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June 22, 2020

## **COVID-19 Update: OSHA and EEOC Guidance on Returning to Work**

The Occupational Safety and Health Administration (the “OSHA”) has issued guidance (the “OSHA Guidance”) for “non-essential businesses” that have reopened or are preparing to reopen during the COVID-19 pandemic.<sup>1</sup> Under the OSHA Guidance, a business reopening plan should proceed in three phases, addressing and implementing the nine “guiding principles” to slow the spread of COVID-19.<sup>2</sup> The OSHA Guidance also responds to employers’ questions about COVID-19 testing, health screening and PPE. In addition, the Equal Employment Opportunity Commission (the “EEOC”) has issued guidance clarifying that employers should not require antibody testing before allowing employees to return to work.

### **I. Key Takeaways**

- Under the OSHA Guidance, businesses are encouraged to reopen in three phases. Businesses may ease limitations on non-essential business travel and maximum occupancy as they proceed through the phases.
- Employers should not use antibody testing to make decisions about returning employees to the workplace. However, it is permissible to require a viral test, as opposed to an antibody test.

### **II. Reopening in Three Phases**

Under the OSHA Guidance, businesses may reopen in three phases as described below.

#### *Phase One*

- Encourage telework, to the extent feasible.
- Consider limiting the number of people in the workplace in order to maintain strict social distancing practices.

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<sup>1</sup> OSHA, Guidance on Returning to Work, <https://www.osha.gov/Publications/OSHA4045.pdf>.

<sup>2</sup> See OSHA Guidance at 6–10.

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- Where feasible, consider providing accommodations to workers who are at “higher risk for severe illness” as defined by the Centers for Disease Control and Prevention (the “CDC”),<sup>3</sup> including those 65 years and older and those with serious underlying medical conditions.<sup>4</sup> Consider extending accommodations to workers with household members at higher risk for severe illness.
  - Limit non-essential business travel.

### *Phase Two*

- Continue to encourage telework, but non-essential business travel can resume.
- Limitations on the number of people in the workplace can be eased, but continue to maintain moderate to strict social distancing, depending on the type of business.
- Continue to accommodate workers who are at higher risk for severe illness and those with household members at higher risk for severe illness.

### *Phase Three*

- Resume unrestricted staffing of work sites.<sup>5</sup>

All business reopening plans should align with the lifting or modification of relevant stay-at-home orders and other requirements or recommendations from the CDC or federal, state, and local health authorities. Additionally, during all phases of reopening, employers should continue to implement strategies to minimize the spread of COVID-19, including basic hygiene, social distancing, identification and isolation of sick employees, workplace controls, policy flexibilities, and employee training. Employers should also prevent, monitor for, and respond to any emergence or resurgence of, COVID-19 in the workplace, which could require increased need for contact tracing, enhanced cleaning, and disinfection practices, or even a temporary closure of the business.<sup>6</sup>

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<sup>3</sup> CDC, “People Who Are at Higher Risk for Severe Illness,” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

<sup>4</sup> See OSHA Guidance at 4–5.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 5.

### III. Guiding Principles

All business reopening plans should be guided by the following principles outlined in the OSHA Guidance:

#### *Hazard Assessment*

Employers should conduct a thorough hazard assessment to determine which job tasks or categories may involve occupational exposure to COVID-19. Consider, among other things, potential exposures from members of the public (e.g., customers, visitors), as well as exposures from coworkers.

#### *Hygiene*

Encourage proper hand hygiene and provide soap, water, paper towels and hand sanitizers. Frequently clean and disinfect high-traffic areas using EPA-registered disinfectants<sup>7</sup> and adhere to the CDC cleaning and disinfection guidelines.<sup>8</sup>

#### *Social Distancing*

Limit business occupancy to maintain appropriate social distancing practices. Encourage social distancing by posting directional signs and signage.

#### *Identification and Isolation of Sick Employees*

Employers may conduct COVID-19 testing or screening in a manner which is non-discriminatory and non-retaliatory. Employers should consider implementing health screenings in conjunction with flexible sick leave policies that encourage sick workers to stay home.<sup>9</sup> If records of health screenings or temperature checks are made or maintained by a physician, nurse, or other health care personnel or technician, employers are required to retain such records for the duration of each worker's employment plus 30 years and follow the OSHA confidentiality requirements.<sup>10</sup> Alternatively, employers may acknowledge temperature readings in real-time.<sup>11</sup>

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<sup>7</sup> See Environmental Protection Agency, "List N: Disinfectants for Use Against SARS-CoV-2 (COVID-19)," <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2-covid-19>.

<sup>8</sup> CDC, "Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes," <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.

<sup>9</sup> See OSHA Guidance at 12.

<sup>10</sup> 29 C.F.R. 1910.1020. See *id.* at 13.

