changes to pre-pandemic work policies, procedures and practices. The number and types of changes depend largely on the nature of the business’s work and its workplace conditions. While employers have much to consider in implementing new policies, compliance with any ongoing state and local sheltering or distancing orders, following the guidance of the CDC, OSHA and other government sources, and complying with new and old employment laws – employers cannot comply with the myriad of mandated and suggested changes to doing business without also undertaking proper workforce training.

Employers should consider training on the following topics:

- New federal employee benefits (Families First Coronavirus Relief Act (FFCRA) paid sick leave and expanded Family and Medical Leave) where applicable, and recognizing and appropriately responding to employees’ requests for paid leave

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- New safety procedures including social distancing, PPE use, contact logging, sanitizing, hygiene, etc.
- OSHA requirements and CDC and other guidance including an explanation of why measures are being implemented, how to execute the new rules and considerations, and how to be vigilant identifying and reporting safety concerns
- Recognizing and responding to actionable complaints and potential retaliation related to COVID-19
- Recognizing FMLA and ADA requests in the context of COVID-19 (particularly those related to anxiety about returning to work)
- Performance management and monitoring of employees' compliance with new safety procedures, including social distancing and PPE use, and how to properly respond to employees' noncompliance
- If the employer is implementing new screening protocols, any employees involved with conducting the screening or recording/maintaining related data should be fully trained in facilitating the screening process and managing personal data created by such protocols

PERFORMANCE MANAGEMENT BEST PRACTICES DURING A PANDEMIC

As employers begin bringing employees back to work, performance management is a necessary tool to ensure business continuity. If absenteeism and abuse of work flexibility due to the pandemic are left unchecked, the negative impact to work productivity, increased work errors, and downward pressure on employee morale and engagement may impact an organization's ability to survive during this pandemic. To effectively manage performance during the pandemic, it is critical for employers to:

- Develop a protocol and strategy for employees who are afraid of returning to work
- Prepare for abuse of FFCRA benefits (if applicable) or other types of medical leave
- Anticipate challenges to the company's social distancing and PPE requirements shortly after RTW and ensure alignment and consistency on how supervisors should discipline
- Set expectations for employees who are given the option to continue working remotely and ensure consistency for such expectations with employees who are working on site
- Schedule regular one-on-ones for both remote and on-site workers to provide reassurance that regular work is to be performed, build rapport, and solicit employee feedback. Also clarify the preferred method of communication during the pandemic (Zoom, Skype, email, phone, Teams). Managers and supervisors must be sympathetic to the challenges presented by the pandemic and actively listen when concerns are brought forward
- Reinforce to supervisors the need to recognize potential ADA accommodation requests and FMLA and/or FFCRA requests when discussing performance concerns and emphasize training on identifying safety related complaints and concerns in order to manage retaliation risks

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- Identify goals for performance management initiatives and strive for objective metrics for work performance and performance improvement plans
- Use performance management as an opportunity to emphasize the company's mission and goals for ensuring business continuity during the pandemic
- In the event an employee must be separated, consider different options to ease the transition, such as PPP funds (if available) or the federal unemployment benefit that is available until July 31, 2020

GOVERNMENTAL ORDERS AND RESOURCES IMPACTING RTW PREPARATION

As shelter in place and other similar orders begin to expire and the economy prepares to re-open, employers should review and incorporate the various orders and guidance issued by federal, state and local government entities. The White House recently issued [guidelines](#) for re-opening the economy, which includes a three-tiered approach and certain threshold criteria that states should meet before entering into any phase of re-opening. The gating criteria include a downward trend of symptomatic and confirmed COVID-19 cases and emerging testing capabilities. Under phases 1 and 2 of the guidelines, employers are encouraged to permit continued telework where feasible and practical for business operations. When bringing employees back into the workplace, employers should follow a phased approach to limit the spread of COVID-19 and should consider accommodations that may be necessary for workers who are particularly vulnerable to COVID-19 or similar illness. Further recommendations specific to each phase can be found at the White House website.

The CDC and OSHA have not yet issued guidance specific to economic re-opening, but the agencies' general guidance for employers navigating the COVID-19 pandemic can be found [here](#) and [here](#), respectively. Highlights of the CDC and OSHA guidance include:

- Sending sick employees home; screening employees for signs of COVID-19 symptoms and following discontinuation of isolation recommendations (see also EEOC guidance on screening employees for COVID-19, permitting employers to take employee temperatures and administer COVID-19 tests)
- Establishing policies and practices for social distancing, including telework, flexible work hours, and increasing physical space between employees' workspaces
- Implementing PPE for employees
- Reducing touchpoints and increasing sanitization and cleaning procedures; and
- Promoting good hygiene throughout the workplace

In addition to federal guidance, individual states are also relaxing orders and implementing new recommendations and/or requirements. Many states, including [Colorado](#), [Minnesota](#), [Missouri](#), [New York](#) and [Texas](#) and are also introducing strategies to re-open businesses through multi-tiered approaches. Here is a [link](#) to a state survey of re-opening plans. When considering re-opening, employers should be aware of

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and comply with all applicable federal, state, and local guidelines or executive orders. For multi-jurisdiction employers, conflicts between the various governmental orders will exist and they should consult with their attorneys on how to reconcile the differences.

