Returning to Work during and after COVID-19

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This article is an excerpt from Castle Publications' ebook entitled *Employer's Guide to COVID-19 and Emerging Workplace Issues* by Sheppard Mullin L&E partners Richard J. Simmons, Brian D. Murphy, and Adam R. Rosenthal, available for preorder on the LexisNexis Store here.

This article addresses what employers must prioritize when employees return to work both during the COVID-19 pandemic and after it subsides. While there is no one-size-fits-all solution to creating a safe workplace, employers must carefully monitor guidance from the Center for Disease Control (CDC), state and local health departments, Occupational Safety and Health Administration (OSHA), and state and local government authorities, concerning the various workplace measures they must adopt to curb the spread or resurgence of COVID-19. Employers should recognize that some cities, counties and municipalities have taken a much more active role than others in regulating businesses and enacting regulations and many differ in the forms of regulation they impose. As a result, employers should address such differences when deciding how best to achieve overall compliance within the various jurisdictions in which they operate.

For more articles on COVID-19 and the workplace by Castle Publications, as published on Lexis Practice Advisor, see CDC Guidance and the Return to Work during COVID-19, Wage and Hour Obligations for California Employers during COVID-19, Wage and Hour Obligations for New York Employers during COVID-19, and Leaves of Absence under Federal Law before and after the Families First Coronavirus Response Act (FFCRA).

For more guidance on a wide variety of COVID-19 legal issues, see Coronavirus (COVID-19) Resource Kit. For tracking of key federal, state, and local COVID-19-related Labor & Employment legal developments, see Coronavirus (COVID-19) Federal and State Employment Law Tracker. For tracking of key federal, state, and local non-coronavirus-related Labor & Employment legal developments, see Labor & Employment Key Legal Development Tracker.

The Trump Administration's Approach to Reopening Businesses

On April 16, 2020, President Trump and the White House Coronavirus Task Force announced a three-phased approach for states to gradually reopen business, titled the "Guidelines for Opening Up America Again" (the April 2020 Guidelines). See Guidelines for Opening Up America Again, White House (April 16, 2020) (last visited on April 17, 2020).

In recognition of the fact that each individual state will ultimately decide when and how to reopen the economy, the April 2020 Guidelines provide a roadmap for what the Administration believes the "opening up" of the country should look like. These guidelines plainly respond to mounting pressures from many segments of the population and the country to reduce the ranks of the jobless and facilitate a revival of the economy. The initial guidelines invite states to evaluate back-to-business programs without mandating that states initiate the actual process before they determine it safe and appropriate to do so.

The Three Conditions of the Phased Reopening Process

Before any state can begin the phased "reopening" process, the state (or a region within the state), must satisfy the following three preconditions:

- **Symptoms**. A downward trajectory of influenza-like and COVID-like symptoms within a 14-day period

- **Cases**. A downward trajectory of documented cases or positive tests as a percent of total tests within a 14-day period –and–

- **Hospitals**. The ability to treat all patients without crisis care and a robust testing program for at-risk healthcare workers, including emerging antibody testing

Id., Slide 2 ("Proposed State or Regional Gating Criteria").

In addition to these prerequisites, during each of the three phases, states are expected to (1) maintain sufficient testing and contract tracing for symptomatic individuals, (2) maintain sufficient personal protective equipment (PPE) and critical medical equipment to handle a dramatic surge along with ICU capacity, and (3) develop and enforce plans covering everything from protecting the health and safety of workers in critical industries to advising residents regarding protocols for social distancing and face coverings. Id., Slide 3 ("Core State Preparedness Responsibilities"). Once states can satisfy these prerequisites and have sufficient plans in place to contain the spread of COVID-19, they can begin phase one.

Each of the three phases has its own unique benchmarks and expectations of what employers should do to help their state complete that phase and move to the next one. Employers can generally expect the following conditions placed on them during each phase (recognizing that states and local governments will invariably augment and expand upon these restrictions):

- **Phase one.** During the initial phase employees are encouraged to telework whenever possible and feasible. When employees do return to the worksite, they will do so "in phases." While at work, employers will enforce strict social distancing policies. Employers must "strongly consider special accommodations" for employees who are members of a "vulnerable population" and will be expected to minimize non-essential travel for all employees. Id., Slide 9 ("Phase One Employers"). During this phase, schools and youth activities will continue to be closed. However, "large venues" (e.g., houses of worship, sit-down dining, movie theaters, sporting venues and gyms) can operate "under strict physical distancing protocols." Id., Slide 10 ("Phase One Specific Types of Employers").

  o The April 2020 Guidelines identify the following people as "vulnerable individuals": (1) elderly individuals; and (2) individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.