<sup>11</sup> OSHA Guidance at 13.

Employers should also establish and implement a protocol for when there is a positive case of COVID-19 at the workplace. Employers may need to cooperate with contact tracing and notification efforts by relevant public health authorities.<sup>12</sup>

#### *Return to Work after Illness or Exposure*

Workers who have had COVID-19 or exposure to COVID-19 should follow the CDC guidance on discontinuing self-isolation<sup>13</sup> or discontinuing self-quarantine.<sup>14</sup> Employers should ensure that workers who have been exposed to COVID-19 self-monitor for signs and symptoms of COVID-19 at work. Employers should refer to the CDC guidance on discontinuing self-isolation<sup>15</sup> when determining when an employee with a suspected or confirmed case of COVID-19 can return to work.<sup>16</sup>

#### *Controls*

Employers should select and implement appropriate engineering controls (e.g., physical barriers, enhanced ventilation) and administrative controls (e.g., staggered shifts, limiting breakroom capacity, replacing in-person meetings with video-conference calls).<sup>17</sup>

Employers should also determine if their work environment necessitates the use of personal protective equipment (“PPE”) (e.g., gloves, surgical masks and face shields), in which case appropriate PPE should be provided and used. If PPE is needed, but not available, and employers cannot identify alternative means to accomplish business needs safely, work tasks must be discontinued.<sup>18</sup>

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<sup>12</sup> See *id.* at 7.

<sup>13</sup> CDC, “Discontinuation of Isolation for Persons with COVID -19 Not in Healthcare Settings,” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>.

<sup>14</sup> CDC, “Public Health Guidance for Community-Related Exposure,” <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

<sup>15</sup> CDC, “Discontinuation of Isolation for Persons with COVID -19 Not in Healthcare Settings,” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>.

<sup>16</sup> See OSHA Guidance at 8.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 15.

### *Workplace Policy Flexibilities*

Employers should consider implementing flexible telework or leave policies to help minimize workers' exposure to COVID-19. Employers should also ensure that workers understand what options are available to them and how to make use of such options.<sup>19</sup>

### *Training*

Employers should train workers on ways to mitigate the risk of exposure to COVID-19 and how to adequately put on, take off, clean (as applicable), and discard PPE.<sup>20</sup>

### *Anti-Retaliation*

Employers should ensure that workers understand their rights under the Occupational Safety and Health Act, including the right to a safe and healthful work environment and the right to raise concerns about workplace safety and health without retaliation. Employers should also ensure that workers know who to contact with questions or concerns about workplace safety and health.<sup>21</sup>

## **IV. EEOC Guidance on Antibody Testing**

The EEOC has confirmed that requiring antibody testing before allowing employees to return to work is not permitted under the Americans with Disabilities Act (the "ADA"). In light of the CDC's position that antibody test results "should not be used to make decisions about returning persons to the workplace,"<sup>22</sup> at this time, an antibody test does not meet the ADA's "job-related and consistent with business necessity"<sup>23</sup> standard for permitting medical examinations or inquiries. On the other hand, it is permissible to require a test to determine if an employee has an active case of COVID-19 (*i.e.*, a viral test).<sup>24</sup>

The OSHA Guidance can be found [here](#).

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<sup>19</sup> See *id.* at 9.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 10.

<sup>22</sup> CDC, "Interim Guidance for COVID-19 Antibody Testing," <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html>.

<sup>23</sup> 29 C.F.R. § 1630.14

<sup>24</sup> See EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated June 17, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

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Prior OSHA guidance on preparing workplaces for COVID-19 can be found [here](#).

The EEOC guidance on antibody testing can be found [here](#).

Please refer to our [May 30, 2020 Memorandum](#) for more information specific to businesses reopening offices in New York State.

The OSHA offers no-cost and confidential advice to small and medium-sized businesses, with priority given to high-hazard worksites. Additional information about this program can be found [here](#).

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

Jeh Charles Johnson  
+1-212-373-3093  
[jjohnson@paulweiss.com](mailto:jjohnson@paulweiss.com)

Brad S. Karp  
+1-212-373-3316  
[bkarp@paulweiss.com](mailto:bkarp@paulweiss.com)

Loretta E. Lynch  
+1-212-373-3000

Jean M. McLoughlin  
+1-212-373-3135  
[jmcloughlin@paulweiss.com](mailto:jmcloughlin@paulweiss.com)

Liza M. Velazquez  
1-212-373-3096  
[lvelazquez@paulweiss.com](mailto:lvelazquez@paulweiss.com)

Lawrence I. Witdorchic  
+1-212-373-3237  
[lwitdorchic@paulweiss.com](mailto:lwitdorchic@paulweiss.com)

*Counsel Maria Helen Keane and associate Leah J. Park contributed to this Client Memorandum.*