



# Planning for What's Next: Returning to the Workplace During COVID-19

COVID-19 LEGAL RESOURCE GUIDE | MAY 08, 2020

Employers everywhere are facing unprecedented challenges as they plan to reopen workplaces in the coming weeks and months in the midst of the COVID-19 pandemic. State and local governments have begun to modify stay-at-home and shelter-in-place orders to allow nonessential businesses to reopen, forcing many employers to start thinking about what returning to the workplace will look like for their businesses, whether that return is days, weeks or months away.

This Alert is intended to help employers navigate the difficult issues involved in planning and implementing a successful and safe return to the workplace. Recognizing that employers will need to consider different issues at various stages of the reopening process, we have structured this Alert in three parts:

- Where Do We Begin? — [First Steps](#)
- What About Logistics? — [Preparing the Work Environment and Employees for Return](#)
- We're Open. Now What? — [Anticipating Challenges That May Lie Ahead](#)

We note that the following are general considerations for employers — there is no one-size-fits-all approach to reopening, and each employer's plan will vary based on a variety of factors, including jurisdiction, industry and size.

Moreover, the one question we do not attempt to answer is “when?” The answer will vary, likely significantly, from state to state and within states, and from industry to industry. For example, in New York, Governor Cuomo has [outlined](#) a four-phase process based on the type of business:

- Phase 1: Construction; manufacturing and wholesale supply chain; and select retail using curbside pickup only

- Phase 2: Professional services; finance and insurance; retail; administrative support; real estate and rental leasing
- Phase 3: Restaurants, food service, hotels and accommodations
- Phase 4: Arts, entertainment, recreation and education

Regions in upstate New York are expected to be permitted to return to work earlier than New York City and surrounding areas.

### **Where Do We Begin? — First Steps**

#### 1. Follow Government and Health Agency Guidance

First and foremost, employers must rely on the guidance provided by government and health authorities when deciding how and when to reopen the workplace. As guidance from state and local government officials and health authorities is constantly evolving, employers are encouraged to monitor resources such as the Centers for Disease Control and Prevention (the CDC), the Occupational Safety and Health Administration (OSHA), the Equal Employment Opportunity Commission (the EEOC), and state and local agencies to ensure compliance with applicable government and health directives.

#### 2. Create a Task Force

Reopening the workplace will implicate novel financial, human resources, facilities and legal issues that employers need to be prepared to address. Employers should consider creating a task force composed of individuals who will be responsible for planning and implementing a safe and successful return to the workplace. This task force may address issues regarding office safety, employee policies, financing, governmental assistance and other business considerations.

#### 3. Create a Plan

Once employers have a task force in place, they should consider adopting a written plan that addresses concerns regarding the physical office space(s); the order in which

employees will return to work; screening policies for employees, clients and visitors; and health and safety requirements employees will be expected to follow.

#### 4. Ensure Effective Communication

Employers should begin planning for written and other communications (such as town halls) to employees that describe new office rules and procedures. Such communications have two goals: first, to advise employees of what will be expected of them when they return to the workplace and, second, to provide comfort that the employer is taking reasonable and appropriate steps to ensure a safe working environment. In addition, employers should engage in regular outreach to employees regarding developments and plans.

#### 5. Be Mindful of Discrimination

Many issues may arise in connection with the return to work that can implicate potential discrimination risks, and employers therefore should ensure that all COVID-19-related employment decisions, policies and protocols are nondiscriminatory and not retaliatory. Any COVID-19-related workplace decision, including decisions related to returning to the workplace, must be based on government and public health guidance, objective factors and legitimate business needs.

Employers should beware that pandemic-related discrimination, harassment and retaliation will not be tolerated and, where necessary, remind employees of applicable harassment policies and remind supervisors of their role in reporting and stopping harassing or discriminatory conduct.

## **What About Logistics? — Preparing the Work Environment and Employees for Return**

### 1. How should we prepare office spaces?

Before any employees return to the workplace, employers will need to implement procedures in response to new risks posed by COVID-19. This may include physical space modifications as well as changes to sanitation procedures.

