

# Opening the Doors: Return-to-Workplace Considerations During COVID-19

## Part One: Navigating the Legal Risk of Return

April 16, 2020

Employment

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Whether a company is an essential business or is expecting to reopen in the coming weeks, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to work, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

This five-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

1. **Navigating the Legal Risk of Return (Part One)**
2. Considering Screening Measures for Employees Returning to Work ([Part Two](#))
3. General Workplace Safety Precautions ([Part Three](#))
4. Accommodating Special Circumstances ([Part Four](#))
5. International Employment Considerations ([Part Five](#))

### Navigating the Legal Risk of Return: Conflicting Orders, Waivers, and Potential Claims

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As a threshold issue, many employers will want to consider the risk that they will be subjected to claims by employees when resuming operations based on an employee's potential exposure to COVID-19 in the workplace. Such claims could theoretically arise no matter when operations resume if a vaccine is not yet available, but most employers cannot afford to wait until that time to recall employees to the worksite.

#### What Key Liabilities Should We Be Concerned About?

Generally speaking, employers are protected from liability for injury or illness to employees arising out of the scope of employment by the workers' compensation regime, a system governed by state law; workers' compensation is typically the exclusive remedy for tort liability against employers. However, in some jurisdictions, an employer found to have acted negligently in maintaining a safe workplace may lose the protection of workers' compensation. For

example, pursuant to the Occupational Safety and Health Act (OSHA), employers have a “general duty” to maintain a safe working environment. Although there is no individual cause of action under OSHA, a violation of OSHA, such as a failure to follow specific OSHA rules for personal protective equipment, could be used in some jurisdictions to establish “negligence per se” in a wrongful death or injury action or might result in an “intentional” action by the employer that could void workers’ compensation protection for the employer.

### **Can Negligence Arguments Be Made by Employees?**

Negligence arguments could be based on other circumstances. For example, employers may find that they are subject to multiple different orders impacting their ability to resume on-site operations, particularly if they operate in several jurisdictions. The federal government may also issue guidance that conflicts with state or local shelter-in-place or stay-at-home orders.

Employees who feel they are forced to return to work too early—an argument that could be bolstered by citing to conflicting guidance on the safety of doing so or by asserting that the employer failed to follow the appropriate governmental order—may seek to hold their employer liable at any time if they contract COVID-19 after returning to work.

### **Should Employees Be Asked to Sign Waivers Upon Return?**

Employers may wonder whether, to limit liability, they can ask employees to sign advance waivers of liability before bringing them back to work. Prospective waivers of claims by employees in favor of their employers are generally considered void as against public policy because of the unequal bargaining power of the parties, and are typically unenforceable. Moreover, employees cannot be asked to waive their access to their workers’ compensation benefits. Independent contractors, on the other hand, can be asked to sign waivers; most contracts between employers and contractors already contain indemnification provisions in favor of the employer.

### **What Role Should Health Authority Guidance Play?**

The most effective way for employers to mitigate risk is to closely track and follow health authority guidance concerning safe workspaces (including the [Centers for Disease Control’s interim guidance](#) concerning critical infrastructure workers) and follow the guidance most applicable to the physical location where employees will work—generally state or local guidance—to determine when the workplace should reopen.



As we will discuss in more depth in our next installment, employers are advised to adopt measures to promote a safe and healthy work environment, and communicate with employees about the safety measures the employer is taking, which could include, for example:

- implementing prescreening procedures for employees attending work;
- adopting social distancing measures in the workplace; and
- revising policies concerning schedules, leave, and telework.

### **Any Other Advice As We Consider Reopening?**

Based on the challenges set forth above, many employers may find it easier to adopt a gradual and flexible return-to-work process if feasible, including an “opt-in” process where employees are clearly notified that the decision to return is theirs. Employers in some locations may also want to consider whether to provide commuting stipends or benefits to enable employees to avoid public transit in commuting to the worksite.

Finally, employers are advised to establish a committee of key stakeholders (including executive, human resources, and legal representatives) to follow updates and changes in guidance and try to ensure consistency across operations.

