

Back to the Future

Employer considerations for returning to the workplace

MARK E. BROSSMAN, RONALD E. RICHMAN, MAX GARFIELD, SCOTT A. GOLD AND ABDULRAHMAN ALWATTAR, SCHULTE ROTH & ZABEL

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As government mandated stay-at-home orders are eased or lifted, employers will be presented with the decisions of if, when and how, to bring their employees back to the workplace. A return to the workplace from lockdown mode does not mean a return to how business was conducted prior to the COVID-19 pandemic. New laws, orders, directives and guidance from every level of government are being issued and have weaved a complex regulatory web for employers to navigate. Employers need to be cautious, engage in advanced planning and make numerous important decisions prior to reopening offices.

Plethora of guidance

Guidance has been issued from all levels of government and is expected to continue to be issued in the coming weeks. The White House has issued nonbinding guidelines, which envision a slow, phased reopening over a period of weeks or months. The Centers for Disease Control and Prevention (“CDC”) published a checklist for employers considering reopening workplaces, providing a list of recommended health and safety actions and ongoing monitoring plans employers should take before reopening.¹ State and local governments have also issued guidelines. In New York State, Governor Andrew M. Cuomo issued Regional Guidelines for Reopening New York, which provide that different types of businesses in 10 different regions of the state will be permitted to open in phases. The phases are based on the CDC’s recommendations. Prior to reopening, a region must experience a 14-day decline in hospitalizations and deaths over a three-day rolling average.² Governor Cuomo’s guidelines provide, inter alia, that to maintain the phased reopening, each region must have at least 30% total hospital beds and ICU beds available after elective surgeries resume, coupled with at least a 90-day stockpile of personal protective equipment (“PPE”).³ The Governor also requires capacity for diagnostic testing regimen, a

comprehensive tracing system and isolation facilities.⁴ The Governor’s “shelter in-place” order for the State of New York was extended until May 28, 2020, provided that certain industries in certain parts of the state outside of the New York City metropolitan area may reopen as early as May 15, 2020.

Should an employer reopen?

The health and safety of the workforce should be the guiding principle behind all decisions concerning reopening. The general duty clause of the Occupational Safety and Health Act (“OSHA”) requires that each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or are likely to cause death or serious physical harm.⁵ Absent a vaccine or treatment, reopening will be gradual as stay-at-home orders are lifted. Further, there is a concern that there will be a second wave of the COVID-19 with a much larger spread. When considering reopening, an employer should determine if its workplace is in a community no longer requiring significant mitigation and whether the employer has protective measures in place for employees, including those at high risk. All employers should familiarize themselves with OSHA’s Guidance on Preparing Workplaces for COVID-19 and closely follow guidance from other government agencies as the crisis evolves.

Doing so should help address employer concerns related to potential litigation and COVID-19. The COVID-19 pandemic is already proving to be fertile breeding ground for litigation, which will likely continue, and infected employees (and plaintiffs’ counsel) may seek to hold employers liable. While it is not yet clear how workplace contractions of the COVID-19 will be treated, state workers’ compensation statutes may bar many employee tort claims. Proving causation will present another challenge to these types of claims. Furthermore, state and federal lawmakers are considering legislation that would immunize certain employers from

these types of claims. Accordingly, to protect employees and help mitigate potential liability, before reopening their worksites, employers need to consider how best to reduce the risk of COVID-19 infection in their workplace.

Preparing the workplace

Prior to reopening, employers should consider reconfiguring their physical workplaces and modifying floor plans. Alterations to workspaces and layouts should be considered to place employees further apart from one another so that coworkers can realistically maintain at least a six-foot distance during the work day. Some employers should use Plexiglas, tables or other barriers to ensure minimum distances between coworkers and/or customers. In enclosed spaces, employers should consider establishing one-way directional flow of movement. Coworkers should not share property, such as phones, computers or desks in the workplace. Employers should conduct deep cleanings of entire workplaces frequently, conduct regular disinfecting of high-touch surfaces and shared equipment, and consider increasing ventilation of their workplaces. If industrial cleaning solutions will be used to clean workspaces, employees using and storing such solutions should be trained on their use and the proper protective equipment that should be worn during such use. The necessary protective equipment to administer the cleaning solutions (e.g., masks and gloves) should be provided by the employer.