- **Phase two.** During the second phase, employers will still "encourage telework whenever possible" and enforce "moderate social distancing protocols" in common areas. It is envisioned that non-essential travel can resume. Employers will continue to "strongly consider special accommodations" for employees in vulnerable populations. Id., Slide 13 ("Phase Two Employers"). During this phase, it is expected that schools and organized youth activities will reopen, that "large venues" will be able to operate under "moderate physical distancing protocols," and that bars may operate with "diminished standing-room occupancy" where applicable and appropriate. Id., Slide 14 ("Phase Two Specific Type of Employers").

- **Phase three.** The final phase will see the full reopening of American society and commerce, with the recognition that until there is a COVID-19 vaccine or a readily available cure, vulnerable individuals should minimize their exposure to social settings where social distancing is not practical absent precautionary measures, and even "low-risk populations" should consider minimizing "time spent in crowded environments." Id., Slide 16 ("Phase Two Individuals").

The Role and Responsibilities of Employers in the Process

Consistent with the April 2020 Guidelines, as soon as stay-at-home / shelter-in-place orders are lifted, and tens of millions of Americans return to their usual workplace (either after being unemployed for a period of time or after working from home), business leaders will need to implement practical workplace policies and procedures that balance business needs with the health and safety of their employees. It is anticipated that states will issue their own specific requirements for non-essential businesses to reopen during each of the three phases.

For example, on April 23, 2020, Georgia Governor Brian Kemp, issued the first extensive statewide "reopening" order (the Georgia Order). Georgia Executive Order 04.23.20.02 (April 23, 2020) (last visited on April 25, 2020). The Georgia Order is an exemplar of the types of onerous requirements employers throughout the country will have to implement in order to reopen during phase one.

The Georgia Order

A few noteworthy requirements in the Georgia Order:

- **Face masks.** Employees are required to wear masks at all times. Employees in restaurants must have either new face masks every day or clean their face masks daily.

- **Pre-screening.** Restaurant employers must pre-screen employees to identify signs of illness, including fever over 100.4 degrees, coughing, or shortness of breath.

- **Staggered shifts and virtual meetings.** For employees who are required to come into work, the employer must implement staggered shifts, hold meetings and conferences virtually where possible, and limit contact between employees and customers.

- **No gathering of workers during work hours.** Employers must prohibit gatherings of workers during working hours, permit employees to take breaks and lunch outside, and limit numbers of employees in the breakrooms.

- **No handshakes or person-to-person contact.** Employees may not handshake or engage in any unnecessary person-to-person contact in the workplace.

Businesses where employees have to come in close contact with customers, such as hair salons and tattoo parlors, must sanitize all equipment and chairs between each customer, stagger employee shifts so that no more than 50% of the normal number of employees providing services are in the business at any time, and prohibit walk-in customers.

Consider Reopening Issues

As many non-essential businesses prepare to gradually reopen their facilities, and in many industries their entire business, the following are potential considerations that should be discussed with legal counsel.

Designation of a COVID-19 Czar

A key component of effective crisis management is centralized communications. A "COVID-19 Czar" or post-crisis czar can serve as an organization's point person responsible for managing the response to the pandemic. In consultation with senior leadership and health and employment law experts, this individual is chiefly responsible for developing and enforcing health and safety policies. Duties will necessarily include revising and implementing the organization's Infectious Disease Preparedness and Response Plan, as well as unique policies and procedures relating to how employees interact with one another, customers, and other third parties.

Depending on the organization and the future trajectory of the pandemic, the COVID-19 Czar may be entrusted with emergency powers to, for example, suspend operations, restrict access to the premises, or, where permissible, force employees to obtain medical clearance before returning to work. Depending on the size of the organization, this leader may be solely responsible for managing this crisis or may take this important task on with his or her other duties.

Social Distancing

As a condition to allowing "non-essential" businesses to reopen during phases one and two of the April 2020 Guidelines, local and state authorities will likely mandate that employees practice some form of social distancing in the workplace. Whether social distancing results from such government directives (as is the case in Georgia, as discussed above) or informal policing by employees themselves, the public consciousness regarding an easily spread virus likely will not dissipate quickly. This has and will continue to be particularly challenging in those environments where employees have traditionally worked in close proximity to their co-workers and the general public (e.g., classrooms, construction sites, assembly lines, restaurants, gyms, etc.), and impossible in many other environments (e.g., hospitals, airplanes, hair salons, etc.).

