

April 27, 2020

COVID-19 Update: Practical Considerations for Employers as They Prepare for a Return to the Workplace

As state and local governments modify stay-at-home directives and non-essential worker restrictions over the coming weeks, employers must consider when and how to resume in-person operations safely. The challenges facing employers as they prepare to reopen workplaces in the midst of a global pandemic are unprecedented.¹ Return to the workplace decisions are complicated by the ongoing health risks posed by COVID-19, the patchwork of state and city stay-at-home directives to which employees in the same workforce may be subject, and ever-changing guidance issued by federal, state and local government officials and health authorities.² Employers that are proactive, remain focused on their fundamental obligations to employees, and are well-informed on the most current labor and health agency guidance will be in the best position to meet these challenges and mitigate the risks to their businesses going forward.

This Memorandum provides practical considerations for employers on how to navigate the difficult issues involved in planning and implementing a successful and safe return to the workplace, based upon current guidance issued by the Equal Employment Opportunity Commission (the “EEOC”), the Centers for Disease Control and Prevention (the “CDC”) and the Occupational Safety and Health Administration (the “OSHA”). As federal, state and local agency guidance is being continually updated in response to the pandemic, it is critical for employers to monitor these sources and to follow the directives of government and health authorities applicable to their geographic location and industry.

I. Key Takeaways

Timing and Scope of Reopening

- An employer’s decision as to when and how to reopen must be guided by the directives of government and health authorities and based on the facts and circumstances of its business model and workforce.

¹ See our [April 25 Memorandum](#) for a discussion of the Business Roundtable Roadmap for Resumption of Economic Activity; see also Business Roundtable, Letter to Vice President Pence (Apr. 24, 2020), <https://www.paulweiss.com/media/3980065/business-roundtable-guidelines-for-returning-to-work-20200424.pdf>.

² *Id.*

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- Before reopening, employers should consider how best to mitigate the risk of COVID-19 in their physical workplace, including by modifying floor plans, intensifying cleaning protocols and increasing ventilation, as appropriate.
 - Employers should consider all reasonable options available to decrease workforce density, such as a phased return of the workforce, staggering shifts, alternating on-site employees and encouraging telework.

Ensuring a Safe Workplace

- As with the decision as to when and how to reopen, decisions as to how to ensure a safe workplace for workers who return must ultimately be guided by the specific directives of state and local government and health authorities.
- Employers may implement screening protocols for employees and other visitors to identify COVID-19 symptoms or exposure, such as temperature checks or targeted inquiries. Employers may also require and administer COVID-19 testing to employees, however the limited availability of tests may make this unrealistic in the near-term.
- Employers should encourage social distancing in the workplace by limiting in-person gatherings, the use of common spaces, business meetings and travel.
- Common equipment and surfaces should be cleaned and disinfected frequently.
- Employers should promote healthy hygiene and infection control practices.
- Employers may require, or allow voluntary wearing of, personal protective equipment (“PPE”) (such as face coverings), but should be mindful that specific OSHA requirements may apply.
- Employers should develop a plan for prompt identification and isolation of individuals who experience COVID-19 symptoms in the workplace.

Responding to Employee COVID-19-Related Concerns and Requests

- Employers should engage interactively and flexibly with employees requesting COVID-19-related accommodations.
- Reasonable accommodations should be considered for employees who are in vulnerable groups or are otherwise concerned about returning to the workplace.

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- Requests for COVID-19-related leave should be handled consistently, in accordance with company policies, and in compliance with sick and family leave laws and guidance.
 - Employers should provide a meaningful avenue for employees to raise concerns about health and safety issues and ensure that these concerns are addressed promptly and thoughtfully.
 - Under no circumstances should employees who raise health and safety concerns in good faith be subject to retaliation.

Protecting Confidentiality of Employee Medical Information

- Employers should store all medical information related to COVID-19 separately from personnel files and protect its confidentiality.