Access to nonessential shared spaces, such as large meetings rooms, should be restricted. For essential shared spaces, such as restrooms, elevators, office printers and perhaps pantries, employers should adopt policies that limit the number of individuals permitted in such areas. These policies may include posting signage to inform employees to limit the number of individuals in these shared areas to a “safe” number, closing off sections of the shared

areas, or raising temporary barriers in such areas to reduce the number of employees able to contemporaneously access those areas. Close contact between employees should be avoided as much as practicable. Food deliveries to the workplace should be prohibited. Likewise, access to joint refrigerators and kitchen areas should be restricted. To the extent applicable, employees should be required to bring their own food and utensils to work.

Personal hygiene items, such as hand soap, hand sanitizer containing at least 60% alcohol, disinfectant wipes, sanitizer and tissues, should be made readily available and distributed throughout the workplace. Employers should consider providing single-use tools to employees to limit direct contact with high-touch surfaces.

Preparing the workforce

Employees should be apprised of new safety and workplace policies before returning to work. Social distancing in the workplace should be required and enforced. Not all employees need be recalled to the workplace at the same time. Employers should consider gradually recalling employees to reduce density in the workplace, beginning with those employees or departments that are the most “essential.” In addition, work hours or work days can be staggered so that not all recalled employees are physically present in the workplace at the same time. All nonessential business travel should be prohibited. The number of customers or clients permitted into an employer’s facilities should be restricted. In-person meetings, if required, should have limited attendees with required physical distancing and be of short duration.

Some employers successfully operated various departments or businesses by telework. These businesses should determine whether employees can and should continue to work from home. Many predict that telework is here to stay and that the future of work has been permanently altered, and employers should develop and publicize policies on teleworking. An employer’s teleworking policy should clarify

that it is temporary (e.g., lasting only for the duration of the COVID-19 pandemic) and that it can be terminated by the employer, in its sole discretion, at any time. Such policies may, if appropriate, further clarify that employees’ physical attendance is still considered an essential job function.

Employers should consider providing personal protective equipment, including masks and gloves, to all employees and require the donning of all such PPE in the workplace at all times. Masks must be utilized in all close-contact settings. Employers should also require employees to follow certain hygiene protocols, such as periodic hand washing or sanitizing, and the use and disposal of tissues. Signage reflecting these protocols should be strategically posted to boost employee compliance.

Employers have a responsibility to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic. The US Equal Employment Opportunity Commission (“EEOC”) has recommended that employers explicitly communicate to their workforce that “fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.”⁶ They note that it may be helpful for employers to advise supervisors and managers of their roles in “watching for, stopping and reporting any harassment or other discrimination.”⁷

Responding to employee COVID-19 concerns

Communication during this period of uncertainty is critical. Employers should develop policies and procedures to deal with COVID-19 issues and concerns. Managers should be trained and point persons assigned to answer any questions and record comments and concerns. Employers must be sensitive to employee concerns and deal with each employee on an individualized basis. Employers should adapt or create systems to receive feedback. For example, some employees

may refuse to return to work out of fear of contracting COVID-19. While employers do not necessarily need to comply with an employee’s desire to continue teleworking, employers should have personal discussions with such employees to address their concerns and reach a resolution. If an employee has a reasonable belief that he or she is under imminent threat of death or serious physical harm, OSHA permits such an employee to refuse to work.⁸ This, however, is a high standard and will be a steep hurdle for employees to clear. Employers should be creative in developing policies to put employees at ease and increase employee participation in reopening. For example, in the early days of reopening, an employer may permit employees to telework for a certain number of days per week or make coming to the workplace voluntary for all employees.

Employers should also be aware of what options their employees have to commute to work. Certain locations and forms of commuting may put employees at increased risk to contract the virus. Some employers are considering offering private shuttles to employees or giving employees a stipend to cover private cars or rental cars for their commutes.

In addition to considering applicability of the employer’s existing leave policies and the Family and Medical Leave Act (“FMLA”) and state and city leave requirements, such as New York’s new paid sick leave laws, employers should be aware that the federal Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act have added additional legal requirements concerning employee leave. Employers with fewer than 500 employees are required to provide certain paid childcare leave and paid sick leave through Dec. 31, 2020.⁹ Of most concern to employers seeking to have employees return to the workplace is the acts’ temporary amendment of FMLA to include a new entitlement of up to 12 weeks of paid leave to employees that are unable to work (in person or remotely) due to

a need to care for a child because the child's physical school or child care is unavailable due to a public health emergency.¹⁰ Caring for a child in this circumstance is a qualifying reason for both emergency paid sick leave and emergency FMLA leave. Paid sick leave (limited to \$200 per day or \$2,000 total) is available for the first 10 work days of expanded FMLA leave, which are otherwise unpaid.¹¹ After the 10 work days elapse, the employee would receive two-thirds of the employee's regular rate of pay for the hours the employee would have been scheduled to work in the ensuing 10 weeks (capped at \$200 per day or \$10,000 total).¹² Employers with fewer than 50 employees are exempt from this new FMLA requirement if they can establish that leave would jeopardize the viability of their business according to criteria set by the US Department of Labor.¹³