WORKPLACE POLICIES TO REVIEW FOR RTW PREPARATION

A comprehensive RTW strategy should include a thorough review of workplace policies and practices to incorporate new work rules responsive to COVID-19. Ideally, major policy changes should be communicated to employees in advance of returning to work, and training should be conducted remotely, where practicable. As with training prior to the pandemic, employers should also pay attention to wage and hour rules, particularly if training is conducted prior to employees being on site. Workplace policies that should be reviewed include:

- Attendance policies, which should be adapted to business priorities during the pandemic recovery, such as promoting fewer in-person meetings, defining essential workers who must be on-site, or providing guidance for high-risk employees
- Third-party visitor and work travel policies
- Leave policies, which should incorporate new federal, state or local paid and/or unpaid sick leave laws, as applicable
- Policies related to entering and exiting the work premises and changes to pay practices if necessary, due to screening processes
- Privacy policies and practices to address the additional personal data gathered as a result of social distancing and enhanced employee screening
- Workplace conduct policies, which should incorporate sanitation practices and hygiene expectations
- Safety and PPE policies, which should reflect new social distancing and PPE requirements, if applicable. This should also include a review of how the cost of replacement PPE will be allocated for employee negligence or misuse
- Social media policies, especially with regard to disclosing personal health information of employees
- Mandatory overtime policies in the event there are increased absences due to infection or other reasons
- Emergency closing and pandemic response policies, in anticipation of second and third waves of COVID-19

HANDLING RTW ACCOMMODATION CHALLENGES

Bringing employees back on site during the pandemic presents unique and challenging accommodation issues. Employees may have a variety of reactions and concerns relating to returning to the workplace. Such concerns may include:

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- The employee is sick
- The employee is not sick, but is afraid of contracting COVID-19
- The employee does not want to return to work because of underlying health condition/vulnerability to COVID-19
- The employee does not have a health condition/vulnerability, but does not want to return to work because they live with someone who has such a condition/vulnerability
- The employee objects to medical screenings required by the employer prior to returning to work

For companies with fewer than 500 employees, the employer should first determine whether the employee is eligible for leave under the FFCRA programs (EPSLA and/or EFMLEA). If the employee's stated concern does not qualify for EPSLA or EFMLEA leave, the employer should consider whether to permit employees to use accrued vacation or paid time off. Factors to consider are the expected volume of business and corresponding need for the employee, and the employer's pre-existing policies for use of vacation or PTO.

If the employee has an underlying health condition or vulnerability, the employer should also analyze whether the employee's concern should be treated as a request for a reasonable accommodation under the ADA. The EEOC's recently released guidance on the ADA and COVID-19 reminds employers of their obligation to comply with the ADA.

The employer must engage in an interactive process with the employee if put on notice of the potential need for a reasonable accommodation. This process will require the employer to confirm the essential functions of the position. It is particularly important to articulate why physical presence at the worksite is essential if the employee has been working remotely during a government-mandated stay-at-home period. In some circumstances, the employer may require information from the employee's health care provider. If the employer believes the employee's requested accommodation is not reasonable and presents an undue hardship, the employer must attempt to identify other possible accommodations. The interactive process should be well-documented, both to ensure consistent treatment of such requests and to defend any claim of failure to accommodate the employee's disability.

PREPARING FOR THE SECOND (OR THIRD) WAVE

The 1918 pandemic and the 2009 H1N1 pandemic both provide historical examples of pandemics that resulted in second and third waves that were more devastating than the first wave. Employers should be attentive and prepare for second and even third waves of COVID-19, after RTW procedures have been implemented. As part of any RTW process, employers should consider the following measures to prepare for subsequent outbreaks and the return of COVID-19:

- Immediately begin a process of reviewing the company's response to the pandemic. Constantly evaluate the effectiveness of the response and look for improvements that can be made to streamline a rapid

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return to shelter-in-place or social distancing in the event subsequent waves arrive

- Ask how the company would have responded differently, given what we know now about COVID-19
- Develop a process for evaluating the company's response that has structure and formality, as well as ongoing review of best practices for responding to COVID-19
- Solicit employee feedback on response weaknesses and suggestions for improvements. Good employee communication also helps maintain positive employee relations by conveying to the workforce the company's preparation for subsequent waves. Consider conducting a survey on the company's response to the pandemic
- Maintain accurate lists of different categories of employees, including: 1) employees who are essential to the work site; 2) essential employees who can work remotely; 3) non-essential employees who can work remotely; and 4) non-essential employees who cannot work remotely
- Update internal employee communication plans in the event of a second wave and consider what additional employee time off benefits will be offered should that occur
- Determine response protocols and functions that should be handled internally versus through third-party vendors. Conduct regular training on pandemic response and use of PPE. Consider maintaining vendor supply contracts for PPE and sanitation products

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