Preventing Discrimination, Harassment and Retaliation

- As is the case when making any employment decision, employers should ensure that all return to work and COVID-19-related employment decisions, policies and protocols are non-discriminatory and not retaliatory.
- Employers should communicate to the workforce that pandemic-related discrimination, harassment and retaliation will not be tolerated.

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II. Timing and Scope of Reopening

- Employers deciding when and how to reopen once cleared to do so by relevant government authorities should consider whether their workplace is physically prepared to safely accommodate employees. Physical preparations may include office layout modifications, separating work stations, erecting safety barriers to protect workers whose jobs require more contact with others, implementing intensified cleaning, disinfection and ventilation protocols, and stocking supplies and protective equipment.
- Employers should develop an infectious disease preparedness and response plan.³ Such plans should consider and mitigate any risks associated with various job duties or worksites, such as where, how and to what sources of COVID-19 segments of their workforce may be exposed.⁴

³ OSHA, "Guidance on Preparing Workplaces for COVID-19," <https://www.osha.gov/Publications/OSHA3990.pdf>.

⁴ *Id.*

- Employers should consider protocols for ongoing monitoring of COVID-19 symptoms and ensuring there is an appropriate response plan in the event employees become sick.⁵
- There is no one-size-fits-all solution for determining the pace at which employees should return to the office, but employers should consider a phased approach as it will give the employer increased flexibility to respond to changing health conditions, including infection rates and testing availability.⁶
- When planning for a return of the workforce, employers should consider all reasonable options to reduce worker density, including alternating days or weeks in the office, staggering shifts, and permitting employees who can effectively telework to continue to do so.⁷

III. Ensuring a Safe Workplace

Screening Employees and Visitors

- Employer obligations with respect to conducting medical inquiries and examinations are governed by the Americans with Disabilities Act (“ADA”). The ADA requires that any mandatory test of employees be “job related and consistent with business necessity.”
- EEOC guidance issued in response to the COVID-19 pandemic 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, including 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.⁸ Any decision related to the screening or exclusion of employees must not discriminate against, or have a disparate impact on, a protected

⁵ *Id.*

⁶ See CDC, “Community Mitigation,” (updated Apr. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/community-mitigation.html>; White House, “Guidelines: Opening Up America Again,” <https://www.whitehouse.gov/openingamerica/>.

⁷ OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

⁸ EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

group.⁹ Additionally, employers must maintain all information obtained through the screening process as confidential records in compliance with the ADA.¹⁰

- When screening, employers may ask employees if they are experiencing symptoms identified by public health authorities as being “associated with” COVID-19 (e.g., cough, sore throat, fever, chills and shortness of breath). Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on identifying additional symptoms associated with COVID-19, such as loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea and vomiting.¹¹
- Temperature checks should be conducted in the least invasive way possible and in a manner that minimizes physical contact, such as through the use of a touchless forehead thermometer. Some employers may be considering using thermal scans in lieu of temperature checks, but there is no official guidance at this time on the use of thermal scans.¹² Current CDC guidelines cite a temperature above 100.4 degrees Fahrenheit as indicative of a fever, but employers should be aware that some people with COVID-19 do not have a fever.
- COVID-19 tests may be administered to employees to detect the presence of the virus before they enter the workplace. Consistent with the ADA, however, employers should ensure that the tests are accurate and reliable. Employers should review guidance from the U.S. Food and Drug Administration (the “FDA”), CDC and other public health authorities, and check for updates, concerning which tests are considered safe and accurate. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Employers should be aware that accurate testing will only reveal whether the virus is currently present; a negative test does not mean the employee will not contract the virus in the future.¹³
- At this time, employers should exercise caution when considering whether to implement or require serological (antibody) testing, and should consult the FDA and official health agency guidance. The

⁹ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” (updated Mar. 21, 2020), https://www.eeoc.gov/facts/pandemic_flu.html.

¹⁰ EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

¹¹ *Id.*

¹² See Reuters, “Exclusive: Amazon Deploys Thermal Cameras at Warehouses to Scan for Fevers Faster” (Apr. 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-amazon-com-cameras/exclusive-amazon-deploys-thermal-cameras-at-warehouses-to-scan-for-fevers-faster-idUSKBN2200HT>.

