The Legal and Practical Considerations of Re-Opening Workplaces in the COVID-19 Era: Part One – Practical Considerations

With no certainty about when a vaccine will be widely available to the general public, and all fifty states beginning to lift their shutdown orders, it has become clear that businesses will need to prepare for the reality of returning to the workplace while under the continued threat of the coronavirus. Facing this challenge will require employers to balance employee safety and business needs in new and creative ways. As our understanding of the virus grows and the risk assessment in different geographic locations evolves, workplace regulations and best practices may change from month to month. Employers will need to be ready to adapt based on local guidance, the severity of regional outbreaks, and advances in medical understanding and treatments. With this need for flexibility in mind, we have compiled a list of considerations to help guide employers as they plan for the safe reopening of the workplace. Part One of this guidance will cover the practical considerations of reopening, while Part Two will address the legal considerations inherent in the upcoming return to the office.

I.   State and Local Shutdown Orders

Before any employer reopens its physical offices, it should review and ensure compliance with any local, industry-specific guidelines for reopening, such as New York's guidelines, which, among other things, require employers to develop and maintain a written safety plan and to affirm that they have read the detailed guidance for their industries before they can return to the office.

II.   Safety Considerations

Both the Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control (CDC) set up resource centers to provide workplace safety guidance for various industries in light of the pandemic. The CDC also issued a series of decision trees to assist in determining whether an organization is prepared to safely reopen and set forth specific guidance for employers seeking to protect their workers who may be at increased risk of suffering serious health complications from COVID-19. All of this guidance suggests that a combination of employee monitoring and testing, worksite and schedule modifications, and policy changes will be necessary to accomplish the goal.

A.   *Employee Testing and Monitoring*

Aside from any industry-specific considerations raised by guidance from the CDC, OSHA or local public health officials, employers should consider the following issues when deciding whether to implement testing or other measures to monitor for COVID-19:

Self-Monitoring: The simplest—and most important—method of monitoring the health of your workforce is to encourage employees to monitor their own symptoms at home and to stay home when they are sick. Any employee who feels ill should be strongly encouraged not to come into the office, and employers should ensure that their policies make it as easy as possible for workers to stay at home while they have COVID-19 symptoms and during the period when they may be contagious. In the case of an employee who has COVID-19 symptoms or receives a positive diagnosis, the EEOC guidance confirms that an employer may require the employee to leave the office immediately and stay at home until they have recovered. When an employee calls in sick, an employer may inquire whether he or she is suffering from any of the most common symptoms of COVID-19 in order to determine if additional steps should be taken to protect other employees with whom the sick individual may have had contact. To help avoid

discrimination claims, employers should stay up-to-date with, and rely on, the most recent CDC guidance identifying COVID-19 symptoms.

Employee Temperature/COVID-19 Screening: In the absence of local guidance or industry-specific considerations, employer-mandated temperature checks or COVID-19 testing are not required. However, employers may wish to regularly screen employees as they enter the workplace—either by taking their temperatures or by using rapid COVID-19 testing—to help avoid exposing the entire workforce to a sick individual. Last month, the EEOC issued guidance on the application of the Americans with Disabilities Act (ADA) in the COVID-19 era. The guidance affirms that employers are permitted to take an employee's temperature or require them to submit to a COVID-19 test before returning to work. Such testing must be conducted on a non-discriminatory basis, which likely means that all employees entering the worksite (or potentially in particular job functions) must be tested. Furthermore, the guidance emphasizes that employers should only use reliable tests. The FDA recently warned that one popular rapid COVID-19 test may have a false negative rate as high as twenty percent.

Several logistical considerations should be taken into account when developing such a testing regime. For example, some office buildings may be planning to implement screening procedures for all tenants, and businesses should coordinate with their landlords to determine whether building management, or the employer itself, will be responsible for conducting this testing. Employers should also ensure that they have the necessary supplies in place—thermometers, testing kits, and personal protective equipment (PPE)—to conduct testing consistently and safely. All of these supplies will likely be in high demand for the foreseeable future, so it may take time to build up a sufficient stockpile to begin testing. Moreover, employers must plan ahead to manage the traffic flow created by testing sites installed at workplace entrances. There must be sufficient space for employees to socially distance while waiting to be tested, and non-exempt employees must be compensated for time spent waiting to enter the building.

The CDC and OSHA guidance also suggest that employers should not be overly reliant on testing. Evidence to date indicates that a significant number of individuals with COVID-19 are asymptomatic and may be contagious without having a fever. And one-time testing provides, at best, information about the prevalence of COVID-19 in the workforce at a particular point in time.

