Wednesday, April 22, 2020

As government authorities look to implement business reopening measures, employers are now planning to move employees back into the workplace as state and local stay-at-home orders expire and other COVID-19 business restrictions expire or are modified. What are the various considerations employers must keep in mind when reopening their physical work locations?

This Question and Answer Guide describes a number of COVID-19 employment and return-to-work considerations. Because the COVID-19 pandemic is a fluid situation
and highly dependent on jurisdiction- and sector-specific considerations, we anticipate that additional guidance will be coming from the federal, state and local governments as plans to allow businesses to open are developed in the coming days and weeks.

Disclaimer: Because requirements at the federal, state, and local level are constantly changing, employers should monitor developments, and consult counsel for advice based on their specific circumstances.

I. General Questions: When and How to Resume Business Operations

When will employers be able to reopen physical locations?

This will vary based on the employer’s location and industry. Employers will have to comply with state and local directives, which will guide when and how to reopen. As examples, in New York and New Jersey, the Governors’ stay-at-home orders are currently set to expire May 15, 2020. For information on closure and other emergency orders that are currently in effect, visit our COVID-19: Government Actions resource page.

While employers will have to comply with state and local directives, on the federal level, the U.S. Centers for Disease Control and Prevention (CDC) just released guidance to assist businesses in making decisions regarding reopening during the COVID-19 pandemic. That guidance directs that businesses should not reopen unless they can answer yes to ALL of the following questions:

- Are you in a community no longer requiring significant mitigation (or restricting operations to designated essential critical workers)?

- Will you be able to limit non-essential employees to those from the local geographic area?

- Do you have protective measures for employees at higher risk (e.g., teleworking, tasks that minimize contact)?

Even if companies are able to answer yes to these three questions, the CDC recommends that business remain closed until they can implement a number of safeguards to combat the spread of COVID-19 — most of which we are seeing tracked in return to work orders being signed by Governors and listed in Occupational Safety and Health Administration Guidance on Preparing Workplaces for COVID-19. The safeguards include:

- use of healthy hygiene practices.

- intensified cleaning, disinfection, and ventilation.

- social distancing.

- telework and cancellation of non-essential travel.
• seating distance of at least 6 feet and staggered gathering (starting/closing) times.

• restricted use of any shared items or spaces.

• training all staff in all of the safety actions.

Even then the CDC does not recommend that businesses reopen until they also establish ongoing monitoring protocols such as:

• having sick employees stay home.

• establishing routine, daily employee health checks.

• monitoring absenteeism and having flexible time off policies.

• having an action plan if an employee or worker tests positive/presumptive positive for COVID-19.

• creating and testing emergency communication channels for employees.

• establishing communications with state and local authorities.

The CDC also recommends that employers be prepared to close quickly if needed based on applicable guidelines. Employers should also be aware of the CDC’s [Guidance](#) for cleaning and disinfecting workplaces.

**What legal obligations will employers need to consider as part of reopening plans?**

This will also vary based on the employer’s location and industry. Employers will have to comply with federal, state, and local directives, which will likely include various screening and testing measures, social distancing, use of face masks, protocols for addressing reports of COVID-19 positive exposure, and other measures. Employers will also have to be mindful of complying with obligations regarding confidential treatment of medical information with regards to medical testing results. Also, disability discrimination laws need to be considered when making decisions regarding who is selected to return to work based on medical conditions.

**Which employees should return to work first?**

As it is unlikely for most employers that all employees will be able to return to the workplace at once, employers should consider what employees, departments, groups, or units should return first based on business needs, compliance with ongoing restrictions regarding limitations of operations to “essential business,” and compliance with health precautions such as social distancing. The legitimate business reasons for this selection process should be documented to provide evidence of non-discriminatory selection criteria if later challenged.

