

# CORONAVIRUS INFORMATION & UPDATES

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## Understanding the Challenges of Workplace and Business Re-Opening

As the governors and mayors, and state and local health commissioners, determine when and how to allow the re-opening of “non-essential” workplaces and businesses that in many cases have been downscaled or shut since late February, questions arise about exactly how workplace and business activity might be resumed with an acceptable margin of safety for workers, customers and visitors. The experience we as a nation, and as employers and businesses, have had with COVID-19 will predictably change some practices in perpetuity, while other practices may be phased out over time, as the public health crisis abates, and as effective treatments and vaccines are identified. At present, however, businesses and workplaces should keep in mind the steps and practices outlined below, as they consider how to resume operations.

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### Workplace Sanitation and Cleanliness

Vastly upgraded sanitation and cleaning practices in business, manufacturing and retail settings will undoubtedly be one of the long-surviving vestiges of our collective experience with COVID-19, and one can predict that occupational health and safety as a discipline will be deployed widely, in new ways and in new environments. More stringent rules will likely be adopted by the federal Occupational Safety and Health Administration (OSHA) and similar state agencies, in settings previously considered far less dangerous than, for example, health care delivery, where a previous epidemic experience (HIV/AIDS) led to the adoption of very specific blood-borne pathogens standards. Indeed, some settings – such as health care, drug manufacturing and food production and preparation – have been under rigorous regulatory and trade custom regimes for decades, but others, such as white collar offices and light manufacturing, have had less scrutiny and more lax practices.

Among the practices that should be considered in this regard are the following:

- Enhanced and more frequent cleaning/disinfection of all workplace and business surfaces. Businesses should plan and revise cleaning protocols, focusing on surfaces that are touched and handled frequently and continuously by staff and customers, such as desktops and countertops, door handles, elevator buttons, escalator handrails, keyboards and cash registers, electronic credit card payment machines, and gasoline pump handles. Surfaces that before now were cleaned infrequently or not at all should now be addressed in cleaning schedules, and once daily cleanings for the most commonly used surfaces may now be made more frequent, to twice or four times or more, each working day.
- Providing kitchen facilities at workplaces should be re-considered, due to the inherent risk of creating environments that risk cross-contamination of comestibles and potables, and due to the nature of “floor” kitchens as encouraging handling of items and surfaces by multiple people throughout the working day.

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- Providing common eating areas will be risky, both because of the risk of contaminated surfaces, but also because they promote close gatherings of employees. To the extent that workplaces decide they need to continue providing break rooms or common eating areas, then the areas will require continuous cleaning, as well as the adoption and implementation of social distancing rules and other methods of reducing person-density (described more fully below under **Employee Work Rules**). As the pandemic abates, enforcing distancing and reducing person density will likely be reduced or even eliminated as necessary practices, although the continuous cleaning of eating surfaces and table seats will need to continue.
- Bathrooms are communal facilities that must remain operational and accessible, but cleaning and disinfection practices can be enhanced and made more frequent. Ensuring an acceptable level of density in communal bathrooms will be needed, with limits on persons calibrated to floor space. One can predict that in the future, both because of the emergence of gender-neutral bathrooms and because of cleanliness and density standards, newly designed workplaces are more likely to have multiple private gender-neutral bathrooms than communal facilities.
- Employer-provided cafeterias and canteens will need to be re-oriented in their serving methods, so that self-serving of anything except individually wrapped items will be reduced or eliminated.
- All of these measures will require greater expenditures for cleaning services and equipment, and for meal services, as well as enhanced supervision of these services to ensure that the more robust standards are observed. OSHA enforcement in regard to sanitation may be enhanced, requiring more compliance resources and stepped-up efforts. Certain measures (e.g., discontinuation of on-site food service or access to kitchens) may require modifications to employee break and lunch periods as employees are forced to venture off-site.

## Employee Work Rules

Employers should consider work rules that promote better sanitation and infection control, both by requiring adherence to personal cleanliness practices (such as routine hand-washing and daily personal bathing) and adherence to personal movement and positioning practices (such as social distancing and sneezing or coughing into a handkerchief or paper tissue). Adopting, implementing and enforcing such rules have little precedent in many U.S. workplaces and businesses, which have often relied on subtle social pressures, good manners, and peer expectations to promote behavioral norms. Codes of personal conduct and sanitation/bathing/hand-washing practices should be carefully drafted, based on attention to federal, state and local public health guidelines. Supervisors will need to be trained in what to look for, what to correct, and what to document about individual workers' adherence to these standards. Ultimately, failure to respect these standards must be enforced by sanction, suspension or termination, but application of these rules must be neutral and fair as to job category and job status in each workplace, with the CEO expected to adhere just as rigorously as any line employee, in order to avoid claims of unlawful discriminatory action. Facilities and supplies (such as sinks with hot water and soap, and alcohol-based hand-cleansing solution) must be provided by employers and businesses to allow adherence to new required practices of personal hygiene.