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# Opening the Doors: Return-to-Workplace Considerations During COVID-19

## Part Two: Potential Screening Measures for Employees Returning to the Workplace

April 17, 2020

Employment

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Whether a company is an essential business or is expecting to reopen its doors in the coming weeks, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to work, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

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1. Navigating the Legal Risk of Return ([Part One](#))
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### Potential Screening Measures for Employees Returning to the Workplace

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Employers may want to adopt screening procedures for any employees attending or returning to the workplace. The [CDC](#) and many jurisdictions are now encouraging such checks. Furthermore, the EEOC has issued updated [guidance](#) clarifying that employers may conduct body temperature checks, COVID-19 diagnostic testing, and other limited medical inquiries of their employees during the COVID-19 pandemic without violating the Americans with Disabilities Act (ADA), given the threat of harm presented by infected employees in the workplace. (Employers should note that when the pandemic ends, they will be required to revert to stricter rules around employee medical inquiries and medical tests.)



## **What Can Employers Ask Employees About Symptoms During the Pandemic?**

Employers are permitted to ask employees whether they are experiencing any COVID-19 symptoms, such as a fever, chills, cough, shortness of breath, body aches, sore throat, or other symptoms identified by the CDC or other public health authorities. Employers may require that employees answer questions or provide certifications concerning their experience of any COVID-19 symptoms or their exposure to individuals with confirmed cases. Employers may do this on a daily basis or at other intervals, as well as when an employee calls in sick, and must maintain information as a confidential medical record. Employers should be careful not to ask health questions that are unrelated to COVID-19, including asking about underlying medical conditions or symptoms not associated with COVID-19. (For the purpose of determining whether an employee should be permitted to remain at home, employers can ask employees to certify as a general matter that they have an underlying health condition that heightens their risk of harm if they were to contract COVID-19.)

## **What Are Best Practices for Body Temperature Checks?**

Employers who decide to implement temperature checks during the pandemic should, as an initial consideration, determine whether they will ask employees to check their own temperatures at home or conduct checks onsite. In either scenario, employers should give notice to employees that the checks will be performed or required.

Additionally, for onsite checks, employers should observe best practices, including:

- setting forth a consistent process for conducting the checks;
- considering whether to use a third party to conduct the testing (with appropriate confidentiality agreements);
- providing private space for conducting checks;
- using no-contact thermometers or thermal scanners for checks, and conducting proper disinfecting as may be required;
- ensuring social distancing if employees must wait in line for the check;
- compensating non-exempt employees for time spent waiting, if applicable; and
- determining whether to conduct checks as a “go/no go” or to keep a log of temperature results.

Employers should also ensure compliance with [EEOC guidance](#) concerning how any temperature or other medical information collected in the process will be stored.

Finally, employees should be notified that temperature checks will not necessarily ensure a COVID-19-free workplace, because a significant percentage of employees infected with COVID-19 may be asymptomatic.

## **Are There Special Considerations for Employee Diagnostic Testing for COVID-19?**

Some employers may choose to provide or require COVID-19 diagnostic testing for employees, particularly as faster tests are developed and made more readily available. Currently, there are

several types of diagnostic tests available in the United States, including blood-based screening tests, which look for antibodies developed by the body in response to the virus, and molecular tests, which typically use nasal or throat swabs to look for the presence of the virus itself. There are different regulatory requirements applicable to each type of test, and employers should confirm that any testing is performed in a manner consistent with the requirements of the Centers for Medicare and Medicaid Services (CMS) and U.S. Food and Drug Administration (FDA). For example, according to current CMS guidance, any entity conducting COVID-19 testing (even for purposes of employee screenings) is required to maintain appropriate certification under the Clinical Laboratory Improvement Amendments (CLIA). Employers should also ensure that tests used for employee screening have received necessary FDA authorization for that purpose (e.g., point-of-care or home use). Employers should be aware of applicable local, state, and/or federal public health reporting obligations related to COVID-19 diagnostic testing.