#### Adapt Your Space

- *Physical Modifications:* Depending on the type of workforce and the nature of the space, employers may want to consider installing plexiglass shields or temporary walls as appropriate to protect employees. Seating arrangements also should be reviewed for compliance with social distancing recommendations, to the extent practicable. Employers also should consider limiting the number of “high touch” surfaces employees need to encounter throughout the office, such as by installing automatic doors and lights, installing special handles, or propping open doors between office spaces (if acceptable under applicable security protocols).
- *Modify Cafeteria Use:* Employers can consider converting cafeterias to pickup or delivery only or staggering times when employees can use the cafeteria, and may want to modify food offerings (e.g., box lunches instead of a buffet or salad bar). Efforts should be made to avoid crowding and significant lines, and employers should consider using disposable utensils if not already doing so.
- *Limit Common-Area Use:* Consider closing or limiting access to other common areas, such as lounges, lobbies, pantries, break rooms and copier rooms.
- *Address Restroom Crowding:* Many workplace restrooms are not large enough to permit social distancing. Working with landlords, where applicable, employers need to consider strategies to control crowding in and around restrooms.
- *Elevator Capacity:* Employers should work with building management to determine the best options for limiting capacity in elevators and limiting crowding in elevator lobbies.
- *Reduce Conference Room Occupancy:* Employers should consider discouraging the use of conference rooms and/or in-person meetings and consider encouraging employees to communicate by phone or videoconference. Employers should also consider decreasing the amount of seating in conference rooms to a level where social distancing can be maintained.
- *Follow Guidance:* Employers will need to make modifications to their workplaces to ensure their offices comply with all applicable federal, state, local and industry guidelines on social distancing in the workplace, including guidance from the EEOC, OSHA and the CDC.

## Cleaning and Sanitization Procedures

Prior to reopening offices, employers should ensure they have a plan to regularly clean and disinfect offices and shared communal spaces. Employers should pay particular attention to frequently touched surfaces, shared equipment such as printers and copiers, and common areas. Frequently touched surfaces that should receive regular cleaning (or be cordoned off or disabled) include drinking fountains, ice dispensers, coffee machines, pantry appliances, countertops, door handles, light switches, handrails, drawer handles, tables, sinks, faucets, toilet handles, phones, keyboards, computer keyboards and mice, and elevator buttons.

Employers should reference applicable disinfecting guidelines from OSHA, the CDC and local health departments when making decisions regarding sanitization protocols.

Employers should actively encourage employees to practice healthy hygiene and consider making hand sanitizer and disinfecting sprays or wipes available to employees and visitors. As recommended by the CDC, employers should consider posting signs in restrooms and kitchen areas promoting handwashing for at least 20 seconds

## 2. Changing Workplace Behaviors to Reduce Risk of Transmission

- *Consider Remote Work:* Employers should consider facilitating social distancing by allowing employees to continue remote work where possible.
- *Limit In-Person Meetings:* Employers should consider utilizing telephone and videoconferences as opposed to in-person meetings when possible.
- *Stagger Work Hours, Breaks and Lunch Schedules:* Employers should consider staggering work hours (starting earlier or later than pre-pandemic), breaks and lunch schedules of employees.
- *Restricting Movement:* Employees who have their own offices should be encouraged to remain in their offices, and all employees should be discouraged from sharing workspaces and supplies when not necessary. Employers should consider restricting movement throughout the office as reasonable and utilizing signs to encourage employees to keep a safe social distance. In some office environments, it may be appropriate to designate certain hallways as one-way to reduce the incidence of employees passing each other. Signage also could assist in directing the flow of traffic if lines begin to form for popular appliances or frequently visited areas such as restrooms or copiers.

### 3. Scheduling Employees' Return to Work

- Employers should consider allowing employees to reenter the workplace in phases after (a) the employer is authorized by relevant government and health authorities to reopen and (b) the workplace is physically prepared to accommodate employees.
- Employers may wish to consider allowing volunteers who want to return to the workplace to be included in the first phase of reopening — some employees may be more anxious to return than others. Employers should consider including essential employees and employees who can more easily social distance in the workplace (e.g., because they work in private offices rather than open spaces) in the first phase of reopening.
- Employers can also consider staggering employees' return to the workplace by using alternating schedules and/or staggering hours, as in these examples:
  - Alternating schedules: Blue Team reports to the office in weeks 1, 3, etc.; Orange Team reports to the office in weeks 2, 4, etc.
  - Staggered hours: Blue Team reports to the office between 8:30 a.m. and 9:00 a.m.; Orange Team reports to the office between 10 a.m. and 10:30 a.m.

### Consider Health Screenings to Ensure Workplace Safety

Recent EEOC guidance has clarified that because an individual with COVID-19 “will pose a direct threat to the health of others,” employers may implement screening protocols for employees entering the workplace. Approved screening protocols include asking questions about COVID-19 symptoms, taking body temperatures, administering COVID-19 tests to detect the presence of the COVID-19 virus and requiring self-reporting of symptoms. Employers should ensure nonexempt employees are compensated for health screening time to the extent required under state, federal or local law.