**What social distancing protocols should employers implement?**

Employers will have to comply with federal, state and local directives on social
distancing as workplaces reopen. Employers will likely want to consider staggering work hours and alternating days of work for different groups, shifts or teams of employees to reduce the number of employees on site. Employers may want to:

- evaluate workplace layouts and consider making certain stairways and hallways one way if social distancing guidelines cannot otherwise be met.
- use plexiglass shields, tables or other barriers to block airborne particles and ensure minimum distances in the workplace, as recommended by the Equal Employment Opportunity Commission.
- develop protocols to avoid crowding in elevators.
- close or modify certain common areas, such as lunch rooms, time clock stations and workplace fitness centers so that employees can socially distance.
- erect physical barriers implement rules to limit sharing equipment and supplies. Such rules might require employers to be prepared with additional equipment and supplies before beginning to bring employees back onsite.
- change latch-based door handles so doors open or close through use of an “electric eye” or with a push of the door or a button or push pad, which may also assist with ongoing deep cleaning protocols.

Of course, all such changes must be balanced against maintaining appropriate building security.

Employers should also rethink customer service delivery methods. Employers may go to drive-through or pick-up means of providing customer service and arrange for contactless pay options for customers. Employers may be required to provide certain hours of operation for high-risk customers only, as defined by the CDC.

**What employee guidelines will be required?**

Employees must comply with social distancing rules in the workplace. Social distancing rules should be communicated electronically and/or in hardcopy at workstations and common areas. Materials should be easy to understand and available in the appropriate language and literacy level for all workers. Employers may want to provide video training to returning employees to introduce them to new workplace rules. Employees should acknowledge receipt of rules and training. Human Resources professionals should train supervisors on how best to enforce social distancing rules. Employees may also be required to wash their hands at specified frequencies, following recommended practice.

**Can I allow employees to continue to work remotely?**

Yes. Employers should consider which employees may be able to continue to work remotely to allow those who need to be in the workplace to socially distance. The Occupational Safety and Health Administration (OSHA) recommends that employers establish flexible worksites to increase the physical distance among employees. Additionally, we anticipate that many employees may request to continue working remotely despite employers reopening worksites. Employers should consider in
advance how they will handle such requests, taking into account the Americans with Disabilities Act’s (ADA) reasonable accommodation requirements for individuals with disabilities.

**May employers resume meetings and conferences?**

Employers should consider limiting meetings or conferences, and conduct meetings virtually as much as possible. If in-person meetings are necessary, they must be conducted in a manner consistent with social distancing requirements. Federal, state, and local orders regarding group gatherings will need to be considered. Consider posting updated “maximum occupancy” signage on meetings rooms to limit attendance to the number of people who may be in the room while still maintaining the recommended person-to-person distance, removing extra chairs to avoid use of the room by more people at one time than recommended and adding plexiglass shields atop conference tables to help block airborne particles. Employers should also implement protocols for sanitizing meeting spaces between uses throughout the workday.

**May employers resume employee business travel?**

For the time being, we recommend that employers continue to conduct meetings virtually, and anticipate that initial re-opening authorizations may allow essential travel only. If an in-person meeting is necessary and compliant with federal, state, and local orders, employers should follow the advice of the CDC and applicable public health authorities regarding information needed to permit an employee’s return to the workplace after visiting any identified high-risk location, whether for business or personal reasons.

A more detailed description regarding issues relating to business travel is included below in *Section V. Practical Realities: HR Issues.*

**May employers resume office celebrations or events, and allow employees to arrange celebrations such as office birthday parties?**

If employers normally have office celebrations, we recommend holding them virtually. Employers should avoid any work-sponsored or workplace events that involve communal sharing of food, and gently communicate these expectations in advance to employees who may wish to celebrate their reunion by bringing in treats to share. Employers should not provide beverage pitchers, food or sandwich trays, hot food buffets, or a utensil dispenser or basket. We also recommend employers postpone indefinitely in-person events such as company sporting games or team lunch outings due to the challenges of maintaining effective social distancing. Employers must comply with federal, state, and local guidance regarding gatherings, and should review the guidance often, as changes occur.

**What policies need to be updated as employees return to work?**

Employers should consider whether their existing policies need modification, and review their policies to ensure compliance with all newly enacted laws. For example, many state and local paid sick leave laws have been modified based on COVID-19-related absences, and the Families First Coronavirus Relief Act (effective April 1,
2020) applies to most employers of fewer than 500 employees. Remote and telework policies will also need to be reviewed and revised. Employers might consider an interim addendum to their handbooks and manuals to address these rapidly changing provisions.