Screening employees

The EEOC has issued guidance concerning monitoring COVID-19 symptoms and making medical inquiries. Before permitting employees to repopulate the workplace, employers should consider asking their employees to answer questions on their symptoms, exposure and any previous diagnosis related to COVID-19. Questions concerning whether an employee tested positive or has been experiencing COVID-19 symptoms, or whether the employee has been exposed to anyone who has been diagnosed with COVID-19 or who has displayed symptoms associated with COVID-19, are permissible.¹⁴

The EEOC has clarified that even if an employer knows that an employee has a medical condition that might place the employee at high risk of severe illness if he or she becomes infected with COVID-19, the employer is not allowed to exclude the employee — or take any other adverse action solely because the employee has a disability that the CDC identifies as potentially placing the employee at high risk.¹⁵ If the employee does not request a reasonable accommodation, the law does not mandate that the employer take action. Such action is only allowed if the employee's disability

poses a "direct threat" to their health that cannot be eliminated or reduced by reasonable accommodation.¹⁶ The direct threat requirement is a high standard and is not satisfied based solely on the condition being on the CDC's list — "the determination must be an individualized assessment based on a reasonable medical judgment using the most current medical knowledge and/or best available objective evidence about the employee's disability."¹⁷ In making this determination, employers may ask an employee to submit to a medical examination if the employer has "a reasonable belief, based on objective evidence," that the employee will pose a "direct threat" due to their medical condition.¹⁸ Even if an employer determines that the disability constitutes a direct threat to the employee's health, the employer can only exclude the employee from the workplace if there is no way to provide a reasonable accommodation that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace.¹⁹

The EEOC noted that accommodation may include:

- Additional or enhanced protective gowns, masks, gloves or other gear.
- Additional or enhanced protective measures, for example, erecting a barrier that provides separation or increasing the space between an employee with a disability and others.
- Elimination of marginal job duties — i.e., duties that can be reassigned as a reasonable accommodation without causing an undue burden or hardship.
- Temporary modification of work schedules.
- Moving the location of where the employee performs work.²⁰

The EEOC has stated that disability-related inquiries and conducting medical exams are permitted if job-related and consistent with business necessity and that inquiries and reliable medical exams meet this standard, if necessary, to exclude employees with a medical condition that would pose a direct threat to

their health and safety.²¹ Accordingly, during the pandemic, employers are permitted to conduct COVID-19 tests on employees, including taking employee body temperatures, before permitting employees to enter their worksite.²² Employers should ensure that their tests are accurate and reliable using available guidance from the CDC or other public health authorities. All tests must be administered in a non-discriminatory manner. Further, such tests should be, when possible, conducted by a health care professional. Tests and screenings should be done privately and the results of such tests and screenings are confidential and should be maintained by employers as confidential medical records. With respect to antibody testing, the EEOC has not yet issued guidance on the legality of administering such testing.

Moreover, the antibody tests in their current form may have reliability and accuracy issues and the EEOC warns employers to be cautious of relying on inaccurate testing. Finally, there have been extensive discussions about utilizing technologies that track the movement of individuals for purposes of limiting the spread of COVID-19. These contact tracing technologies in the workplace raise serious privacy concerns.

The COVID-19 Consumer Data Protection Act was recently introduced in the US Senate and aims to "provide all Americans with more transparency, choice, and control over the collection and use of their personal health, geolocation and proximity data" by entities working to track and limit the spread of COVID-19. A second bill, the Public Health Emergency Privacy Act introduced in the US Senate and US House of Representatives on May 14, also aims to regulate the use of contact tracking technologies.

Employees who become ill with symptoms of COVID-19 should be directed to stay home. Employees who become symptomatic at work should be immediately sent home and all potentially exposed employees quarantined. Employees can be required to obtain a doctor's

note certifying fitness for duty in order for an employee to be permitted to return to work. The EEOC, however, has stated that doctors may be too busy during the pandemic to provide such documentation. They note that new approaches may be necessary such as an email to certify that an individual does not have COVID-19.²³

Employers should be aware that their employees may request accommodations for religious or disability reasons. Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act of 1990 (“ADA”) require employers to engage in the “interactive process” to determine a suitable accommodation that does not pose a hardship for the employer under Title VII²⁴ or an undue burden for the employer under the ADA.²⁵ Local laws, such as New York City’s Human Rights Law, also require employers to provide reasonable accommodations to certain employees unless doing so would create an undue hardship for the employer.²⁶ The employer may ask questions or request medical documentation to determine whether the employee has a “disability,” and whether the disability necessitates an accommodation.