Workflow Plans Limiting Physical Proximity

While further guidance from state and local government on this topic is expected, organizations should consider developing workflow plans that, to the extent feasible, limit the physical proximity between and among employees and customers. Depending on the environment, this may include physical adaptations, such as erecting permanent plexiglass barriers, well beyond the timeframe suggested by OSHA engineering protective measures. It may also include restrictions on how close employees and customers can stand or sit near one another.

Telework Options

In addition, as organizations have been forced to have many employees work from home during the first few months of this pandemic, as stay-at-home orders are lifted, many companies may either permanently transfer office employees to full-time remote workers, or more likely, schedule days when certain office employees are required to work from home and other days when they need to be in the office. This may take the form of assigning workers to an "A" or "B" designation and implementing a schedule when "A" employees come to work and "B" employees work from home, and vice versa.

Interpersonal Hygiene Policies

In addition to social distancing, employers should develop policies around interpersonal contact in the workplace. This may include everything from policies that prohibit handshaking and other physical greetings, to rules concerning sharing equipment (e.g., phones, headsets, computer keyboards, etc.). The Georgia Order explicitly prohibits handshaking and physical contact and discourages employees from sharing phones, desks, tools, and equipment.

Policies on Interpersonal Activities Outside of the Workplace

Employers may also develop policies concerning interpersonal activities outside of the workplace. For example, as discussed above, it is entirely possible that local and state stay-at-home orders will be lifted so long as people continue to practice social distancing outside of work (e.g., restrictions on X number of individuals congregating in the same area, restrictions on certain sports and entertainment venues, etc.).

In the event this occurs, employers may consider having lawful policies in place should an employee engage in certain "risky behaviors" outside of work (e.g., close interactions with strangers, attending large indoor public events, deciding not to wear a mask while in public, traveling to known hotspots, etc.).

Before implementing any such policies, employers should consult with an experienced employment lawyer, as these policies could run afoul of existing laws that prohibit employers from disciplining employees for engaging in lawful activities outside of the workplace, or other discrimination prohibitions.

Employee Personal Protective Equipment (PPE)

The lack of sufficient personal protective equipment (PPE) for healthcare workers was reported widely during the first month of the COVID-19 pandemic. As a condition of returning non-essential employees to work, cities and states may mandate that employees wear respirators, surgical masks, or some other face covering in the workplace. In April 2020, Los Angeles and New York state, for example, issued ordinances and executive orders

requiring that essential workers don face coverings, particularly if interacting with customers or members of the public. This will pose several challenges for employers.

In addition to the lack of available PPE, employers will need to ensure that any mouth and nose covering does not interfere with the employee's ability to safely perform his or her job. Wearing a respirator or face covering for an entire shift will be challenging for many employees who are not accustomed to such restrictions.

Depending on whether businesses are required to have their employees don a face covering, or the business decides on their own to require face protection, employers will need to develop policies and procedures around use of PPE in general and face masks in particular.

These policies may need to take into account several considerations, including:

- The type(s) of masks that are permissible

- Whether the masks will be provided by the employer or employee (and if provided by the employee the potential wage and hour issues relating to having employees provide their own masks)

- For reusable masks, policies around how often a mask needs to be washed, and who is responsible for cleaning/sanitizing the mask

- Whether employees can wear their work mask away from work

- Whether employees may take off their mask during their shift (other than to eat and drink) and where they can take off their masks (e.g., open spaces, personal offices, etc.)

- The disciplinary measures in place should an employee refuse or resist wearing a mask for personal reasons (because they simply do not believe it is necessary, find it to be uncomfortable, or feel that it conflicts with their personal aesthetic); medical reasons (perhaps because it restricts their breathing); or religious reasons (particularly for men with beards)

- Who bears the costs of procuring, and laundering (if applicable) the mask

- The potential need for reasonable accommodations for persons suffering from a disability who may be unable to properly don PPE

    o   See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question G2) (last visited April 24, 2020).

    –and–

- The development of training for all of the foregoing

Customer and Visitor Personal Protective Equipment (PPE)

Absent a directive from local, state, or federal government regarding the general public wearing facemasks outside of their homes, employers must consider developing PPE policies and procedures with respect to their customers, students, patients, vendors, and the general public that come into contact with the organization's employees. Similar to the "no shirt, no shoes, no service" signs, organizations will need to decide whether to require third parties to wear face masks when engaging with their employees in person.

Increased Cleaning and Sanitization

Workplaces following the COVID-19 pandemic will need to be much more sanitary. Employees and the general public will insist that organizations spend more time and resources on cleaning physical facilities. In addition to supplying hand sanitizer stations (which will require sufficient quantities) and access to hand washing with antimicrobial soap and warm water, organizations may need to train, and likely increase, the number of janitorial staff to regularly clean and disinfect high-touch surfaces in common areas (e.g., tables, chairs, doorknobs, light switches, common phones, touch screens, keyboards, toilets, and sinks).