Also, employers should have detailed policies on what to do when an employee becomes symptomatic, tests positive or is potentially exposed to COVID-19. The policy should inform employees of the measures taken to ensure employee safety. As referenced below, policies regarding containment measures such as mandatory temperature monitoring, handwashing and face mask usage also need to be implemented and provided to employees prior to their return to work if possible. Employers should also proactively suggest new forms of greeting each other to avoid hand shaking, hugs, back slaps and other forms of physical contact in which people may engage out of longstanding habit. Offer non-contact ideas such as hand waves or other such gestures that signal positivity without touching each other.

To the extent employers will be implementing COVID-19 testing such as swabs or blood tests, policies that detail what is expected in terms of frequency, location of testing, cost, implications of a positive result, HIPAA protections, ramifications for refusing to test, etc. must be carefully crafted and disseminated prior to implementation.

Materials should be easy to understand and available in the appropriate language and literacy level for all workers.

II. Practical Realities: Environmental and Physical Considerations

What logistical considerations should employers consider when preparing for the physical return of its workforce?

Employers will need to consider what supplies may be needed to facilitate a smooth return to work, keeping in mind the CDC guidelines, as well as applicable state and local return to work orders. For example, employers should pre-order (taking shipping time into consideration) products including hand sanitizer, paper goods, sanitizing wipes, bottled water, face masks, gloves, etc. Special cleaners may need to be ordered, and personal protective equipment (gowns, gloves, masks) may be needed for any individuals who clean or remove trash. Depending on what state and local governments require, preparations for medical testing, such as electronic or sanitary thermometers, should be considered. In addition, employers should monitor what may be required for on-site COVID-19 testing and/or antibody testing. Employers should consider what supplies will allow employees to minimize time spent in common areas. Additionally, individual workspaces should be prepared with necessary supplies to eliminate the need for employees congregating in a supply room. Employers may want to implement a bring-your-own-refrigerated-lunchbox policy to limit use of common refrigerators. Employers will need to determine if changes need to be made regarding lactation rooms to ensure strict compliance with thorough sanitization protocols. Employers will also have to consider adding additional hand washing stations. Finally, employers should prepare signage and other instructions for employees and visitors to their facilities to avoid any
confusion related to containment practices upon reopening.

**Are employers required to modify the physical workplace?**

It depends. Employers should analyze whether certain workplace modifications are required to maintain social distancing and compliance with other government-issued guidelines. If returning a single department, unit or group is a priority, employers need to consider whether they should implement new seating or work arrangements.

Conduct a detailed evaluation of the physical workspace layout. If any employees work at stations that are within 6 feet of each other, make reassignments to different stations to ensure the minimum distancing — and for employees who work alongside each other on a regular basis, increase the goal to keep these workers 9 to 12 feet apart. If available space does not allow this much separation, evaluate options for staggering schedules as an alternative or adding physical barriers between stations. Employers should also consider whether furniture or work equipment can be reconfigured to facilitate social distancing. For example, removing tables and chairs in meeting, lunch or break rooms may facilitate social distancing and compliance with the CDC guidelines of at least 6 feet of distance between seats. Pay special attention to areas where printers, copiers and other types of shared equipment are located, and consider moving the equipment or designating a single employee to operate that equipment, distribute print-outs, etc.

Employers might consider assigning working groups to different teams and having each team work in a different area of the worksite; this may also assist in providing backup in the event that any working group member tests positive for the virus or reports a direct exposure event.

As noted above, employers should ban communal food. Some states are implementing specific seating requirements, so employers with open area seating arrangements may need to start assigning seating and taking other measures suggested above such as erecting plexiglass barriers. Requirements may be specific to the industry or type of work environment (e.g., laboratory versus office space versus manufacturing or retail floors, etc.).

**Are employers required to modify work hours?**

This will depend on what guidance is provided by the government, as well as what practically works for an office environment to comply with social distancing orders. Staggering hours, shifts, etc., may be required to ensure employees are sufficiently distant and to minimize the number of individuals congregating in common entry or exit spaces. Similarly, alternating days of work for different groups or teams of employees may assist with social distancing requirements.

**Are employers required to maintain new cleaning or hygiene regimens?**

A: We recommend that employers deep clean the workplace prior to any employees returning, both as a containment measure, and to help employees feel more comfortable about returning onsite. If there is a skeleton crew in the workplace, try to contain those employees to a specific area while this deep cleaning process is underway so that the occupied area can be cleaned immediately prior to additional...
employees returning. Food should be removed from common areas and kitchen or break areas.