Antibody Testing: Antibody testing may help determine which employees may have recovered from COVID-19 and therefore are likely to have some immunity against future infection. However, these tests are not yet widely available in all areas, and there is evidence that many of the tests currently on the market are not reliable. Further, our understanding of post-infection immunity is in its infancy, and the fact that an employee tests positive for coronavirus antibodies is not a guarantee that he or she will not become sick again in the future. Until medical science advances and more reliable antibody tests become available, it may be difficult for employers to incorporate antibody testing into their reopening plans.

Fitness for Duty: For employees with a confirmed case of COVID-19, the EEOC guidance makes clear that employers are permitted to require an employee to submit a doctor's note certifying his or her fitness for duty before returning to the office. Employers should be cognizant that, due to increased demand as a result of the pandemic, it may take longer than normal for an employee to obtain such a note. Employers should thus consider whether less formal documentation, such as an email or signed form from a clinic, is an acceptable alternative. Employers may also want to require an employee to submit proof of a subsequent negative test before returning to work. It should be noted, however, that a negative test is not an absolute guarantee that an employee is not contagious—it only shows an individual's status at that point in time. Moreover, reporting suggests that some individuals continue to test positive even after receiving one or more negative test results, so employers may wish to require proof of multiple negative tests over an extended period of time before welcoming an employee back to the office. While awaiting these

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results, employees should be permitted to work from home if it is possible for them to do so. The CDC recently released additional guidance for managing the return to work of individuals who have tested positive for COVID-19.

Privacy & Confidentiality: With respect to each of these monitoring and testing strategies, employers must be sure to abide by their existing confidentiality requirements related to employee medical records. All information about an employee's symptoms, temperature, or test results must be stored separately from the employee's personnel file to limit access to this confidential information. The EEOC guidance clarifies that employers may maintain any COVID-19-related employee medical information with employees' pre-existing confidential medical records. Employers should keep these confidentiality obligations in mind when determining whether building management or the business itself will be responsible for conducting and documenting safety screenings at the entrance to the workplace.

Employers should also be circumspect regarding the information that is shared with the wider workforce in the face of confirmed exposure to the coronavirus. Consistent with public safety, employers may communicate with public health officials in connection with contact tracing efforts arising out of workplace exposure. Employers will also likely want to alert employees who may have been exposed to a confirmed case of COVID-19 in the workplace to the basic information related to their potential exposure (e.g., which floors or office spaces were accessed by the sick employee during which time periods), but employers must be careful to maintain confidentiality of personally identifying information to the fullest extent possible.

B.   Worksite Modifications

In addition to employee testing, the OSHA and CDC guidance make clear that businesses may need to make modifications to the physical worksite to ensure the safe return of their workforces, depending on the nature of each employer's worksite, as well as the way in which its employers use that space. The changes below will likely be generally applicable to most office environments:

- All employers will need to display prominently any new workplace safety posters and notices that have been issued by the relevant state and local authorities related to COVID-19.

- Most offices should implement mandatory traffic patterns for one-way ingress and egress in hallways. This will allow employees to avoid passing within close proximity of each other as they navigate the workplace. Grocery stores and other essential businesses have accomplished this by placing directional arrows on the floor of aisles, and other businesses may wish to emulate this practice.

- Organizations with open-office plans should add physical barriers between workspaces, separate desks, and/or stagger employee shifts and start times to limit the number of individuals in shared office spaces.

- Ventilation rates should be increased, and outdoor air ventilation in particular should be increased to the fullest extent possible. Employees should be encouraged to open their windows if it is possible and safe to do so. Businesses should inspect and repair worksite ventilation systems before reopening.

- Organizations that use "hot desk" or hoteling space management policies should significantly increase the frequency of workstation cleaning with the goal of cleaning each workstation before it is used by a new employee. The best policy is likely to eliminate shared workstations entirely if possible.

- Physical barriers should be installed to separate employees in public-facing positions (such as receptionists) from visitors to the office.

- Businesses should implement and enforce occupancy limitations in communal spaces to ensure that employees are able to maintain a safe distance (i.e., at least six feet) from each other at all times. Employers should consider removing chairs and tables from conference rooms, or closing smaller communal spaces entirely, to limit the

number of people lingering in these spaces. They should also use tape or signs to denote six feet of space in areas where employees may need to gather in groups.

- Employers who provide on-site food service for their employees should consider whether it is safe to continue providing cafeteria-style food service or catering. If possible, it may be advisable to switch to boxed lunches that can be delivered directly to each floor or office to limit the use of shared utensils and the length of interactions between employees. In some cases, food service may need to be eliminated in its entirety.