¹³ EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

World Health Organization (the “WHO”) currently recommends use of antibody testing in research settings, and not “in any other setting, including for clinical decision-making,” because inadequate tests may miss individuals with active infection or produce false positives.¹⁴ Although the FDA has noted that antibody tests may be useful for making workplace decisions *in the future*, the FDA is not currently required to approve all tests on the market.¹⁵ Given the complexity of serology tests, employers may wish to postpone implementing such tests until there is more uniform guidance. Additionally, although the federal government is reportedly considering the use of certificates of immunity to lift restrictions for certain individuals,¹⁶ the WHO recently cautioned against using COVID-19 antibody tests as a basis for issuing such certificates as further validation is needed.¹⁷ At this time, it is unclear what legal implications reliance on such certificates would have for employers.

- Employers should clearly communicate any health screening procedures so that employees understand what is being asked of them and under what circumstances they will be asked to return home if found to be ill.
- No guidelines have been released to date on who should conduct workplace health screening. Although the use of licensed healthcare professionals is preferable, an employer may task employees who have been appropriately trained to conduct the screening. Employers should provide safety and personal protective equipment to any individual performing screening activities.
- Employers implementing health screening measures should consider where such procedures will take place so as to maximize employee privacy.
- Employers should develop protocols for handling situations in which an employee does not agree to screening or when screening results indicate that an employee should not enter the workplace. Given that EEOC and CDC guidance permit employers to screen employees for COVID-19 symptoms before entering the workplace and provide that employees with symptoms of COVID-19 should leave the workplace, employers are permitted to condition entry to the workplace on a negative screening result

¹⁴ World Health Organization, “Advice on the Use of Point-of-Care Immunodiagnostic Tests for COVID-19” (Apr. 8, 2020), https://www.who.int/news-room/commentaries/detail/advice-on-the-use-of-point-of-care-immunodiagnostic-tests-for-covid-19#.Xo_1jdsCuUE.twitter.

¹⁵ FDA, “Coronavirus (COVID-19) Update: Serological Tests” (Apr. 7, 2020), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-serological-tests>.

¹⁶ Politico, “Fauci: Coronavirus Immunity Cards for Americans are Being Discussed” (Apr. 10, 2020), <https://www.politico.com/news/2020/04/10/fauci-coronavirus-immunity-cards-for-americans-are-being-discussed-178784>.

¹⁷ WHO, “‘Immunity passports’ in the Context of COVID-19” (Apr. 24, 2020), <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>.

to protect the rest of the workforce, provided that screening is being conducted in a non-discriminatory manner.

- Employers may require an employee who is returning to work after being sick with COVID-19 to provide a doctor's note or to have been symptom-free for a certain amount of time under the ADA's "direct threat" exception. Employers are required to notify employees in advance if they plan to require a "fit-for-duty certification."¹⁸ The EEOC has noted, however, that it may be difficult for health care professionals to provide fitness-for-duty documentation during and immediately after a pandemic and that employers should consider other approaches such as relying on local clinics to provide less formal certification that an employee no longer tests positive for the virus.¹⁹
- While employers are prohibited under Title II of the Genetic Information Nondiscrimination Act (the "GINA") from requiring disclosure of an employee's family medical history,²⁰ employers are permitted under the ADA to require employees to disclose whether they have been in contact with anyone, including those living in their households, with COVID-19 or symptoms of COVID-19. The CDC also advises that employees who are well but who have a sick family member at home with COVID-19 should notify their employer.²¹
- Employers should consider implementing screening protocols for customers, clients and other workplace visitors, and protocols as to how to appropriately manage situations in which a customer, client or other visitor does not pass the screening.

¹⁸ See 29 C.F.R. § 825.312; EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

¹⁹ EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

²⁰ See EEOC, "Facts About the Genetic Information Nondiscrimination Act" (Sept. 14, 2009), <https://www1.eeoc.gov//eeoc/publications/fs-gina.cfm?renderforprint=1>.