Employers may need to schedule daily or weekly deep cleans after employees return. A deep clean is advised whenever an onsite employee reports being positive or presumptively positive for COVID-19. Employers should provide disinfectants throughout the workspace for employee use in wiping down surfaces. Employers should note that some states are adopting specific cleaning regimens. For example, Pennsylvania requires that areas visited by a person who is a probable or confirmed case of COVID-19, be closed off with exterior windows open for ventilation for a minimum of 24 hours. The Pennsylvania Safety Measures for Businesses Order is available here. In implementing any cleaning protocol, review the latest guidance provided by the CDC and OSHA.

Can employers require employees to observe infection control practices (e.g., regular hand washing and social distancing protocols)?

Yes. Requiring infection control practices, such as regular hand washing, following proper coughing and sneezing etiquette, and proper tissue usage and disposal, is prudent and does not violate the ADA. Tissues should be provided throughout occupied work areas, with covered disposal receptacles so that employees can discard their used tissues personally and immediately. Employers should consider increasing the number of hand washing stations, and provide breaks as necessary for employees to wash their hands for at least 20 seconds.

Should employers draft safety response policies and communicate them to employees?

Yes, and these policies should include protocols for employees to follow in various COVID-19 related situations. As employees return to work, employers should inform employees of the safety or prevention measures they have taken to ensure employee safety and the protocols employees are expected to follow. Materials should be easy to understand and available in the appropriate language and literacy level for all workers.

We anticipate an increase in OSHA complaints and investigations due to various safety concerns related to COVID-19.

3. Practical Realities: Employee, Applicant, Vendor and Customer Health Screenings and Other Health Considerations

Can employers require the use of personal protective equipment (e.g., masks, gloves, etc.) in the workplace?

During a pandemic, yes. Employers should take into consideration what is being required and/or recommended by the CDC as well as other federal, state and local government mandates.

For example, Pennsylvania is requiring that employers provide employees masks to wear, and requires that employees wear masks during work hours. For more information, read our detailed overview of other states and cities that have issued...
If an employer requires the use of personal protective equipment, can an employee request an accommodation for modified protective gear? Must an employer grant such a request?

When an employee with a disability needs a reasonable accommodation under the ADA (such as non-latex gloves, face shields instead of masks for employees who communicate by lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment suitable for use with religious garb), the employer must engage in the interactive process as with any other request for accommodation. This would include obtaining information from the employee (and his/her health care provider as appropriate), engaging in a discussion about the request, and providing the modification or an alternative, if feasible and not an undue hardship on the operation of the employer’s business under the ADA or Title VII. The EEOC has issued guidance on evaluating undue hardship during the COVID-19 pandemic, which you may read here.

Must employers provide employees with personal protective equipment?

If employers require personal protective equipment, it is best to either reimburse employees or provide it to employees. There are certain wage and hour and state law considerations if employees must purchase certain equipment themselves. For example, in California, employers are prohibited from requiring employees to pay for business expenses. Also, before requiring employees to provide their own equipment such as face masks, employers should confirm availability. If supplies are not readily obtainable, employers should offer options for employees to obtain the needed equipment.

What if an hourly employee reports to work without his/her required personal protective equipment?

If an hourly, non-exempt employee cannot go home and return within a reasonable amount of time, an employer should decide whether to send the employee home with or without pay for the remainder of the day, or to provide him/her with the necessary personal protective equipment. Exempt, salaried employees may also be sent home or provided equipment they do not have, but their pay should not be docked on an hourly or daily basis for reporting to work without required personal protective equipment.

Must hourly employees be paid if they must return home to retrieve forgotten personal protective equipment?

No, the time does not need to be paid. Employers may want to consider paying normal wages for first-time situations, but should apply any such policy evenly.

What if an employee provided with personal protective equipment repeatedly comes to work without it?

If an employee fails to bring the issued personal protective equipment several times
over a relatively short time frame, employers should consider documenting the behavior and using its internal disciplinary system. Obviously, employers will still have to provide personal protective equipment to the employee if the employee remains at work. Employers must apply this policy evenly and ensure no one receives different treatment.

