

Returning to Work: Now What?

Your state and/or local government has decided that you can reopen your business and welcome back your employees. Now you may be thinking: "What do I need to think about in order to safely reopen and make sure my employees are safe?"

This is certainly not an exclusive list of considerations but may help guide you through the maze of conflicting obligations and/or concerns.

Protecting Employees

When reopening, employers should do at least the following consistent with state and federal guidelines:

- **Social Distancing.**
 - Consider designating, with signage, tape, or other means, 6-foot spacing for employees, customers and clients to maintain appropriate distances while in lines.
 - Consider implementing, with signage, tape, or other means, one-way movement through hallways and other high-traffic areas for employees and visitors to maintain appropriate distances.
 - Consider installing protective screens or other mitigation measures when employee and customer interactions are likely.
 - Consider perhaps limiting the number of customers in your business or certain areas at any one time.
 - Consider implementing protocols to limit the number of individuals per elevator at a time.
 - Consider adopting contactless payment systems, wherever possible.
 - In reception areas, limit the number of seats. Organize seats in such a manner so there is at least 6 feet between seats.
 - Use phones, videos, or video conferencing to reduce the need for meetings and other close personal contact.
 - Break rooms should be managed to reduce communal use. If safe distances cannot be maintained, consider finding alternative areas in which employees may take breaks.
- **Contractors and Vendors.**
 - Other members of the community may also have an impact on the safety of your workplace and your employees. Develop a protocol to instruct those individuals where they should report and what safety measures or protocols you want those non-employees to follow.

- **Housekeeping.**
 - Implement enhanced housekeeping practices which includes cleaning and disinfecting frequently-touched surfaces, tools, and equipment consistent with CDC Guidance.
 - Increase the frequency of cleaning of high-touch areas such as payment stations, touchscreens, bathrooms, elevator buttons and handrails, door and sink handles, water fountains, railings, keyboards, phones, and light switches.
 - Train staff to wipe down surfaces after every interaction and between time-entry visitations.
 - Conduct a full deep cleaning every evening.
 - Ensure the ventilation system is operating properly.
- **Personal Protective Equipment ("PPE").**
 - Unless you are a health care provider, mortuary or your employees are likely to come into contact with individuals with COVID-19, you may not be required to provide PPE except to employees using hazardous chemicals or cleaners. Custodial staff and others who are cleaning and disinfecting are at risk of being exposed to the virus and the toxic effect of cleaning chemicals. They should have appropriate PPE for cleaning and disinfecting, such as gloves and gowns.
 - Cloth face coverings: Your business may wish to draft a policy governing employee use of cloth facemasks. Generally, voluntary cloth facemasks are not PPE under OSHA, which requires training. Employees should, however, be provided with the CDC Guidelines so they know how to use and remove the cloth facemasks in the most effective manner and are made aware of their limitations.

Handling COVID-Positive Employees

Self-reporting of COVID-19 symptoms and exposure. Employers should have a policy to address whether and how employees should notify you if they test positive for COVID-19, are experiencing symptoms of COVID-19, have been exposed to the virus, are quarantined, or are living with someone who has tested positive or who is quarantined.

COVID-19 Testing:

- If testing becomes widespread, COVID-19 testing may be possible for employees, but it is not a substitute for taking other protective measures at the worksite. Some employers are utilizing onsite temperature checks or self-monitoring of temperature before allowing employees to enter the work facility. If you choose to do that for visitors or employees, you should develop a protocol for conducting onsite testing or collection of temperature data.
- For prospective employees, you may screen individuals for COVID-19 after making a conditional offer of employment. Employers may withdraw job offers or delay start date if an employee tests positive for COVID-19 or is experiencing symptoms of COVID-19. Employers should only do so after making a conditional job offer and only if they screen all prospective employees in the same job category for COVID-19 after making a conditional offer of employment.