What’s next?

As noted by the EEOC, “employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.” As more guidance and rules are published, employers will be equipped with more practical measures for preparing their worksites. In the meantime, employers must enforce the rules they establish to protect the health and safety of their employees.

Future mandated closures may be on the horizon. Employers should monitor and update their business continuity and safety communication plans accordingly. In the event another round of mandatory closures takes place, employers should have an emergency plan in place detailing how the employer and its employees will navigate that challenge.

UPDATE (5 JUNE 2020)

As a follow-up to this article, we are sharing updated advisories recently issued by New York State and the Centers for Disease Control and Prevention (“CDC”), offering guidance on safely reopening offices. The CDC’s most recent guidance updates and supplements its previous guidance on reopening office workplaces. Below we describe some of the key provisions in the state’s guidance.

New York State Updated Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency

On May 28, 2020, the New York State Department of Health (“DOH”) issued updated “interim guidance” for “all office-based work,” including for both essential and nonessential businesses (“NYS Guidance”). The NYS Guidance provides mandatory requirements for employers and businesses that operate within an “office setting,” including, but not limited to, professional services, nonprofit, technology, administrative support and higher education administration.¹ The NYS Guidance includes many of the suggestions described in our recent Alert. The NYS Guidance reiterates that employers must follow all New York State standards and all applicable federal requirements, such as those promulgated by the CDC and the Occupational Safety and Health Administration (“OSHA”). The owner/operator of the business and the building owner with respect to common areas are responsible for ensuring compliance with these minimum requirements (“Responsible Parties”). While the NYS Guidance applies to regions of the state that are in “Phase Two” of the state’s reopening plan and is based on current health practices for businesses in “Phase Two,” New York City will not enter “Phase One” until June 8, 2020. Because there must be at least two weeks in between phases, New York City may not enter “Phase Two” until at least June 22, 2020.

The NYS Guidance is organized around three categories — People, Places and Processes. With respect to People, the NYS guidance requires the below, among other measures detailed in the updated guidance:

- Social distancing of at least six feet must be maintained among individuals at all times, unless safety of the core activity requires a shorter distance.
- *Exception* When, for business purposes, individuals must come within six feet of one another, each individual must don an acceptable face covering² that covers both their mouth and nose.
- At no point may the total number of individuals in an area exceed 50% of such area’s maximum occupancy limit as set by its certificate of occupancy.
- To maintain adequate social distancing, Responsible Parties may modify or reconfigure their workplaces, limit use of shared work stations, consider closing common seating areas (including reception) and may also install physical barriers in accordance with OSHA’s guidelines.
- Responsible Parties must post signs throughout the workplace to remind employees to, among other items, follow hygiene, cleaning and disinfection protocols.
- The use of small spaces, including elevators, supply rooms and personal offices, must be limited to one person at a time, unless all individuals in such space are wearing acceptable face coverings.
- Employers must limit in-person gatherings to the greatest extent possible.
- When absolutely necessary, in-person meetings should be held in open, well-ventilated spaces with adequate social distancing and with all attendees wearing acceptable face coverings.
- Nonessential common areas, such as gyms, pools and game rooms, must remain closed.
- Other common areas, such as copy rooms, kitchens and reception desks, may remain open provided that adequate social distancing, including reducing bidirectional foot traffic and posting signage and distance markers, is implemented.
- Employers should create policies which encourage employees to successfully work from home when feasible.
- All nonessential travel should be limited.
- Employers must take measures to reduce

interactions and contact among individuals in an office, including by staggering work schedules, reducing in-office workforce, reducing bidirectional foot traffic and shifting and/or altering workspaces.

- Responsible Parties should limit on-site interactions and movements to limit contact to the extent possible, including by establishing designated areas for pickups and deliveries.