**Can an employer screen the health of its employees, such as through taking employee temperatures?**

Yes. Because the CDC and state or local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers can measure employees’ body temperature. Employers should notify their employees of temperature screening measures in advance and inform the employees that the purpose of temperature screening is solely to protect the employees by keeping individuals with symptoms consistent with COVID-19 offsite and not to determine if an employee has any other illness, impairment or disability. Messaging should make clear that screening is not intended to be, nor is it a substitute for, a clinical diagnosis. We anticipate different types of health screening options becoming available and expect that the government will issue additional guidance regarding such options.

**Should hourly, non-exempt employees be compensated for health screening time?**

Requirements can vary by location, under both federal and state law, so employers who do not intend to pay non-exempt employees for the screening time or for the time spent waiting to be screened should consult counsel.

**What measures should employers take to protect the employees conducting health screening?**

Employers should take mitigation measures to protect employees taking temperature readings, including use of physical barriers and/or personal protective equipment which may include face shields to protect against test subjects’ sneezes or coughs. Additional information can be found at OSHA’s website, which provides guidance for health care employees, including recommendations on gowns, gloves, approved N95 respirators and eye/face protection. If employers are using a qualified third-party provider to conduct the screening, they should confirm that such vendors have a protocol in place to minimize exposure risk. If employers will be conducting COVID-19 testing using swabs or blood tests, additional measures will need to be implemented.

**Can employers implement screening protocols for customers or workplace visitors?**

Yes. Employers should consider the potential complications of not allowing vendors and customers who do not pass screening to come onsite and ensure that such screening is applied uniformly. It is also acceptable to screen visitors before entering a facility (or to simply prohibit visitors altogether). Employers are encouraged to communicate by email or other means to regular visitors, suppliers, and delivery companies explaining their COVID-19 management policy, asking that
no person enter their buildings for non-essential purposes and explaining any containment practices that all visitors must follow while onsite.

**What procedures should employers put in place for employee health screening at work?**

Employee health screening, either through antibody tests or temperature checks, will likely take place when businesses reopen as such tests become more available, reliable and immediate. For an in-depth look at current screening options, their efficacy, and individual and privacy rights implications related to implementing such screenings, read our guide on Testing Employees for COVID-19. If such testing does occur, employers should train those who will be testing on all steps of the process, including how to sanitize the tools used. We also recommend employers create appropriate forms to record information and be thoughtful about where testing will occur. Employers might consider a space with multiple stations where people can come in and out with a certain degree of privacy. A location near the entrance is preferable to minimize the area of exposure for persons who do not pass screening. Any information gathered, including screening results, must remain protected under ADA confidentiality requirements. This information may not be stored with employee personnel files. See below for additional guidance.

**Does workplace screening need to be consistent with the Americans with Disabilities Act (ADA)?**

Yes. The ADA permits employers to make disability-related inquiries and require medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if they are necessary to exclude employees with medical conditions that would pose a direct threat to the health or safety of others that cannot be effectively mitigated in some other manner. A direct threat is to be determined based on the best available objective medical evidence. Guidance from the CDC or other public health authorities is such evidence, so employer actions are defensible under the ADA as long as any screening implemented is consistent with such advice. For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) of all those entering the workplace. Similarly, the CDC recently posted information on return by certain types of critical workers, available here. Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion. EEOC guidance on COVID-19, including disparate treatment considerations, is available here.

**What if an employee has a temperature or otherwise presents COVID-19 symptoms?**

If an employee has a temperature, it is best to confirm a heightened temperature with a second test, in a confidential manner, and to consider any explanation the employee may offer for a heightened temperature. It is reasonable to send an employee home who has an elevated temperature (100.4 degrees Fahrenheit or higher). According to current CDC guidance, an individual who has COVID-19, or symptoms associated with it, should not be in the workplace. If, however, an employee is sent home, the employer should consider how the absence is treated.
under its sick-leave/PTO policy, employee entitlements to wages for the day, and
employee entitlements to any other leave, such as under the Families First
Coronavirus Relief Act (effective April 1, 2020), or other applicable federal, state, or
local law.

What if an employee refuses to consent to health testing?

If an employer’s policy is that an employee cannot work onsite without submitting to
health testing, the employer could bar the employee from work (without pay for non-
exempt personnel and also for exempt personnel if the absence from work is for an
entire workweek).