- Organizations occupying multi-story office towers should limit the number of individuals who can use an elevator at a single time to ensure that employees are able to maintain a safe distance from each other at all times. Because this will lead to an inevitable delay at the start and end of each work day, employers should consider staggering employee start times to avoid generating a backlog in the building lobby.

- Employers may consider installing property technology to track employee movement within the office, which can be used to prevent individuals from congregating in large groups and will provide vital contact-tracing information in the event of a workplace exposure to the coronavirus. Of course, the use of this technology has privacy and data security implications that must be fully vetted before it is put in place.

For many of these proposed modifications, organizations will need to work with building management to implement the changes. Employers who share a building with other companies should also consult building management with respect to the maintenance and cleaning of shared building amenities, such as HVAC and filtration systems.

Cleaning & Disinfecting: Regardless of the physical configuration of the office, employers will likely need to increase the frequency with which they clean and disinfect the workspace. The CDC has issued a [decision tree](#) to help guide businesses in determining when and how frequently their work spaces should be cleaned. According to this guidance, any indoor space that has been occupied within the last seven days will need to be thoroughly cleaned, with an emphasis on disinfecting and laundering frequently touched surfaces and objects. In New York, the Department of Health has also issued specific [guidelines](#) for workplace cleaning and disinfecting that must be followed in order for businesses to reopen. In addition to explaining which surfaces and areas will need to be disinfected most frequently, these guidelines require that if an individual who entered the workplace is subsequently diagnosed with a confirmed case of COVID-19, the business must engage trained cleaners to thoroughly clean and disinfect throughout the area. Because most workplaces have been empty and unused for several months, there are special considerations employers should keep in mind when preparing for the initial return to the office. The CDC has provided specific guidance for reopening buildings after a prolonged shutdown, with a particular emphasis on the risk of the buildup of mold and *Legionella* in unused [water systems](#).

PPE: Finally, employers should consider providing necessary PPE—including masks, gloves, soap, and hand sanitizer with at least 60% alcohol by concentration—to employees on a regular basis. Depending on local reopening procedures, some businesses may be required to provide their workforce with PPE. This is the case in New York, where employers must provide (and maintain adequate supplies of) face coverings for employees at no cost, and must also furnish hygiene stations stocked with soap and/or hand sanitizer to permit frequent handwashing by employees. Where local ordinances would require an employee to wear a mask in order to get to the workplace or perform his or her essential job functions once he or she arrives, an employer should provide adequate face coverings to employees free of charge. In most instances, providing employees with reusable masks—which will likely be easier and more cost effective to procure—will be sufficient to comply with state and local rules. Nonetheless, employers should be sure to provide a sufficient number of masks to permit those employees who may not have ready access to laundry facilities to travel to and from the worksite during the workweek. Employers may wish to consider collecting used masks at the worksite and arranging for them to be laundered on a regular basis to ensure fresh supplies are always available. Consistent with any local or state guidance, employers should set forth clear policies explaining when and where employees will be required to don PPE in the office.

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C. Schedule Modifications

In addition to making changes to worksites and equipment, employers should consider modifying employee work schedules to ensure that safe distances between employees can be maintained and offices do not become overcrowded.

Phased Return: In transitioning back to the office, employers should give careful thought to which employees need to be physically present on a regular basis, especially in light of the comparative success of most companies' transition to a remote-work environment. The plan for reopening a workplace can generally be divided into three phases:

- *Phase One*: Employees who wish to do so are permitted to return to the office. During this phase, employers should take the time to work out any issues in their business safety plans while only a limited number of workers are present at the worksite.

- *Phase Two*: The majority of employees are encouraged to return to the office. During this phase, employers should continue to adjust their business safety plans to accommodate any new concerns that arise when a larger proportion of the workforce is in the office.

- *Phase Three*: With limited exceptions, all employees are required to return to the office. By this time, employers should have worked out any remaining kinks in their business safety plans.

In planning for who will return during each phase, employers should be aware of the potential for discrimination claims and have a legitimate business reason for determining who returns to the office and when. These decisions should be based on job descriptions and duties and not on the individuals who fill the positions. Moreover, businesses should remain cognizant of their obligations under the WARN Act to the extent a previously temporary furlough will become permanent in light of the plans for reopening.

Staggered Shifts: Especially in areas where a large portion of the workforce is dependent on mass transit, employers may consider staggering employee shifts and start times. This will reduce pressure on public transportation systems and lessen the risk of backlogs while employees undergo health screenings and await their turn to use the building elevators to access the worksite. Because staggered shifts will reduce the number of employees in the office at any given time, this practice will also provide organizations with more flexibility to convert their existing office space to accommodate necessary social distancing practices.