²¹ CDC, "Interim Guidance for Businesses and Employers: Plan and Respond to Coronavirus Disease 2019" (updated Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

Maximizing Social Distancing in the Workplace

- Employers should closely review all applicable federal, state and local guidelines on social distancing in the workplace, including those from the EEOC, OSHA, and the CDC.²² In addition, employers should consider any industry-specific guidelines that may apply.²³
- Employers can facilitate social distancing by encouraging employees to use telephone and videoconferences, limiting the size of in-person meetings, and decreasing and spreading out seating and furniture in conference rooms and other common spaces.
- Employers can use signs and markers to limit the number of people allowed in common rooms and spaces at a given time (e.g., bathrooms, conference rooms, dining areas, elevators), spread employees out in common spaces or where lines may form and direct the flow of traffic in high-circulation areas.
- Employers should be especially vigilant about limiting the number of employees in areas where employees tend to congregate such as pantries, break-out rooms, cafeterias, supply and copier areas, elevator banks and elevators, stairwells and conference rooms. Employers should consider converting cafeterias to pick-up or delivery only and/or setting staggered meal schedules.
- Employers should discourage workers from using other workers' phones, desks or other work equipment, and should consider modifying intra-office delivery practices, such as mail delivery systems, to limit the exposure of messengers and mail staff.
- Employers should encourage employees to conduct meetings with clients and customers virtually and to limit the number of outside visitors to the office, as appropriate.²⁴

²² See, e.g., OSHA, "Guidance on Preparing Workplaces for COVID-19," <https://www.osha.gov/Publications/OSHA3990.pdf>; EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (updated Mar. 21, 2020), https://www.eeoc.gov/facts/pandemic_flu.html; CDC, "Interim Guidance for Businesses and Employers: Plan and Respond to Coronavirus Disease 2019," (updated Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

²³ See, e.g., OSHA, "COVID-19 Guidance for Construction Workers," <https://www.osha.gov/Publications/OSHA4000.pdf>; see also CDC, "Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19" (updated Apr. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html>.

²⁴ See NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020) <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

Mitigating Risks from Travel

- Employers should discourage nonessential business travel, prohibit nonessential business travel to locations with ongoing COVID-19 outbreaks, as identified by CDC travel warnings²⁵ and other government and public health authorities, and encourage employees to limit out-of-office business meetings and travel generally.
- Employers cannot restrict an employee's personal travel. Employers may require employees to report personal travel to areas designated as high-risk and for post-travel self-quarantine by the CDC.²⁶ Employers should ensure that employees understand relevant time-off and compensation policies in the event that an employee must quarantine after such personal travel, and whether remote work would be available in that situation.

Heightened and Frequent Workplace Cleaning

- Employers should regularly clean and disinfect the workplace, following applicable workplace disinfecting guidelines from the OSHA, CDC and local health departments.²⁷
 - Employers should ensure that all common areas, shared electronic equipment and workspaces, and frequently touched surfaces are cleaned thoroughly and frequently throughout the day, including drinking fountains, elevator buttons, doorknobs, light switches, handrails, kitchen and pantry appliances, counter tops, drawer pulls, tables, sinks, faucets, toilet handles, push plates, phones, keys, remote controls, desks, chairs, printers, keyboards, computer mice and thermostats.
 - Employees should consider modifying high-touch surfaces to limit handling, such as installing automatic doors, propping open doors and installing automatic lights.

²⁵ See CDC, "Coronavirus Disease 2019 (COVID-19) Travel", <https://www.cdc.gov/coronavirus/2019-ncov/travelers/>.

²⁶ As of April 27, 2020, high-risk areas include China, Iran, most of Europe, and the United Kingdom, and Ireland, and the CDC currently recommends all individuals traveling internationally to self-quarantine for 14 days upon arrival in the United States before returning to work. See CDC, "Coronavirus Disease 2019 (COVID-19) Travel FAQs," (Apr. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html>. See also CDC, "Travelers' Health Global COVID-19 Pandemic Notice," <https://wwwnc.cdc.gov/travel/notices/warning/coronavirus-global>; CDC, "Coronavirus Disease 2019 (COVID-19) Travelers Prohibited From Entry to the US," <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html>.