The EEOC has released guidance authorizing employers to administer COVID-19 tests to employees before permitting employees to enter the workplace. The guidance indicates that a COVID-19 test is one that “detects the presence of the COVID-19 virus,” but the guidance does not specifically mention screening (antibody) tests. The EEOC advises that employers should ensure that the tests are accurate, and that employers should review guidance from the FDA and CDC and other public health authorities regarding what may or may not be considered safe and accurate testing. Additionally, the agency advises employers to consider the incidence of false-positives or false-negatives for a particular test, and to be aware that accurate testing only reveals whether someone currently has the virus but does not mean someone will not acquire the virus later. Employers should also generally observe the best practices cited with respect to temperature checks, above, with any diagnostic testing.

### **If “Immunity Credentialing” or Similar Immunity Certification Is Adopted, What Should Employers Know?**

If antibody (serology) tests become widely available to screen for potential immunity to the coronavirus, government authorities may consider issuing certificates of immunity or other indicators of an individual’s immunity to the virus. These certificates may then be used to determine which individuals can safely move about in public without presenting a threat to themselves or others, and employers may want to consider how to use these to determine who could safely return to the worksite. As this issue unfolds, employers are advised to pay close attention to CDC, EEOC and other guidance that is issued on how employers could use the certificates to screen workers, as there are a host of possible employment law risks, including discrimination claims and medical confidentiality considerations.

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## Employment

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# Opening the Doors: Return-to-Workplace Considerations During COVID-19

## Part Three: General Workplace Safety Precautions

April 21, 2020

Employment

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Whether a company is an essential business or is expecting to reopen its doors in the coming weeks, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to work, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

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### General Workplace Safety Precautions

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As described in Part One, employers have a general duty under the Occupational Safety and Health Act (OSHA) and comparable state laws to provide a safe workplace for employees. Employers should consult federal, state, and local agency guidance regarding workplace safety measures to be taken during the pandemic, including [CDC](#) and [OSHA](#) guidance on the subject. Complying with applicable guidance on workplace safety issues will help minimize the risk of claims by employees, vendors, visitors, or other parties alleging that the employer negligently or willfully failed to maintain a safe work environment.



This alert addresses safety precautions all employers should consider, including social distancing, use of protective equipment, hygiene practices, developing protocols for workplace and off-duty exposures, and more.

### **How Should We Address Social Distancing in the Workplace?**

Implementing social distancing measures will be an important key to maintaining a safe workplace during the COVID-19 pandemic. While the particular social distancing practices will need to vary depending on the type of workplace or as may be required by an applicable public health agency or other governmental order, examples of social distancing measures in the workplace could include:

- closing lunch rooms or staggering lunch and break times;
- removing chairs from conference rooms to limit attendance at meetings and ensure employees can sit at least six feet apart;
- leaving a buffer between scheduled meetings in conference or meeting rooms to avoid overlap between two groups and to allow time for cleanings;
- installing social distancing decals on the floors of any shared spaces in the workplace;
- encouraging employees with their own offices to stay in their offices as much as possible;
- adopting videoconference guidelines or installing video phones so that even when in the office, employees are discouraged from meeting in person;
- to the extent possible, restructuring open floor layouts to ensure that employees can sit at least six feet away from each other;
- installing barriers between workspaces, in reception areas, or between customers and employees that can be easily cleaned and are high enough to prevent contact;
- delivering products through curbside pick-up or delivery; and
- posting social distancing reminders throughout the workplace, including compliance with any state or local posting requirements.

### **Can Changes to Work Schedules Be a Part of the Overall Plan?**

Staggering shifts or splitting or rotating work schedules may also reduce the number of employees present in the office at any given time. When considering this approach, review applicable state and local laws that affect the timing of meal and rest periods, as well as laws regarding payment of overtime if these practices result in longer shifts for employees.

Employers may also consider staggering employee returns in order to minimize the number of employees returning at once and the logistics of staggered or split shifts.

Employers should also consider limiting the number of clients, customers, and other third parties in the facility or workplace. Decisions about limiting the number of employees or visitors allowed onsite should be made on a nondiscriminatory and consistent basis.