Employee Cohorting: Finally, employers should consider dividing their workforces into cohorts and alternating on a regular basis which cohort is currently working in the office. For example, all employees with last names beginning A-M might return to the worksite for one week, while employees with last names beginning N-Z work from home. The next week, the two cohorts could switch places. Based on federal and state guidance, the workplace would likely need to be cleaned and sanitized after use by each cohort. As a result, alternating between cohorts on a day-to-day basis is likely not feasible.

Dividing the workforce in this manner has the benefit of reducing both the number of individuals in the office at one time and the number of individuals to whom each employee is exposed. In the unfortunate event that an employee tests positive for COVID-19 after returning to the office, the cohort system will also allow an employer to quickly quarantine the other individuals in that employee's cohort without the need for detailed contact tracing. Moreover, some form of this system will likely be necessary in many states, including New York, where reopening plans contemplate that less than fifty percent of the workforce should have access to communal spaces in the worksite at the same time. Organizations considering implementing an employee cohort system should be sure to divide the employees in each business unit or client service team into multiple cohorts to ensure business continuity in the event that one cohort is exposed to the coronavirus and must work from home or go out on leave for a period of time.

D. Commuting

Organizations whose employees depend on public transportation will face unique challenges in reopening. This concern is particularly acute in New York City, where many employees understandably will be reluctant to stand cheek-to-jowl with millions of other New Yorkers on a rush-hour train into Midtown Manhattan for the foreseeable future.

There are no easy solutions to this problem, but there are several policies employers can consider to help alleviate employees' concerns related to the use of mass transit. Some organizations may want to dust off their post-9/11 business continuity plans and use satellite or suburban offices as an alternative to reopening their New York City worksites. Employers could also plan their phased reopening by prioritizing the return of those individuals who can safely walk or bike to work every day. Businesses should anticipate that additional space will be needed to store employees' bicycles during the work day.

For those individuals who have no ready alternative to public transportation, businesses may consider offering subsidies for car rentals and parking nearby the office so that such individuals can drive to work. A more cost-effect and space-efficient alternative would be to provide a company-sponsored ride share for individuals commuting from long distances. Any ride-share program would need to abide by accepted social-distancing practices and should take care not to mix individuals from different employee cohorts so as to limit the number of individuals with whom any one employee comes into contact.

E. Travel Policies

According to the CDC guidance, employers should also consider modifying their travel policies as they plan to reopen their offices. Businesses should seriously consider eliminating non-essential travel—both domestic and international—until there is more certainty regarding a treatment protocol or vaccine. For employees who do need to travel for work, employers may put in place mandatory work-from-home policies for employees who have traveled to destinations experiencing an active coronavirus outbreak. Moreover, employers may want to require vendors and other visitors to the office to disclose their recent travel history and certify that they have not traveled to a coronavirus hotspot or been exposed to a confirmed case of COVID-19. Businesses operating in New York and New Jersey should be cognizant that their employees will likely be the primary targets of such policies—and may be subject to state-mandated self-quarantine requirements—and should plan accordingly when arranging for essential business travel. Finally, employers must ensure that any travel-related restrictions or work-from-home policies are not based on discriminatory assumptions regarding race, ethnicity or national origin, and are equally applicable to all individuals.

F. Workplace Conduct Policies

Finally, there are several policies related to workplace conduct that employers should consider enacting to ensure worker safety when offices begin reopening:

- Employers should draft clear policies setting forth when and where employees will be required to wear PPE while in the office. These policies should be consistent with existing state and local guidelines on the use of face coverings. Employers should also consider in advance what modifications may be necessary to accommodate individual workers' needs while maintaining a safe working environment. For example, facial hair can limit the effectiveness of certain face coverings, but may be a requirement of an employee's religious practice or observance. Similarly, individuals with breathing problems or claustrophobia may find it difficult to wear masks for an extended period of time.

- Employers may need to enact policies that limit the size and location of internal and external meetings in order to comply with official guidance and rules regarding social distancing.

- Employers should refresh and revise policies related to physical interactions between employees in the office. It may be advisable to instruct employees not to hug or shake hands in the workplace to reinforce the need to practice social distancing and in order to remain compliant with state and local rules on reopening. The CDC guidance specifically recommends that employers prohibit handshaking in the office.

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In addition to these practical considerations, employers must be prepared to address many of the unique legal challenges that have arisen during the pandemic. Please be sure to review Part Two of this update, which will address many of these legal considerations, answer several of the most frequently asked questions regarding the return to work, and provide a set of best practices for business to follow as they develop their reopening plans.

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