²⁷ See OSHA, "Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus," <https://www.osha.gov/Publications/OSHA3994.pdf>; NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>; NYC Health, "COVID-19: General Guidance for Cleaning and Disinfecting for Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/disinfection-guidance-for-businesses-covid19.pdf>.

- Employers should have soap and water, hand sanitizer and disinfecting sprays and wipes readily available to all employees and visitors.
- Hand sinks should have clean running water, soap and paper towels at all times. Touchless hand sanitizer dispensers can be placed in high-traffic areas where sinks are unavailable.
- Employers should use—or require that their cleaning services use—Environmental Protection Agency-approved cleaning chemicals effective against COVID-19. Laundry should be washed at the warmest possible setting with detergent and dried completely.

Promoting Healthy Hygiene Practices

- Employers should actively encourage healthy hygiene and infection control practices for employees and workplace visitors. Employers should closely review all applicable federal, state and local guidelines on hygienic measures, such as those issued by OSHA, the CDC and local health departments.²⁸
 - Post signs in restrooms and pantry areas promoting hand-washing for at least 20 seconds.
 - Encourage respiratory etiquette such as covering sneezes and coughs, and provide tissues and no-touch trash cans.
 - Encourage employees to use disinfectant wipes and sprays to clean their personal work surfaces.
 - Encourage employees to stay home when sick.

Provision and Usage of Personal Protective Equipment

- OSHA's respiratory protection standards mandate respiratory masks for employees in certain high-risk (e.g., health care and laboratory workers exposed to COVID-19 patients) and medium-risk workplaces (e.g., those who work with the general public in communities with ongoing community transmission).
- 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

²⁸ See, e.g., OSHA, "Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus," <https://www.osha.gov/Publications/OSHA3994.pdf>; NYC Health, "COVID-19: General Guidance for Cleaning and Disinfecting for Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/disinfection-guidance-for-businesses-covid19.pdf>; see also Business Roundtable, Letter to Vice President Pence (Apr. 24, 2020), <https://www.paulweiss.com/media/3980065/business-roundtable-guidelines-for-returning-to-work-20200424.pdf>.

members of the public.²⁹ These face coverings must be provided at the employer's expense.³⁰ Other jurisdictions also require workers to wear face coverings under certain circumstances.³¹

- PPE is not required in low-risk workplaces or for non-essential workers. Employers may, nevertheless, require, encourage or allow voluntary wearing of, PPE (such as face coverings).³² Employers who require employees to wear PPE should make face coverings and/or gloves available.³³ Employers should be mindful of OSHA requirements that are applicable when employers require PPE and respiratory protection as well as those applicable when employees voluntarily choose to use respirators.³⁴ Employees should be reminded to practice social distancing, even when wearing PPE.³⁵
- Appropriate face coverings for non-essential workers include, but are not limited to, cloth masks that cover the mouth and nose. Due to continuing shortages and supply challenges, respiratory, medical grade and surgical masks generally should be reserved for health care providers, first responders and essential workers who need respiratory protection.³⁶

²⁹ See New York State Governor Andrew M. Cuomo, "No. 202.16: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," (Apr. 12, 2020), <https://www.governor.ny.gov/news/no-20216-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

³⁰ See *id.*; see also New York State Department of Health, "Interim Guidance on Executive Order 201.16 Requiring Face Coverings for Public and Private Employees Interacting with the Public During the COVID-19 Outbreak" (Apr. 14, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_eo20216employeefacecovering_041420.pdf.

³¹ The CDC currently recommends that any essential workers who were potentially exposed to COVID-19 return to work only if they wear a face covering for 14 days following the exposure. See CDC, Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19," <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>.

³² See EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

³³ For example, NYC requires all employees to wear face coverings when customers are present, at employer expense. NYC Health, "Face Coverings: Frequently Asked Questions" (Apr. 2, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-face-covering-faq.pdf>; see also NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

³⁴ See 29 U.S.C. § 1910.32; OSHA, "Voluntary Use Respirators," (Jan. 2012) https://www.osha.gov/video/respiratory_protection/voluntaryuse.html.