### **What Protective Equipment Should Be Used?**

Depending on the particular workplace and job duties, personal protective equipment (PPE) may be recommended or required by OSHA or state law, and employers should follow OSHA and other governmental guidelines for training employees on the donning and doffing, use, and maintenance of this equipment. PPE may include, for example, gloves, goggles, face shields, masks (see more below), and respiratory protection. Employers may need to prepare a written hazard assessment relating to PPE use.

## Can Employers Require Employees to Wear Face Coverings?

Masks may be required PPE depending on the job and risks. In addition, employers should consider encouraging or requiring the use of cloth face coverings or masks to limit the potential spread of germs (although due to current shortages in supply, N-95 masks should generally not be used or required unless indicated by the type of work). Note that some jurisdictions are requiring face coverings in some circumstances, and more states and cities will likely follow suit.

Generally, employers can issue face coverings or, in the event of a shortage, can approve employee-supplied cloth coverings, although it is important to note that some jurisdictions specifically require employers to provide the coverings. Also, employers may be required to accommodate workers who cannot wear a mask or face covering for medical or religious reasons provided that doing so would not pose an undue hardship for the company's operations.



## What Are Basic Hygiene and Infection Control Practices to Implement?

Even prior to the outbreak of COVID-19 in the U.S., OSHA and the CDC recommended that employers implement good hygiene and infection control practices to curb the spread of the virus, and these should continue as employees return to the workplace. These measures include promoting frequent hand washing and making soap and running water readily available, providing hand sanitizer, encouraging employees to cover their coughs and sneezes, providing tissues and trash receptacles, and requiring workers to stay home when they are ill or have been exposed. Employers should discourage the sharing of personal work equipment, if feasible, such as desks, phones, headsets (or any other equipment that will touch the face), computers, and work tools, and clean and disinfect such items that are shared. Also, it is critical to implement routine and careful cleaning and disinfecting of surfaces, equipment, and work areas. The U.S. Environmental Protection Agency (EPA) has issued [guidance](#) on disinfectants for use against COVID-19, and the CDC has issued [guidance](#) on cleaning and disinfecting workplaces, which employers should follow.

## Are There Additional Safety Controls that Employers Should Consider?

The types of controls that should be implemented will depend on the risks of exposure in the particular workplace or facility. Additional measures for all employers to consider include:

- developing an infectious disease preparedness and response plan;
- keeping current on federal, state, and local public health guidance;
- providing workers with education and training on COVID-19 risk factors and infection control and hygiene practices;
- screening employees for entry to the workplace (see [Part Two](#) for more information);
- engineering controls, such as installing high-efficiency air filters and increasing ventilation rates, installing physical barriers like sneeze guards, and installing drive-up or drive-through windows for customer service; and
- performing a formal hazard assessment to evaluate whether any other controls may be necessary.

## What Steps Are Recommended to Address Workplace Exposures to COVID-19?

In addition to implementing general safety practices to avoid the spread of COVID-19 in the workplace, it is critical to have in place clear procedures to follow when an employer discovers that an individual with COVID-19 is or has been in the workplace. The employer's protocol should follow CDC and other applicable guidance and should include:

- procedures to identify and isolate individuals who have symptoms of COVID-19, and to seek medical attention for them if needed;
- guidelines to ensure that the affected individual's identity is kept confidential;
- plans for identifying "close contacts"—co-workers or others the affected individual may have come into close contact with as defined by the CDC—which can include a questionnaire for interviewing the individual to determine when symptoms began and with whom he or she interacted while contagious (typically beginning two days prior to the onset of symptoms, according to current CDC guidance) and other steps that may be needed to accurately identify contacts;
- communication plans and template notifications, including a detailed notice to send to employees who were in close contact with the affected person, with instructions on self-quarantine requirements; a more general notice for the workplace indicating that workers may have been exposed; and notifications to any contractors, customers, vendors, or other third parties who may be close contacts;
- processes for disinfecting the workspace and common areas, in accordance with CDC guidelines and using products and chemicals that meet the EPA's criteria for use against the virus that causes COVID-19; and
- processes for recording and/or reporting such illnesses to OSHA or state authorities, to the extent required by evolving [OSHA guidance](#) or state guidance on the topic.