Employees can also claim religious exemption to health testing. In this case, under
Title VII of the Civil Rights Act of 1964, once an employer receives notice that an
employee’s sincerely held religious belief, practice or observance prevents him or
her from engaging in medical screening, the employer must provide a reasonable
accommodation unless it would pose a hardship as defined by Title VII (“more
than de minimis cost” to the operation of the employer’s business, which is a lower
standard than under the ADA). In this situation, a fact-specific inquiry and analysis
is likely necessary.

What if an employee is concerned with another employee’s presence in the
office because the employee is exhibiting COVID-19 symptoms?

Any employee health concerns should be directed to Human Resources or some other
single source such as Employee Health and Safety. As referenced above, employers
should have a communicable illness policy with protocols for employees in this
situation. Also, employers should be aware of whether paid sick leave laws in their
jurisdiction allow for time off due to concerns related to contracting COVID-19 even
for workers who are asymptomatic and have not been in close contact with someone
is symptomatic.

If and when a vaccine for COVID-19 is available, can employers require
vaccination?

Normally, there are exceptions that could prevent employers from requiring a
vaccine. Of course, given the current pandemic, this may be an area of the law where
we see change. Given the fluidity of the COVID-19 pandemic, it is prudent to await
further guidance from the government on this issue once (and if) a vaccine becomes
available.

4. Practical Realities: Hiring Issues

How should employers conduct employee interviews when hiring?

Employers should consider virtual interviews and onboarding, which will reduce the
number of in-person interactions. If in-person interviews are conducted, we
recommend employers set certain parameters in place to ensure social distancing
(e.g., no handshakes, minimum distance of 6 feet, etc.)

When hiring, may employers screen applicants for COVID-19?
According to the EEOC, yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.

**May an employer take an applicant’s temperature as part of a post-offer, pre-employment medical exam?**

According to the EEOC, yes. Post-offer, pre-employment medical exams, which would include temperature taking, are permitted after an employer has made a conditional offer of employment.

**May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

According to the EEOC, yes. In addition, CDC guidance provides that an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

**May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms associated with it?**

Yes. According to the EEOC, with reliance on current CDC guidance, such an employee cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

**May an employer postpone a new hire’s start date or withdraw a job offer because the individual is at higher risk for COVID-19 (e.g., 65 years old, pregnant, etc.)?**

No. According to the EEOC, the fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or discuss with these individuals if they would like to postpone the start dates.

**Given remote work, how can one validate I-9s?**

There has been a relaxation of in-person I-9 document review, with limitations. Employers with employees working remotely due to COVID-19 will not be required to review the employee’s identity and employment authorization documents in the employee’s physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2. Employers also should enter “COVID-19” as the reason for the physical inspection delay in the Section 2 Additional Information field once physical inspection takes place after normal operations resume. For a closer look at I-9 validation during COVID-19, read our alert on the Department of Homeland Security’s actions to introduce flexibility to in-person I-9 rules.

5. **Practical Realities: HR Issues**
Are there any steps employers should take to address workplace harassment related to COVID-19?

Yes. Employers should remind all employees that it is against the federal law to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability or genetic information. There may be additional protected categories under state and local laws. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action. Additionally, employers should review any new anti-discrimination laws relevant to the COVID-19 pandemic. For example, New Jersey just passed a law prohibiting discrimination against employees for COVID-19-related reasons. A summary and analysis of this new law is here.

What if an employee does not want to participate in business travel due to COVID-19 concerns?

Absent any prohibitions by governmental authorities, employers may require travel to non-restricted areas the CDC deems safe, particularly if such travel is necessary for the employee to perform essential job duties. However, if an employee does not wish to travel due to COVID-19-related concerns, employers should assess whether the trip is essential. It is better for the employment relationship, and good practice to mitigate legal risk, to consider whether an employer can resolve an employee’s concerns, including by providing personal protective equipment and other options that may help the employee feel safe.

What steps should an employer take if an employee returns from a high risk travel area?

If an employee travels to an area deemed high risk by the CDC, employers may place the employee on a precautionary quarantine status during the incubation period of COVID-19 and require a health care provider release as a condition of return to onsite work. Employers may follow the advice of the CDC and state or local public health authorities regarding information needed to permit an employee’s return to the workplace after visiting a specified location, whether for business or personal reasons.