With respect to Places, the NYS guidance requires the below, among other measures detailed in the updated guidance:

- Employers must provide all necessary PPE as required for its workplace activities, including appropriate face coverings for their employees, at no cost to the employees.
 - Employers must train employees on appropriate donning, doffing, cleaning and discarding of PPE, including that face coverings must be cleaned or replaced after each use and may not be shared.
 - Responsible Parties must adopt measures to restrict the sharing of objects, such as laptops and office tools, or require employees to perform hand hygiene before and after every contact.
 - Responsible Parties must adhere to the DOH's and the CDC's hygiene, cleaning, air circulation and disinfection requirements.
 - Employers must conduct regular cleaning and disinfection of the office.
 - If an employee is suspected or confirmed to have COVID-19, Responsible Parties must, following CDC guidelines, close off, and following 24 hours, if feasible, clean and disinfect areas used by the affected employee, including shared building spaces and restrooms.
- Further, air circulation should be increased in the affected area by opening outside doors and windows.
 - Once the affected area has been appropriately cleaned and disinfected, it may be reopened for use.

With respect to Processes, the NYS guidance requires the below, among other measures detailed in the updated guidance:

- Responsible Parties must implement mandatory daily health screenings of their employees and, where practicable, visitors.
- Screenings may be done remotely (e.g., by telephone or online survey) by employees or visitors before arriving at the office.
- Screenings must use a questionnaire that determines whether the individual has:
 - Knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
 - Tested positive for COVID-19 in the past 14 days; and/or
 - Has experienced any symptoms of COVID-19 in the past 14 days.
- An individual that answers any of the above screening questions in the affirmative must not be allowed to enter the office and should be sent home with instructions to contact their healthcare provider and/or self-quarantine for at least 14 days.
- Screening should be coordinated to prevent employees or visitors from intermingling and permit for adequate social distancing while employees and visitors queue for onsite screenings and/or building entry.
- Personnel performing screening activities

must be provided with necessary PPE and be appropriately protected from exposure.

- Personnel performing screening activities should be trained on CDC, DOH and OSHA protocols.
- In addition to screenings, daily temperature checks may be conducted.
- Contactless thermal cameras in building entrances may be used to identify symptomatic visitors.
- Employers must review all employee and visitor responses collected by the screening process.
- Employers must further designate a site safety monitor who is responsible for continuous compliance with all aspects of the employer's site safety plan.
- Employees that have either tested positive for COVID-19, exhibit symptoms of COVID-19 or have had close contact with a person with COVID-19 must complete a 14-day quarantine before returning to work.
- Responsible Parties must notify their local health department and the DOH immediately upon being informed of any positive COVID-19 test result by an employee in their office.
- Employers must immediately notify building managers of any employees showing symptoms of COVID-19 that have entered the workplace.
- Employers must conspicuously post completed safety plans on site.

More guidance may be issued as the pandemic evolves and as more offices reopen and best practices are developed based on region. Employers should continue to monitor, and comply with, local, state and federal guidelines for reopening their workplaces. **THFJ**

This is a fast-moving topic and the information contained in this article is current as of the date it was published.

FOOTNOTES

1. Workplaces During the COVID-19 Pandemic, Centers for Disease Control and Prevention, available at www.cdc.gov/coronavirus/2019-ncov/downloads/community/workplace-decision-tree.pdf.
2. Regional Guidelines for Reopening New York State, available at forward.ny.gov/metrics-guide-reopening-new-york.
3. *Id.*
4. *Id.*
5. 29 U.S.C. § 654 (1970).
6. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, U.S. Equal Employment Opportunity Commission, available at www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
7. *Id.*
8. 29 U.S.C. § 662(a).
9. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 3102, 134 Stat. 189-92 (2020).
10. *Id.* at § 110(a)(2)(A), 134 Stat. 189-90.
11. *Id.* at § 5110(5)(A)(i)-(ii), 134 Stat. 200.
12. *Id.* at § 110(b)(2)(B)(i)-(ii), 134 Stat. 190-91.
13. *Id.* at § 110(a)(3)(B), 134 Stat. 190.
14. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, U.S. Equal Employment Opportunity Commission, available at www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
15. *Id.*
16. *Id.*
17. *Id.*
18. Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, U.S. Equal Employment Opportunity Commission, available at www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees
19. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, U.S. Equal Employment Opportunity Commission, available at www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. 29 C.F.R. § 1605.2(e).
25. 42 U.S.C. § 12111(10).
26. See generally N.Y.C. Admin. Code § 8-107.
27. By its own terms, the NYS Guidance does not address medical offices, including doctors' offices or dentists' offices, or building owners/managers and their employees or contractors.
28. Appropriate face coverings include, but are not limited to, cloth-based face coverings and disposable masks that cover both the mouth and nose.

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