Employers also should develop a return-to-work protocol for employees who contract COVID-19, following CDC or other public health agency guidance on ending isolation. Employers generally may ask for medical certification in this circumstance, but should consider that such certifications may continue to be difficult for employees to obtain. Employers may consider instead using questionnaires or interviews to obtain the necessary information to confirm that the recommended isolation/quarantine protocol has been followed and that it is safe for the employee to return.

## How Should Employers Address Quarantine Requirements for Employees Exposed to COVID-19 While Off-Duty?

When an employee has been exposed to COVID-19 outside the workplace, either due to close contact with a household member or through other contacts, the employee should be required to self-quarantine as recommended by CDC standards or as mandated by state or local health authorities. The self-quarantine period generally is 14 days from last exposure. However, CDC guidance indicates that [critical infrastructure workers](#) who have been exposed but remain asymptomatic may continue working provided that appropriate screening measures and other enhanced safety protocols are in place with respect to such workers.

## **Should Employers Consider Workplace Tracking to Ensure That Close Contacts Can Be Accurately and Promptly Determined?**

Numerous vendors are developing devices and programs for tracking employee movement in the workplace, both to monitor compliance with social distancing requirements and to track any close contacts of infected employees in the workplace. The use of these products could have workplace privacy implications. Employers should therefore carefully review what data may be captured, how the data might be used or disclosed, and what measures might be needed, including confidentiality requirements and employee notice and/or consent, to mitigate legal risks.

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# Opening the Doors: Return-to-Workplace Considerations During COVID-19

## Part Four: Accommodating Special Circumstances

April 22, 2020

Employment

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### Accommodating Special Circumstances

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As employers plan for and begin welcoming employees back into the workplace, a variety of unique employee situations may require attention. Some employees may still need to telework for operational reasons, others may have child care responsibilities or require medical accommodations, and more than a few will express fear about returning to the worksite. This alert provides an overview of how employers can navigate these special circumstances.

#### Are There Best Practices for Balancing Onsite and Remote Work?

For a variety of reasons, some employees will need to continue to work remotely. Operationally, employers may cap the number of employees initially invited to return to the workplace to implement social distancing measures; for the same reason, employers may want to consider splitting teams or rotating schedules to reduce the number of employees in the workplace at any one time. In planning for these steps, employers



should be guided by justifiable operational needs and goals so as to ensure consistency and fairness in who is invited to return. Employers should also review their policies and practices to ensure that there are no barriers—technological or otherwise—to communications between in-office and remote workers and that in-office and remote workers are treated equitably. Employers may also want to revisit best practices for remote working, taking into account what practices have worked well during the period of fully remote work and what could be improved.

### **How Should Employers Approach Accommodations for Employees with Medical Issues?**

Even in a pandemic, employers have a duty to provide reasonable accommodations for employees who may be considered disabled under the Americans with Disabilities Act (ADA) or corresponding state laws if an accommodation will not impose an undue hardship on the business. Some employees may have underlying health conditions that put them at greater risk of complication from COVID-19 and may therefore seek to remain out of the workplace or seek enhanced protections in the workplace. The latter might include increased protections to reduce the risk of exposure to co-workers or customers, such as physical barriers or temporary transfers to a different position. Flexible scheduling may be provided to allow employees to work or commute at times when exposure risks may be lower. Employers may also need to address accommodations for employees who were receiving accommodations prior to the pandemic or for employees with mental health conditions that have been exacerbated by the pandemic.

As always under the ADA, in response to an accommodation request, the employer may ask questions or request medical documentation to determine whether the individual is subject to the protections of the ADA, and, if so, the employer should engage in an interactive process to determine what type of accommodation might be needed. The EEOC has acknowledged in recent [guidance](#) that, given the pandemic, the usual interactive process may be infeasible; the EEOC suggests that employers may adapt the interactive process, such as by providing temporary or trial accommodations with end dates and then revisiting the accommodation later if it needs to be altered or extended.

Employers may also consider getting a head start on the accommodation process before the doors open. The EEOC has indicated that employers may proactively ask eligible employees to request accommodations that may be needed when the workplace reopens.