Employers implementing screening protocols should ensure they have communicated information about all health screening procedures so they are aware of the new protocols and have an opportunity to ask questions regarding the procedures.

Any decision to conduct COVID-19 screening should be based on objective facts and implemented on a nondiscriminatory basis.

Employers must maintain all information obtained through the screening process as confidential records in compliance with the Americans with Disabilities Act ("ADA"). To protect employee confidentiality, the ADA requires all medical information about a particular employee be stored separately from the employee's personnel file.

#### *Covid-19 Screening*

There are many questions that arise regarding screening. Based on current guidance:

- An employer may ask employees if they are experiencing symptoms identified by public health authorities as being "associated with" COVID-19 (g., cough, sore throat, fever, chills and shortness of breath).
- An employer may implement temperature checks of employees.
- An employer may require employees to get tested for COVID-19 before they enter the workplace.
- An employer may require employees to report if they test positive for COVID-19 or feel sick.
- An employer may ask employees if they have been exposed to anyone with COVID-19 or COVID-19 symptoms.

#### *Antibody Testing*

- As of the date of this publication, the accuracy and relevance of antibody testing is unknown. As such, employers should not require antibody testing in connection with return-to-work plans. If an employer wants to offer it on a voluntary basis, it should carefully consider its use.

#### 5. Consider Whether to Require Employees to Use Masks or Other Personal Protective Equipment (PPE)

OSHA's respiratory protection standards mandate respiratory masks for employees in certain medium- and high-risk workplaces, including health care and laboratory workers exposed to COVID-19 patients. Certain jurisdictions with active COVID-19 outbreaks may also require workers to

wear face coverings under certain circumstances. Even if PPE is not required by health agencies or governmental order, employers should consider requiring or encouraging employees to use PPE in the workplace. Employers who require employees to wear PPE while in the office should obtain PPE that can be made available to employees.

*New York Employers:*

Pursuant to a New York State executive order, effective April 15, 2020, all essential businesses or entities must provide face coverings to any employees who are in direct contact with customers or members of the public. These face coverings must be provided at the employer's expense.

If an employee declines to wear a face covering or other required PPE for medical reasons, employers should engage in the interactive process with the individual as required by the ADA.

*New York City Employers:*

New York City employers should engage in the cooperative dialogue process (discussed in more detail below) with any employee who declines to wear a face covering or other PPE for medical reasons.

## 6. Review and Update Policies

Employers should consider updating the following policies with regard to changes implemented in response to COVID-19:

- *Sick Time:* Policies should be updated to ensure compliance with changes to federal, state and local laws enacted in response to COVID-19. In addition, employers may want to modify policies to require sick employees to stay away from the workplace.
- *Vacation:* Consider whether any changes to vacation or paid time off policies are appropriate, particularly because many employees may have a large amount of vacation to be used within just a few months of their return to work.
- *Flexible work arrangements:* While not an immediate priority, employers may wish to revisit their work-from-home and other flexible work arrangements, and may elect to liberalize the use of such arrangements in the wake of the pandemic.

## **We're Open. Now What? — Anticipating Challenges That May Lie Ahead**



### 1. Create a Working Group to Review Requests for Accommodations

Employers should designate a small group or one individual who will be responsible for making all decisions regarding accommodation and leave requests in connection with COVID-19. Consistency in response is critical to avoid discrimination issues.

### 2. What if an employee does not want to return to work?

Employers should strive to help employees feel comfortable returning to the office. Employers should remind employees of the measures they are taking to ensure workplace safety and address employee concerns about returning to the office, including concerns about commuting, risks to family members, childcare and office safety.

A generalized fear of infection from COVID-19 does not provide a legal basis to refuse to return to the workplace. However, employees have a legal right to refuse to work if they believe in good faith that the workplace would expose them to “imminent danger.”

Some employers may choose to provide some flexibility to an employee who expresses such fears, and could consider allowing the employee to telework, if feasible, or consider offering such employee a schedule modification and/or protective equipment. Employers may require employees who are neither disabled nor qualify for job-protected leave to return to the office. Note that an employer may not retaliate against employees who, in good faith, voice concerns about workplace safety conditions.

### 3. What about employees at higher risk?

Employees who express they are at higher risk of developing complications from COVID-19 should be instructed to comply with the appropriate accommodation request procedures. Note that governmental guidance may specifically address return-to-work issues related to individuals considered to be at greater risk.