Density of employee work environments will also require scrutiny and planning. "Open offices" may be a design fashion whose days are numbered, as workplaces are re-designed and renovated, with small personal offices being preferred, to promote isolation and thus better infection control.

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For the duration of the pandemic, and until effective treatments and/or vaccines are identified and widely used, workers – especially in hard-hit geographic areas – should be strongly encouraged – and in some instances required – to wear masks when interacting closely with colleagues, customers and visitors. Although this will upset some workers and may subject a broader range of employers to OSHA standards that regulate the use of personal protective equipment (requiring regular hazard assessments, training on proper equipment usage, provision and replacement of equipment, etc.), rigorous adherence to this practice would reduce risk of workplace transmission of COVID-19 as well as colds and influenza.

In most workplaces, according to preliminary guidelines issued by the Office of the President but also reflected in some state and local guidance, face-to-face workplace meetings should, at least after initial re-opening, include only those persons whose physical presence is truly needed, with the largest number of persons in such meetings being limited to no more than ten. As the pandemic abates and transmission is reduced, larger in-person meetings could be allowed, but should still be limited to those whose physical presence is, in some sense, necessary for business reasons. Long-term, it is predictable that numbers and size of in-person workplace meetings will be reduced overall.

Similarly, business travel should and will be reduced in most workplaces, due to (1) employee fear of infection as a by-product of personal travel, (2) employer reluctance to put employees at infection risk through travel, and (3) realization of both employers and employees that much of previous business travel could – in light of the virtual meeting experiences of the pandemic – have been accomplished through remote means, which is less taxing on employees and less costly for employers. Workplace rules regarding safe practices during business travel should also be considered, although for obvious reasons, monitoring capabilities will be extremely limited if not altogether infeasible.

## Employee Health

Some employers in essential industries and businesses have implemented beginning-of-work-day temperature screening of employees and contractors as they arrive for work, and sometimes have accompanied this by daily questionnaires administered to each employee asking sentinel questions about present health status (including whether the employee is experiencing fever, chills, cough, shortness of breath, sore throat or other symptoms associated with COVID-19), and inquiring as to the employee's contacts with others outside his or her home, and contacts with anyone known to be diagnosed with COVID-19 infection (through testing) or presumed infection. Although the responses to such questioning are not entirely reliable, the process at least serves to remind employees as to the overall workplace rule that employees not feeling well, for any reason, should not report to work. (Employers also must carefully consider their policies around sick leave and sick-time compensation, balancing operational needs against the need to support employees' efforts to limit the spread of disease, though that issue lies beyond the scope of this Alert.)

As workplaces return to limited or full functioning, these daily screening practices will likely be widely adopted, because they have appeared useful and because they may be recommended by state and local health departments. Content of daily questionnaires, how the results are interpreted and applied, and how personal temperature readings may be used for screening should be consistent with state and local health department guidelines and applicable federal, state and local disability laws that limit an employer's right to request and use certain medical information. Among the complications of temperature screening are possible misreadings by less-than-reliable equipment and increased risk of exposure for employees or others tasked with conducting these screenings, and need for maintenance of health privacy of employees undergoing daily screening, as well as the fact that for some persons, a heightened personal body temperature may be normal and not indicative of COVID-19 infection or illness. Employee health practices and rules will need to take account of these and other factors.



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Some employees may have co-morbid conditions that make their return to work unsafe while any significant community transmission is occurring. For these employees, return to work may require special accommodations under federal, state and local disability laws, and those accommodations may include assignment to personal, private offices, or allowance for extended work-at-home arrangements. Although COVID-19, as a presumably transitory illness, is not a “disability,” these co-morbid, chronic conditions that increase health risk may qualify as “disabilities” for which a reasonable accommodation is required. Beyond *bona fide* disabilities, employees may have other personal circumstances, including household members with co-morbid conditions or childcare challenges, that call for special consideration. Although an employer will, in most instances, have no legal obligation to modify work expectations or policies for an employee dealing with these types of challenges, there may be compelling employee morale, retention or other considerations that weigh in favor of flexibility.

While COVID-19 remains a significant health threat, work rules for employees may tend to exceed limits previously observed. For example, employers might consider rules that, at least for the near future, do not allow employees who report to a physical workplace to engage in leisure or other activities with other than co-habiting family members. Although such a rule is in many ways un-monitorable and largely unenforceable, and although it seems intrusive by standards that preceded this pandemic, the wisdom of it, at least at present, seems sound, in order to promote individual and group employee health and reduce workplace transmission risk. Before adopting rules of this nature, employers will need to navigate state laws that, in some jurisdictions, limit an employer’s ability to regulate lawful off-duty conduct.