### **Can Employers Delay Returning Disabled or Older Workers to the Worksite?**

Employers should not make decisions or adopt blanket rules about who can return to work based on a protected characteristic, such as age or a known or suspected disability or health condition. Employers can, however, encourage workers to self-identify (without requiring detailed information) if they have special circumstances or vulnerabilities that may require accommodation or consideration in the return-to-workplace process.

### **What Are Key Family Care Considerations?**

Some employees may be unable to return to the workplace, or to regular schedules, because of child or elder care responsibilities, particularly if schools remain closed. Employees may be eligible in these circumstances for emergency paid sick leave or emergency family leave under the Families First Coronavirus Response Act (FFCRA). If the employer is not covered under FFCRA or the leave is otherwise unavailable to an employee, employers should consider permitting employees to use other accrued vacation or PTO for child care reasons. Other

options that should be considered, and may need to be implemented for a longer term, include permitting continued telework and flexible schedules or locating or subsidizing child care.

In addition, some jurisdictions prohibit discrimination based on family responsibilities or caregiver status, and certain employer practices with regard to caregivers may implicate gender-specific issues. Employers should ensure that return-to-workplace policies treat caregivers equitably and that well-meaning supervisors do not exclude workers with child care or other family responsibilities from important work opportunities.

### **Are There Other Discrimination Issues Employers Should Monitor?**

As workers return to the job site, employers should reinforce their anti-bias and anti-harassment policies to ensure that employees are not subjected to misconduct or inequitable treatment based on their race or national origin, including as a result of bias arising from the perceived origin of COVID-19.

### **Are Businesses Required to Provide Commuter Assistance?**

Generally, employers are not required to provide transportation to work or assist with an employee's commute. However, during the pandemic, employee fears about using various forms of public transit—subways, buses, or shared rides—could interfere with their willingness to return to work. Thus, as part of an overall plan to maintain operations and a safe work environment, employers may want to consider whether it is feasible to find ways to temporarily reduce reliance on public transit, which could take the form of parking benefits or commuting stipends that would allow employees to take private transportation to work. Employers could also consider schedule flexibility to allow workers to use public transit at off-peak hours.

### **Do Business Travel Policies Need Attention?**

Business travel policies may need to be updated to comply with evolving travel precautions and recommendations set forth by the CDC and other health authorities, and to accommodate employees' health or child care concerns. Also, employers should assess how to address fear of traveling during the pandemic, such as postponing travel where feasible or having employees participate in meetings or events through video conference instead. For all work travel, employers should make reasonable efforts to promote social distancing during business trips, such as arranging for travel during off-peak hours or reserving airplane seats that are located away from other travelers if possible. Employers should also consider whether quarantines are required upon return from business travel, and ensure that employees continue to be paid during the quarantine period if they cannot otherwise work.

Because there could be intermittent disruptions to global travel for the foreseeable future, businesses should consider implementing a protocol in case travel is shut down while an employee is abroad. This could include educating employees on the current risks of travel, how company policies may apply during travel, and what assistance will be available if the employee is stranded during travel.

### **Any Other Policies We Should Consider?**

Employers may have adopted or revised a number of policies or practices during the period of remote work that may need to be revisited. For example, employers have been permitted during the remote work period to complete I-9 verifications over videoconference; the Department of

Homeland Security has implemented procedures that must be followed to revisit the verifications once operations resume. Likewise, background checks may have been postponed for onboarding employees due to court closures, and these should be completed once operations resume. Any deadlines that have been postponed during the period of remote work should be revisited.

### **How Should Employers Handle Employee Fears About Returning to the Workplace?**

Employers should communicate with employees who express concern about returning to identify the source of their fear. If an employee is hesitant to work alongside colleagues who may have already been infected with COVID-19, educating employees about the low exposure risk associated with this circumstance may be the best way to ameliorate concerns. Employees who are generally fearful about contracting COVID-19 at work may be reassured by communications from the employer concerning the steps that are being taken to ensure the safety of the workplace. A gradual, voluntary return-to-workplace plan may also enable hesitant employees to delay returning until they see that employers are able to safely operate with social distancing and other measures in place that are protective of employees. Employees may also be willing to return to the worksite but unwilling to take public transportation to get there. As discussed above, employers may consider measures to assist with commuting issues.