³⁵ See CDC, "Coronavirus Disease 2019 (COVID-19) Recommendations for Cloth Face Covers," (Apr. 3, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>.

³⁶ *Id.*

- Pursuant to CDC criteria, face coverings should fit securely and comfortably, be secured with ties or ear loops, include multiple layers of fabric, allow for breathing without restriction, be able to be laundered and machine-dried, and cover the mouth and nose.³⁷
- Employers unable to procure or obtain PPE for their employees should consult with their local office of emergency management to determine whether extra supplies exist. Employers may also permit employees who are not required to use respirator masks to use their own face coverings.
- If an employee declines to wear a face covering for medical reasons, employers should engage in the interactive process required by the ADA. Employees whose breathing would be inhibited or whose health would be otherwise impaired should not be required to wear a face covering, but may need to be provided with a reasonable accommodation, such as an alternate work location, work assignment or different protective equipment.³⁸
- Nonmedical employee objections to wearing face covering should be addressed on a case-by-case basis. Particularly if the employee is not required under OSHA guidelines or state or local regulations to wear a face covering in the workplace, employers should be flexible in balancing employee and safety concerns.

Providing Support and Education on Health & Safety Issues

- Employers should provide regular updates to employees about COVID-19 developments applicable to their workplaces, what they are doing to keep employees safe, how employees can help keep each other safe, and relevant professional and personal support resources, including any available counseling.³⁹
- Employers should encourage employees to report any health and safety concerns and should clearly demonstrate that these concerns will be addressed promptly and thoughtfully.
- Employers should provide training, education and informational material about worker health and safety, including proper hygiene practices and how to use protective clothing and equipment.

³⁷ See CDC, "Coronavirus Disease 2019 (COVID-19) Cloth Face Covers," (updated Apr. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>.

³⁸ See New York State Department of Health, "Interim Guidance on Executive Order 201.16 Requiring Face Coverings for Public and Private Employees Interacting with the Public During the COVID-19 Outbreak" (Apr. 14, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_eo20216employeefacecovering_041420.pdf.

³⁹ See NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

- Employers should actively encourage sick employees to stay home and notify a workplace administrator when they are sick by providing non-punitive sick leave options to allow employees to stay home when ill.
- As we recommended in our [March 10 Memorandum](#), employers should create an environment where employees feel comfortable self-reporting symptoms, and should consider naming a “point person” to whom employees can confidentially confide or direct questions. The point person can be an employee in Human Resources or a similar department with regular and ongoing contact with employees. Having a point person may increase the likelihood that employees will feel comfortable reporting personal travel or other potential incidents of exposure.
- Employers should reassure employees that they are staying abreast of all CDC and public health guidelines regarding COVID-19, and will share any relevant information with employees.⁴⁰

Mitigating the Risks of, and Responding to, Positive Cases in the Workplace

- Employers are encouraged to develop policies and procedures for prompt identification and isolation of sick individuals in the workplace.⁴¹ Such policies and procedures include:
 - Informing and encouraging employees to self-monitor for signs and symptoms of COVID-19, particularly if they suspect possible exposure.
 - Developing policies and procedures for employees to report when they are ill or experiencing COVID-19 symptoms.
 - Immediately isolating people with signs or symptoms of COVID-19 and training workers to do so. OSHA recommends that employers move potentially infectious individuals to a location away from other employees, customers and visitors.⁴² Designated areas with closed doors can serve as isolation rooms until those suspected of illness can leave the worksite. Employers should restrict the number of personnel entering such isolation areas. Face masks should be provided to those who may be ill.⁴³

⁴⁰ See, e.g., OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>; OSHA, “Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus,” <https://www.osha.gov/Publications/OSHA3994.pdf>.

⁴¹ See OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

⁴² *Id.*; see also OSHA, “COVID-19 Control and Prevention,” <https://www.osha.gov/SLTC/covid-19/controlprevention.html>.