What if an employee refuses to report to work because they object to taking public transportation, live in or must travel to work through a “hot spot,” or have other such COVID-19-related concerns?

Employers can allow their employees to take paid time off but may want to consider following PTO policies to help ensure a sufficient workforce. Additionally, employers may want to offer hesitant employees unpaid leave.

If an employee believes he or she is in imminent danger, according to OSHA, that employee can refuse to work based on a specific fear of infection that is based on fact, where the employer cannot address the employee’s specific fear. An employer may consider whether the employee can work remotely, or may qualify for an accommodation under the ADA due to being immune-compromised, or whether the
fear can be effectively addressed by taking additional containment measures at the facility.

Additionally, employees who are told to self-quarantine by a health care provider or governmental authority because of vulnerability to COVID-19 may be entitled to certain federal, state or local leave entitlements.

**May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor’s note certifying fitness to return to work?**

According to the EEOC, after a pandemic, such an inquiry would be permitted. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp or an email to certify that an individual does not have the pandemic virus. Employers should note, however, that the CDC has asked employers not to require “a health care provider’s note for employees who are sick with acute respiratory illness to validate their illness or to return to work.” Additionally, OSHA recommends that employers encourage sick employees to stay home if they are sick. It follows that requiring medical documentation may deter some employees from staying home when sick. Additionally, employers should note that there may be state or local laws to consider. For example, in San Francisco, the Paid Sick Leave Ordinance prevents employers from requiring a doctor’s note to verify an employee’s use of the Ordinance’s leave during the COVID-19 Local Health Emergency.

**Should I direct employees who believe they were infected by COVID-19 at work to submit workers’ compensation claims?**

Typically, workers’ compensation covers occupational diseases that are contracted or aggravated due to the nature of a particular kind of work — such as a hospital worker who gets stuck by a needle and contracts a disease. Illnesses transmitted among workers would generally not be covered. Under normal conditions and in most states, to be covered by workers’ compensation, both of the following conditions must be met:

- the illness or disease must be “occupational,” meaning that it arose out of and was in the course of employment.

- the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

Thus, again under normal circumstances, employees who by the nature of their profession are exposed to the virus (health care workers, first responders, etc.) would be more likely to be covered under workers’ compensation. For other workers, while it may be possible to for an employee to assert that his or her job involved greater risk (such as when there is an outbreak at a building or plant), coverage would be assessed on a case-by-case basis. The employee would also have to establish that he or she in fact contracted the virus from exposure at work instead of
as a member of the general public. Finally, many states have a list of compensable diseases in their workers’ compensation statute, which at this point would not be likely to include COVID-19.

Some states have, however, issued rules to specifically address workers’ compensation coverage for employees who contract COVID-19 and who have remained in jobs working onsite. For example, Illinois has issued an emergency rule establishing a rebuttable presumption that first responders and front-line workers who contract COVID-19 did so due to exposure at work. The definition of front-line workers includes “crucial personnel” identified in a previous executive order such as grocery and pharmacy employees, mail and delivery service providers, production workers manufacturing critical products or in critical industries, and agricultural workers (including those involved in cannabis production). Minnesota passed a similar law although with a narrower definition of front-line workers. New Jersey has pending legislation, and it is likely that other states will follow suit.

6. Practical Realities: Sick Leave Considerations

What if an employee becomes ill with COVID-19 or is placed on an order of quarantine after we reopen?

The employee may be eligible for Federal Emergency Paid Sick Leave or other state or local leave or paid leave entitlements. That employee may also be entitled to up to 12 weeks of job protected unpaid leave under the Family and Medical Leave Act, subject to their health care provider’s certification, and in some states may be eligible for partial wage replacement benefits through temporary disability insurance benefits from their state.

What if an employee has to take care of someone who is ill with COVID-19 after we reopen, or has to take care of a dependent child whose school is closed due to COVID-19?

The employee may be eligible for Federal Emergency Paid Sick Leave, Emergency Family and Medical Leave (for childcare needs due to school or day care closure) and other state or local leave or paid leave entitlements.

For more on this topic, please read our alert on the Families First Coronavirus Response Act and entries detailing COVID-19-related sick leave developments in New York and New Jersey.