Despite an employer's best efforts to create a safe work environment, some employees may refuse to come to work based on nothing other than a general fear of rejoining public life while the pandemic continues. Although likely permissible in many circumstances, employers should exercise caution before disciplining or terminating such employees, in light of protections under the National Labor Relations Act for "concerted activity" by employees with regard to the terms and conditions of their work, and because of the uncertain legal landscape related to liability for exposure to the virus in the workplace. However, employers are not required to pay employees who refuse to return to work and cannot work remotely if the employer can demonstrate that it has complied with all appropriate measures to reduce the risk of exposure in the workplace.

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# Opening the Doors: Return-to-Workplace Considerations During COVID-19

## Part Five: International Employment Considerations

April 27, 2020

Employment

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Whether a company is an essential business or is expecting to reopen in the coming weeks, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to the workplace, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

This five-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

1. Navigating the Legal Risk of Return ([Part One](#))
2. Potential Screening Measures for Employees Returning to the Workplace ([Part Two](#))
3. General Workplace Safety Precautions ([Part Three](#))
4. Accommodating Special Circumstances ([Part Four](#))
5. **International Employment Considerations (Part Five)**

### International Considerations

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As governments internationally face growing pressure to identify the milestones leading to the reopening of markets and economies, and an increasing number of large companies announce plans to restart work imminently, employers are thinking creatively about ways to balance legal/compliance risk against commercial imperatives.

In some countries, such as South Korea, business has remained open, albeit subject to social distancing measures. In others, notably Germany, steps are being taken to reopen certain businesses and to ease lockdown measures implemented weeks ago. President Trump's White House has issued a three-phased plan for reopening the U.S. economy, entitled Opening Up America Again. Otherwise, governments around the globe are generally demonstrating reluctance to produce guidance suggesting that a return to "business as usual" will be happening any time soon. The UK government, for example, appears to feel that any such messaging would undermine clear public pronouncements concerning the need to isolate.



As addressed in [Part One](#) of this series, a threshold issue for many employers contemplating the resumption of business is the risk of claims by employees who may be exposed to COVID-19 in the workplace. Such claims could theoretically arise no matter when operations resume, if a vaccine is not yet available. Most employers cannot afford to wait until that time to recall employees to the worksite, however.

Employers will therefore want to consider preparatory steps carefully. Certain of the issues addressed below are already addressed from a U.S. perspective in previous briefings in this series, linked above. In this briefing, we highlight some of the international employment legal considerations that will need to be taken into account by multinationals with operations outside of the U.S. as they plan for the resumption of operations.

### Guidance and Benchmarking

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Employers operating in multiple jurisdictions should think carefully about the following questions as they formulate a plan for resuming on-site operations:

- What governmental or other health and safety guidance is available and relevant locally?
- How are employment agencies and contract workers engaged by the business thinking about these issues?
- Have industry associations or relevant employee representative bodies published any thinking on return to work protocols/measures?
- Is it necessary or appropriate to liaise with works councils, health and safety committees, or local health authorities before making concrete return to work plans?

### Flexible Working Practices

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Social distancing can be promoted by working on strategies to address:

- **Technology.** Employers should consider whether any technological improvements may be necessary to facilitate better remote working.
- **Flexible Work.** Increased teleworking and greater flexibility as to working hours and shift patterns will limit the number of employees travelling to and from work, and on site at any one time, so employers should consider these measures. Requests for flexible work should be addressed in a non-discriminatory fashion. Indirect discrimination occurs, for example, where a protected class of employees suffers a disadvantage as a consequence of the application of policies and procedures, and such disadvantage cannot be justified as a proportionate means of achieving a legitimate goal. Employers should also note that local laws may entitle employees to take time off work, paid or unpaid, to care for dependents.
- **Travel and Non-essential Meetings.** Employers should consider how to avoid non-essential meetings and travel, at least at the outset. Companies may need to consider investment in new technology and equipment in order to promote new ways of working.