### 4. What if an employee requests an accommodation?

If an employee requests an alternative work arrangement or other accommodation and asserts that the requested accommodation is related to a medical condition or disability, employers should proceed using the interactive process mandated by the ADA, as well as other state and local requirements. As a reminder, “disability,” as defined by the ADA, is a physical or mental impairment that substantially limits major life activity, or a history of a substantially limiting impairment.

*New York City Employers:*

New York City employers should follow the cooperative dialogue process outlined in our [previous alert](#).

Employers may request information or medical documentation from the employee to support why the accommodation is needed.

Employers should consider accommodations such as telework, providing PPE, modification of work schedules, rearranging workspaces and other solutions that will permit such employees to safely perform the essential functions of their jobs.

Employers may expect an uptick in requests for accommodations permitting employees to work from home. As with any request based on a medical need, these requests must be analyzed using the interactive process. One of the issues to be confronted will be whether those employees can perform the principal functions of their job while working from home. In making that assessment, employers will need to consider the extent to which the employees were able to work from home during the period that the workplace was shut down.

An employer does not have to provide an accommodation if it poses an undue hardship to the employer.

#### 5. What if an employee requests leave?

Employers should respond to leave requests promptly and consistently. Employers should follow all company policies and applicable federal, state and local sick and family leave laws, including the Families First Coronavirus Response Act, when responding to leave requests.

##### *New York Employers:*

New York employers should also comply with their obligations under New York law applicable to certain individuals subject to quarantine or isolation, as well as the New York State Paid Family Leave Act, the New York State Paid Sick Leave Law, and, to the extent applicable, the New York City Earned Safe and Sick Time Act.

Employers may wish to consider modifying or enhancing existing company leave policies to encourage employees to stay home when they are sick or when they have had close contact with someone who is sick.

#### 6. What if an employee tests positive?

Any such employee who is in the office should be sent home immediately. Employers also should send home all employees who worked closely with that employee to ensure the infection does not spread. Employers should not identify the infected employee by name when notifying other employees about the infection.

The CDC recommends that employees who worked close to the infected worker be instructed to proceed based on the CDC Public Health Recommendations for Community-Related Exposure. This

includes staying home until 14 days after last exposure, maintaining social distance from others and self-monitoring for symptoms (i.e., fever, cough and shortness of breath). The CDC recommends that those who have had close contact for a prolonged period of time with an infected person should remain at home for 14 days after the last exposure.

7. Can we require employees not to travel in an effort to minimize the risk of infection in the office?

Employers may discourage or prohibit nonessential business travel and may encourage employees to limit out-of-office business meetings and travel generally. Employers generally cannot prohibit employees from engaging in personal travel. However, the CDC recommends that all employees limit travel as much as possible and that all individuals arriving in the United States from foreign destinations self-quarantine for 14 days. Employers may require employees to report personal travel and require employees to self-quarantine away from the office after completing such travel.

8. How should we handle visitors coming to the workplace?

Employers can consider implementing screening protocols for customers, clients, consultants and other workplace visitors, similar to the protocols established for employees. Such protocols must be applied in a uniform and nondiscriminatory manner. As previously discussed, employers should also consider limiting in-office meetings or developing protocols for employees on how to appropriately manage situations in which a customer, client or other visitor comes to the office.

9. How can we prepare our human resources, employee relations teams and/or managers?

It is likely human resources, employee relations teams and managers will face an increase in leave and accommodation requests in connection with the workplace reopening. As such, employers should be sure that all relevant personnel are trained on the appropriate procedures to handle such requests. In addition, employees may be confused about new social distancing measures implemented by the company. Managers and relevant personnel should be trained to answer any questions about new policies.

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As discussed, this is a constantly evolving situation, and the rules and guidance provided by governmental, health and regulatory bodies is updated frequently. We continue to monitor the impact of the COVID-19 pandemic on employers and will provide updates as new developments emerge.

For questions or concerns regarding this Alert, please contact a member of Kramer Levin's Employment Law Department.

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Additional Resources for Employers:

[CDC](#): Guidance for Businesses and Workplaces — Planning, Preparing and Responding to COVID-19

[EEOC](#): Coronavirus and COVID-19 Guidance, including guidance related to EEO laws

[OSHA](#): Guidance on Preparing Workplaces for COVID-19

[New York State](#): COVID-19 Guidance for Employees and Employers

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