- For current employees, you may ask current employees if they are experiencing symptoms of COVID-19. However, **DO NOT** ask if an employee has COVID-19 – only ask about symptoms.
- Develop a protocol to address what happens when employees are feeling ill or are exhibiting symptoms at work. They should be immediately separated from the rest of the staff. They should be given a mask and protective gloves as soon as possible and arrangements should be made for the employee to return home or to a health center.
- Returning to work after illness. You should also develop clear policies explaining the circumstances under which an employee may return to work after experiencing symptoms or being exposed to the virus.

Policy Considerations

- **Telework and Returning to Work.**

Employees who can continue to telework may be allowed to do so. Be flexible if employees are fearful of returning to work. Explain your efforts to make sure they have a safe workplace. If employees refuse to return for fear due to underlying medical conditions or other legitimate reasons, be flexible and let them take unpaid leave or accrued paid leave, if possible. If not possible, be careful about terminating employees, as they may be engaged in protected conduct. Consider replacing rather than terminating them.

- **Leave and Absence Protocol.**

There are several issues related to modifying or extending company leave policies to encourage employees to stay home from work if they are sick or have been exposed to COVID-19. Employers should be consistent in granting leave requests and abiding by company policy, as well as applicable federal, state and local law. If you have fewer than 500 employees, you may have an obligation to comply with the Families First Coronavirus Response Act ("FFCRA") which provides up to twelve (12) weeks of emergency leave for certain employees and/or eighty (80) hours of emergency paid leave in certain circumstances for employees.

Compliance with Applicable Laws

- **Workers' Compensation Laws**

Generally, state workers' compensation benefits are an exclusive remedy for any employees injured in the scope of their employment. Employees in many work environments will likely find it difficult to prove they contracted COVID-19 in the workplace as opposed to through community transmission. However, employees who are at higher risk due to their employment environment, such as first responders, health care providers, mortuary workers, or employees in workplaces that have experienced an outbreak of cases, may be entitled to workers' compensation benefits if they are able to prove they contracted COVID-19 in the workplace.

- **OSHA**

OSHA does not yet have a specific standard for the COVID-19 virus and generally is guided by Section 5(a)(1), the General Duty Clause. This provision requires employers to maintain a

safe workplace environment. Additionally, OSHA has provided informal guidance for several types of job categories, including dental practitioners, restaurants and beverage vendors offering takeout or curbside pickup, construction workers, package delivery workers, and manufacturing workers, which should be consulted. Generally, if employers follow the guidance and directives of the CDC, OSHA and state, local governments and agencies, it will be found to have acted reasonably.

- Employers are not, however, exempt from OSHA reporting. Certain employers are required to record work-related illnesses and injuries. Employers may be required on an OSHA form 300 to report a COVID-19 case if there is objective evidence, reasonably available to the employer, that the employee's contraction of COVID-19 was work-related. For example, if a number of cases develop among employees who work closely together without any other explanation, it may be a recordable injury. Health care providers, first responders, and correctional institutions must make a determination of whether an employee's known contraction of COVID-19 was related to workplace conditions.
- Employers must also make a report to OSHA if an employee is hospitalized or dies because of a workplace illness or injury. If an employee has a confirmed work-related case of COVID-19, employers must report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees. However, there is no duty to report if a fatality due to COVID-19 occurs more than 30 days after the workplace incident leading to the illness or if in-patient hospitalization occurs more than 24 hours after the workplace incident leading to the illness.

- **Employee Privacy**

It is important that any employee medical information which you are provided is kept confidential in accordance with the ADA. This information must be kept confidential and separate from any personnel files thus limiting the access to the confidential information. It may, however, be provided to those managers that have a need to know the information. If an employee reports COVID-19 symptoms or tests positive, the employer should not disclose the name of the employee to coworkers. However, the employer should inform potential close contacts of the employee that they may have been exposed to COVID-19.

Contact Us

Fraser Stryker's Labor and Employment Attorneys are available to answer questions and assist clients in preparation for, or response to, any legal issues related to COVID-19 and employees. Please reach out to us at (402) 341-6000 for further assistance.

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