⁴³ See OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

- Sick employees should follow CDC-recommended steps. Employees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.⁴⁴
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow CDC-recommended precautions, which may involve 14 days of self-quarantine.⁴⁵
- Employees should be required to comply with any mandatory or precautionary quarantine orders or directives from doctors and/or health officials.
- Employers should develop and implement policies and procedures for workforce contact-tracing if an employee tests positive for COVID-19, such as reviewing the employee's calendar and ongoing projects and identifying the persons with whom the employee had regular or close contact. Information on persons who had contact with the ill employee during the time the employee had symptoms and for a period of time prior to the manifestation of symptoms should be compiled. Others in the workplace with close contact within six feet of the employee during this time would be considered exposed.⁴⁶
- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but maintain confidentiality as required by the ADA. Employers should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure.⁴⁷
- Employers may need to notify certain health authorities and should perform enhanced cleaning and disinfection of office space after a person suspected/confirmed to have COVID-19 has been in the workplace, as required by public health regulations and OSHA guidelines.

⁴⁴ See CDC, "Interim Guidance for Businesses and Employers: Plan, Prepare, and Respond to Coronavirus Disease 2019" (updated Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>. See also CDC, "What to Do If You Are Sick," <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>.

⁴⁵ *Id.* See also CDC, "Coronavirus Disease 2019: Community-Related Exposure," (updated Mar. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

⁴⁶ CDC, "Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person With Suspected or Confirmed COVID-19," <https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf>.

⁴⁷ *Id.*; see also CDC, "Coronavirus Disease 2019: Community-Related Exposure," (updated Mar. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

IV. Responding to Employee COVID-19-Related Concerns and Requests

Requests for Accommodations

- Employers should begin accommodations discussions with employees with known disabilities before such employees return to the workplace, so that decisions and arrangements can be made in advance.⁴⁸
- If an employee with a disability makes an accommodation request related to COVID-19, employers should continue to utilize the “interactive process” provided for by the ADA and may request information or medical documentation from the employee to support why the accommodation is needed.⁴⁹ If it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a “disability” as defined by the ADA (a physical or mental impairment that substantially limits major life activity, or a history of a substantially limiting impairment) or under state or local law.⁵⁰
- Given the pandemic, if there is limited time available to discuss the request or it is difficult to obtain medical documentation, an employer can simply decide to forgo or shorten the exchange of information and grant the request on an interim or trial basis, if reasonable.⁵¹
- As the government-imposed restrictions on workplaces are changed or lifted, the need for accommodations may change, and may necessitate temporary accommodations to suit the changing circumstances.⁵²
- Employees who are older or who have chronic or underlying medical conditions may be at higher risk for severe illness such that these employees will face a “direct threat” (as defined by the ADA) if they contract COVID-19. Employers should be flexible in providing reasonable accommodations to more vulnerable employees. Telework, temporary job restructuring or job transfers, providing PPE, modification of work schedules and low-cost solutions such as using Plexiglas or rearranging workspace

⁴⁸ See EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

to provide additional physical protection may permit such employees to safely perform the essential functions of their jobs.⁵³

- An employer does not have to provide an accommodation if it poses an “undue hardship.” The EEOC recognizes that due to the business contraction caused by the pandemic, an accommodation that would not have previously posed an “undue hardship,” *i.e.*, significant difficulty or expense, may pose one now.⁵⁴ Employers must weigh the cost of an accommodation against their current budget while taking into account constraints created by the pandemic. Employers are encouraged to consider low-cost solutions available to reduce physical contact with others for employees with disabilities.

Requests for Leave

- Employers should 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.
- Employers should be consistent in responding to requests for leave and follow company policies, and applicable federal, state and local sick and family leave laws.
- Employers should familiarize themselves with the leave provisions of the Families First Coronavirus Response Act. This is outlined in our [March 18 Memorandum](#), with further clarifications under the CARES Act described in our [March 27 Memorandum](#).
- New York employers should also comply with their obligations under 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. These are outlined in our [March 10 Memorandum](#) and our [March 19 Memorandum](#).