A designated COVID-19 Czar, or other official, should be responsible for ensuring that the employees or third-party contractors responsible for janitorial services are complying with strict coronavirus prevention guidelines. In addition to regular cleaning and sanitizing, organizations will need to work closely with facilities and maintenance, to develop best practices concerning proper air circulation.

Medical Testing

It remains to be seen what tools will be available to employers and the general public for use in combatting COVID-19 resurgence in the future. Below are possible tests that may become routinely used in the workplace.

COVID-19 Tests

Once there are sufficient and reliable tests available for private sector employers outside of healthcare, employers will be able to regularly test employees to determine whether they are COVID-19 positive. On April 24, 2020, the EEOC stated that employers may permissibly test workers for COVID-19 before allowing entry into the workplace as doing so will be "job related and consistent with business necessity" under the Americans with Disabilities Act. See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question A6) (last visited on April 24, 2020).

In the event that such tests are readily available, employers may need policies to ensure that the testing is done in compliance with existing employment laws, including those pertaining to employee privacy, anti-discrimination, and wage and hour. Provided there are sufficient tests available for the general public, businesses will also need to consider policies and procedures around testing employees based on a risk factor assessment, including for example, employees who recently returned from business or personal travel in an area with known "hot spots," employees who have been in contact with individuals who have contracted coronavirus or COVID-19, or individuals who engage in certain "risky behaviors" outside of work. Recognizing that large scale testing of the general public is not currently feasible in the United States, employers should nevertheless consider how they might test employees should the resources become available during or after the current pandemic.

Thermometer Scans

As of April 2020, the CDC recommended that essential critical infrastructure workers who have been exposed to someone who has COVID-19, or is suspected of having the virus, can return to work provided they abide by a number of guidelines while at work (e.g., wearing a mask, social distancing, etc.), and are subject to a pre-screen temperature check. Centers for Disease Control, Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 (last visited Apr. 14, 2020).

Similar to what has occurred in parts of Asia where stay-at-home orders were lifted in early April 2020, thermometer scans may become prevalent across the country. It is entirely possible that in some parts of the country, before people are allowed to walk into a shopping mall or board an airplane, they will need to first pass through a thermometer checkpoint.

Develop Thermometer Scanning Policies

Employers will need to establish clear policies around thermometer scanning that account for, amongst other things:

- Who in the organization is responsible for scanning employees
- Which employees will be scanned (e.g., all employees, only employees in certain departments, only employees who have been in contact with someone who has or is suspected of having COVID-19 symptoms, etc.)
- Whether all employees will be subject to a thermometer scan or whether it will be done randomly (and if random, how will that be determined in a non-discriminatory and statistically significant manner)

- How often will employees be scanned (e.g., daily, weekly, every few hours, etc.)

- The wage and hour implications of having employees waiting to be scanned (e.g., is this time deemed compensable under applicable state and/or federal law) –and–

- Measures to handle an employee who shows an elevated temperature consistent with privacy laws

Antibody Tests

In the event a reliable COVID-19 antibody test is developed, establishing that a person contracted coronavirus and developed sufficient antibodies, it may be possible to determine which employees are no longer susceptible to COVID-19. As of April 2020, it was premature to determine how employers could possibly use the results of an antibody test. There may be opportunities to loosen certain COVID-19 policies for those employees who are immune from contracting and spreading the virus.

Employers should continue to monitor scientific developments in this area. It is entirely possible that if an accurate test were to be developed, at some point in the future, employers may be permitted to select employees to work in certain jobs based on whether or not the employee is immune from this virus. Giving preference to employees who have a COVID-19 immunity will likely raise a host of employment law issues (e.g., application of EEO and non-discrimination policies for both employees with immunity and those without immunity, seniority and staffing, and wage and hour concerns regarding whether the employer or employee should pay for the cost of the antibody test and certification).

Renewed Focus on Employee Mental Health

It will take several years for psychologist and social scientists to fully grasp the profound impact the pandemic has had on people's mental health. While the pandemic has affected every person on the planet, its impact has certainly not been equal. When the economy begins to open, and remote workers return to the workplace and companies actively rehire many employees who were furloughed or laid off during the apex of the crisis, employers will need to be responsive to the mental toll that this crisis has had on their employees—particularly those employees who are grieving the loss of family and friends as well as those employees who are under significant financial stress. Organizations should be mindful of these challenges and consider providing additional mental health resources to support their employees during this unprecedented time.

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