Work rules should require that employees report to a designated employer officer their own diagnosis or presumed diagnosis with COVID-19, or that of a close family or other contact. When such a report is received, the employer ideally will engage the assistance of a local or state health department to conduct workplace contact assessment of the index case, seeking to identify close contacts (while keeping confidential, insofar as possible and absent consent, the identity of the reporting affected employee) and to require that those contacts in turn quarantine themselves – and not return to work – for a definite time period without symptoms, typically 14 days in most jurisdictions. Early in the pandemic, state and local health departments were overwhelmed with requests for contact assessments, and employers, lacking help, undertook these assessments themselves, ideally with the assistance of a health professional. When return to work occurs on a wide scale, there will be new COVID-19 cases reported among active workers, and employers therefore need to be prepared to engage in, if necessary, contact assessment; preferably, employers would, before resuming operations, seek and retain health professional assistance to prepare for receiving notification from an employee of his or her COVID-19 infection diagnosis.

Over the long term, we can expect that these pandemic employer experiences will incentivize employers to develop or enhance employee health services, either directly or by contract with external employee health services providers.

## Testing

During the pandemic, testing for COVID-19 infection and for antibodies (detecting past infection and possible immunity) has been widely discussed and, in many places, only unreliably available. The local difficulties with accessing testing for COVID-19, and problems with long delays in obtaining results, have made it impossible for employers in most cases to use testing as a mechanism for workplace transmission control and risk reduction. Antibody testing is, at present, even less reliable and less available than infection testing; has displayed major problems with false positive and false negative rates; and carries uncertain implications for the immunity of persons previously exposed to or previously infected with COVID-19. In the future, as infection testing becomes more widely available and more reliable, and as the public health and clinical implications of antibody testing are identified, then employer use of testing to screen employees as part of

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direct employee health procedures will increase. Now, however, it seems premature to indicate how an employer might or could or should deploy testing – most likely by contract with an external, for-profit laboratory or external employee health service vendor – and planning for testing as a workplace measure should await more definite guidance from federal, state and local authorities.

### Training and Monitoring, and Revising Policies and Practices

New policies and practices in the workplace require training and re-enforcement of training among workers and supervisors. This is as true in the COVID-19 context as in any other. Employers should make specific plans, and allocate specific responsibilities, for training in the various workplace policies and practices that are being required, in order that employees remember the rules and comply with them and that managers enforce the rules in a consistent and nondiscriminatory manner.

As the pandemic changes in trajectory and risk profile, policies and practices will need to change as well. In many cases, such changes may loosen restrictions, but in some cases, rules may become more onerous or take new forms. Employers and businesses must remain alert to federal, state and local guideline changes regarding COVID-19 control measures, and must carefully align their own policies and practices with public health authority recommendations. As these have changed and will change over the pandemic's course, constant attention is required. For this purpose, employers should consider appointing one or more persons from the workforce as having responsibility for monitoring public health recommendations and adapting the workplace's rules to changes in those recommendations.

### "Phasing in" Return-to-Work, and Overarching Goals

Experience with re-opening workplaces in East Asia suggests that immediate resumption of all activities, with all employees, is difficult to manage, especially given the complexity of new work rules (as outlined above) and the continued challenge that, at least in large urban centers, most employees use public transit to travel to and from work. As long as community transmission is a significant risk, those mass transit venues likely will continue to require social distancing and reduced density of ridership, which in turn will cause delays in travel time. Employers should consider a slow, phased resumption of workplace activities, so that training and reinforcement of that training, and monitoring of new work rules, can be done step-by-step. Employers therefore might consider re-starting work activities in a phased way – for example, directing one quarter of the workforce to return each successive week until, after four weeks, all workers are on-site each day and working. Staggered start times for employees may be indicated, both to reduce density of the workplace at the beginning and end of each day, and to allow employees to avoid the most crowded mass transit time periods, thus reducing risk to employees during their commutes. Some employers have considered instructing employees not to use public transportation until the risk of community spread is no longer significant, but managers should be mindful that some employees may have no other realistic option for getting to work and therefore should be prepared to offer alternatives such as continued work-from-home arrangements.

In summary, as this pandemic evolves, and thereafter in regard to respiratory and other infectious disease control in the workplace, employers should keep in mind these goals:

- Affording employees a safe working environment that is made more safe by adopting and enforcing scientifically based work rules and providing appropriate technology and supplies to employees and others in the workplace;

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- Aligning work rules and practices with guidelines from the cognizant federal, state and local authorities, and amending work rules and practices as those guidelines change;
- Complying with federal, state and local laws and regulations, and collectively bargained safety standards, in all aspects of employment;
- Respecting the special requirements of disability rights laws, including as they apply to employees with co-morbid conditions that raise an employee's personal risk of acquiring respiratory disease in the workplace;
- Cooperating with state and local public health departments in assessing and counseling the at-risk, close contacts of an employee or workplace attendee who is diagnosed with COVID-19; and
- To the greatest extent possible, consistent with protecting the workforce, keeping private the health and social information of individual employees.