7. Practical Realities: Disability Related Inquiries and Medical Exams

How will COVID-19 impact the Americans with Disabilities Act (ADA)?

The ADA and Rehabilitation Act, as well as their state and local counterparts, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state or local public health authorities about steps employers should take regarding COVID-19. Employers should remember that guidance from
public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.

If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?

According to the EEOC, even with the constraints imposed by a pandemic, some accommodations may meet an employee’s needs on a temporary basis without causing undue hardship on the employer. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances and physical barriers from customers and coworkers whenever feasible per CDC guidance; or other accommodations that reduce the chances of exposure. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of his or her job while reducing exposure to others in the workplace or while commuting.

If an employee has a preexisting mental illness exacerbated by the COVID-19 pandemic, may the employee be entitled to a reasonable accommodation (absent undue hardship)?

Yes. Per the EEOC, as with any accommodation request, employers should engage in the interactive process to understand how a requested accommodation would assist the employee to keep working. The employer may request and obtain medical certification from the employee’s health care provider to assist in exploring an appropriate accommodation plan.

How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, sore throat, new loss of smell or taste, or gastrointestinal problems, such as nausea, diarrhea, and vomiting. Symptoms screening should be based on CDC guidance and updated regularly if that guidance changes. Employers must maintain all information about employee illness as confidential medical records in compliance with the ADA.

May employers require that employees stay home if they have COVID-19 symptoms?

Yes, employers may and should restrict such employees from coming onsite. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace, and according to the EEOC, the ADA does not prevent employers from following this advice.
Where must employers store on-site medical examination results?

The ADA requires that all medical information, including temperature check results, be stored separately from the employee’s personnel file. Employers may choose to store COVID-19-related medical files with other medical files, or in a separate location, as long as these files are separate from employee personnel files and properly secured to protect the privacy of the data.

What files are considered medical files?

For purposes of COVID-19, medical files include temperature or antibody results, an employee’s statement that he or she has the disease or suspects he or she has the disease, or the employer’s notes or other documentation from questioning an employee about symptoms.

If an employee discloses that he or she has COVID-19, to whom may employers disclose the identity of the employee?

Per EEOC guidelines, an employer may disclose this information to a public health agency without violating confidentiality obligations. Additionally, according to recently issued EEOC guidance, a staffing agency or contractor that places an employee with a company may notify the company of an employee’s positive diagnosis so that the company can properly determine with whom the employee had contact with at the workplace. However, employers should take care to protect employee privacy, and analyze applicable federal and state privacy laws that may come into play. We recommend employers not share the employee’s identity more broadly without first receiving, in writing, a truly voluntary consent from the employee to do so.

Should an employer postpone discussing accommodation requests with any employees who will not need an accommodation until after the employee returns to work, since the employee is currently working remotely?

No. Per the EEOC, the employer may be able to acquire all the information it needs to make a reasonable accommodation decision before the employee returns. If a reasonable accommodation is granted, the employer also may be able to arrange for the accommodation in advance.

What if an employee was already receiving a reasonable accommodation prior to COVID-19 and now requests an additional or altered accommodation?

The employee may be entitled to additional or different accommodations. The employer may discuss with the employee whether the same or a different disability is the basis for a new request and why an additional or altered accommodation is needed.

Should employers still engage in the interactive process during the pandemic?

Yes. An employer may ask questions or request medical documentation to determine whether an employee’s disability necessitates an accommodation, either the one he
Questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” of his position. However, given the pandemic, an employer may forgo or shorten the exchange of information between an employer and employee known as the “interactive process” and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. Employers may adapt the interactive process — and specify end dates for the accommodation — to suit changing circumstances based on public health directives or other considerations such as timing of the employee’s return to a physical work location.

Can the pandemic itself be a relevant consideration in deciding whether a requested accommodation can be denied because it poses an undue hardship?

Yes. Because “undue hardship” means “significant difficulty or expense,” an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that does not pose such problems.

8. Practical Realities: Employer Tenant/Landlord Considerations

What should employers who lease space discuss with their landlords?

Employers should inquire about any health screenings that landlords may be conducting as a condition of allowing individuals to enter the building. Employers should also discuss sanitation measures that will in place for common areas as well as logistics such as social distancing measures on elevators and in common stairwells and lobbies.