- **Sabbaticals/Unpaid Leave.** It may suit some employers, from a cost-management perspective, to encourage those wishing to do so to take sabbaticals or unpaid leave until the reopening of the office is more settled.
- **Key Roles and Functions.** Some employers are taking this opportunity to review their operations generally, to optimise current organisational structures and reporting lines, and reduce some headcount. At-will employment is not a concept recognised in most ex-U.S. locations, so decisions on selection for termination will generally need to be justified legally if unfair or abusive dismissal claims are to be avoided. Employers will also need to consider applicable notice periods, the enforceability of any post-termination restrictions, and other relevant contractual rights and obligations before finalising concrete plans.
- **Employee Waivers.** As in the U.S., it is unlikely in most countries that employees who may be infected with COVID-19 as a consequence of a return to work will be able lawfully to waive prospective personal injury claims against employers. Suitable preparation and planning, however, will significantly reduce, or even eliminate, the risk of negligence findings against employers.
- **Employee Engagement.** Employers operating internationally may need to include employees, or their representatives, in planning for a return to work. Open and clear communication will be central to securing the necessary confidence from employees to make the return to the office a success. In France, for example, health and safety committees will have a central role to play in implementing return to work programmes. In other countries across Asia and Europe, trade unions will have a right to consultation, and potentially co-determination, in connection with employee safety measures.
- **Sick Leave, Pay, and Benefits.** Employers should consider whether relevant company policies can be temporarily amended, or supplemented, to secure employee buy-in on the measures being considered to facilitate a return to work.



Further thoughts on social distancing arrangements are provided in [Part Three](#) of our briefings in this series.

## Employee Screening

Employers recognise that medical checks and other testing and screening programmes will be critical to any successful return to the workplace. In the U.S., as addressed in [Part Two](#) of this series, the CDC, the EEOC and others have provided guidance to employers wishing to conduct body temperature checks and other limited medical inquiries of their employees during the COVID-19 pandemic without violating anti-discrimination rules. Similar considerations will apply internationally, particularly in relation to those with secondary health issues who may have protections under applicable law as disabled workers.



In addition, data privacy compliance will be a sharp issue in Europe and other countries with similar privacy regimes (such as Argentina, Australia, Singapore and Canada), though many national regulators have suggested that data privacy laws should not stand in the way of efforts to combat and overcome the COVID-19 pandemic. Health data constitute sensitive or “special

category” data for the purposes of the General Data Protection Regulation (GDPR). Enhanced levels of protection therefore apply to the collection, storage, and processing of such medical data, and numerous data protection regulators around the globe have now published guidance on COVID-19 privacy considerations. Even across the European Union, where member states are governed by the GDPR, there is a significant degree of variance between countries in terms of the data that employers will be permitted to collect from employees and visitors—including whether body temperature screening is allowed—so this guidance should be reviewed carefully by employers before implementing any screening program. In particular, employers should ensure they are complying with any consent or privacy impact assessment requirements in relevant jurisdictions.

Diagnostic testing will engage a range of other relevant regulatory considerations regarding use of approved medical tests, and reporting of notifiable diseases to local health authorities (a duty generally imposed on any third party medical professional retained by employers to conduct tests). Once possessed of relevant health data, employers may wish to develop procedures for workforce contact-tracing if an employee tests positive for COVID-19 and has been in contact with others in the workplace, and this, too, will impact privacy regulations. Employers should review relevant regulatory requirements in any jurisdiction where diagnostic testing will occur.



Any screening or tracking initiatives should be implemented in coordination with any internal privacy officers, HR, and compliance teams. Employers should consider adopting a separate COVID-19 influenced health and safety policy, with employees from these teams appointed to oversee the implementation of health and safety measures, share management thinking with employees, and pass employee feedback to management. Again, employee representatives might need to be informed/consulted with respect to any new policies impacting working practices—particularly in the Netherlands or Germany, where works councils have express authority to engage on such issues.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Employment practice:

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