Responding to Concerns about Returning to the Office

- Employers should promptly and thoughtfully respond to employee concerns about returning to the office, including concerns about commuting, concerns about increased risk to members of the employee’s household, and concerns that the ongoing pandemic may make returning to the office unsafe.

⁵³ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” (updated Mar. 21, 2020), https://www.eeoc.gov/facts/pandemic_flu.html.

⁵⁴ EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

- Employers should inform employees of the measures they are taking to ensure workplace safety, but can also consider permitting employees who express health and safety concerns to work from home, if feasible, and to return to the office voluntarily when they feel ready.
- Generally, employees have a legal right to refuse to work if they believe in good faith that the workplace would expose them to “imminent danger.”⁵⁵ Although generalized fear of infection due to the ongoing pandemic and fear of potential risk of infection do not provide a legal basis to refuse to return to the workplace, under the circumstances, employers should consider permitting employees who express such concerns to telework, if feasible. If telework is not feasible, the employer could consider offering temporary accommodations such as schedule modifications and protective equipment to facilitate the employee’s performance of the essential functions of the job, paid time off, or unpaid leave. An employee who is neither disabled nor qualifies for job-protected leave may be required to return to the office.
- An employer must not retaliate against employees who, in good faith and reasonable belief, voice concerns about workplace safety conditions. Employers should be careful to comply with the National Labor Relations Act (NLRA), which prohibits an employer from discharging or disciplining an employee for engaging in a protected “concerted activity,” which may include one or more employees participating in or instigating a concerted refusal to work in protest over working conditions.⁵⁶

V. Protecting Confidentiality of Employee Medical Information

Employers should ensure that they protect the confidentiality of employee medical information in accordance with HIPAA and the ADA.

HIPAA Privacy

- As explained in our [March 10 Memorandum](#), the HIPAA Privacy Rule requires appropriate safeguards to protect the privacy of protected health information (“PHI”), and sets limits and conditions on the uses and disclosures that can be made of such information without patient authorization.⁵⁷

⁵⁵ See OSHA, “Workers’ Right to Refuse Dangerous Work,” <https://www.osha.gov/right-to-refuse.html>.

⁵⁶ See National Labor Relations Board, “Concerted Activity,” <https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/concerted-activity>.

⁵⁷ C.F.R. § 164.508; see also U.S. Health and Human Services, “The HIPAA Privacy Rule,” <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html>.

- An employer who is a covered entity⁵⁸ or performs certain activities that involve the use or disclosure of PHI on behalf of a covered entity is subject to the privacy and security responsibilities under the HIPAA Privacy Rule.

Storage of Employee Medical Information

- The ADA requires all medical information about a particular employee to be stored separately from the employee's personnel file, thus limiting access to confidential information.⁵⁹
- While daily temperature checks and the results of other COVID-19 screening measures may be logged, they must be kept confidential.⁶⁰
- Similarly, an employee's statement that he has (or suspects he has) COVID-19 as well as any employer notes or other documentation from questioning an employee about symptoms must be kept separately from the employee's personnel file.⁶¹
- However, an employer may disclose the name of an employee to a public health agency when it learns that the employee has COVID-19.⁶²

VI. Preventing Discrimination, Harassment, and Retaliation

- It is important that employers remain vigilant in preventing discrimination, harassment and retaliation.
- Any COVID-19-related workplace decision should be based on objective factors and business needs as well as government and public health guidance and implemented in a non-discriminatory manner.
- To reduce the risk of pandemic-related harassment, employers should explicitly communicate to the workforce that fear of the COVID-19 pandemic should not be misdirected against certain individuals. Employers should remind all employees that it is unlawful to harass or otherwise discriminate or retaliate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability

⁵⁸ See U.S. Health and Human Services, "Covered Entities and Business Associates," (updated June 16, 2017) <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>.

⁵⁹ See EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in stopping and reporting any harassment or other discrimination. An employer should also make clear that it will immediately review any allegations of harassment, discrimination or retaliation and take appropriate action.

The CDC Guidance can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

The EEOC Guidance can be found here: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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