

# COVID-19

## LABOR & EMPLOYMENT



## Employer's Guide for Returning to the Workplace

*As of June 16, 2020*

As the U.S. economy reopens in the coming weeks and months, employers are faced with the challenge of bringing employees back to work to a workplace that is drastically different from the one that existed just weeks ago. While states and cities will have unique requirements and conditions with which employers must comply, they intend to rely on, in large part, the constantly evolving guidance provided by the Centers for Disease Control (CDC), Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC). Consequently, it will continue to be crucial for employers to comply with the most recent guidance from the CDC, OSHA, public health agencies, and the EEOC as they bring employees back to work and re-open businesses.

Below is a general overview of current guidance from the EEOC, OSHA and CDC concerning workplace safety and the required or recommended preventive and corrective measures that employers must consider before allowing employees to return to offices and other workplaces. The overview is followed by a summary of the applicable return-to-work plans issued by the state of Tennessee and the city of Nashville. The final section of this update sets forth some frequently asked questions regarding the return of employees to the workplace in the era of COVID-19. Keep in mind that employers should consult legal counsel to ensure that their return to work plans are tailored to fit their specific work environments and employees and satisfy the applicable legal requirements.

### The EEOC and COVID-19

The EEOC has stated that the non-discrimination laws that it enforces (e.g., the Americans with Disabilities Act (ADA)) should **not** interfere with or prevent employers from following the guidance and suggestions from the CDC and state and local public health agencies. The EEOC has further stated: **"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."**

However, the EEOC has issued a [significant amount of guidance](#) for the interpretation and enforcement of the ADA and the Rehabilitation Act in light of COVID-19.

Below, we've summarized some of the significant points made by the EEOC in its guidance:

1. In light of the pandemic, employers may ask employees about virus-related symptoms and may require employees to submit to temperature testing. Employers may also require employees to report a COVID-19 diagnosis to the employer.
2. Under the current circumstances, employers may choose to administer COVID-19 testing to employees before they enter the workplace "because an individual with the virus will pose a direct threat to the health of others." Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration

(FDA) about what may or may not be considered safe and accurate testing, as well as guidance from the CDC or other public health authorities. Keep in mind that testing is rapidly changing, so employers will want to check for updates regarding the efficacy of any testing mechanism that they choose to use. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later. All tests that have received an authorized Emergency Use Authorization (EUA) from the FDA, including any authorizations for home collection of a specimen, can be found on the FDA's [Emergency Use Authorizations](#) page.

3. Employers may require employees with COVID-19 to leave the workplace. Employers may also require that the employee present medical certification proving fitness for duty before returning to work.
4. Employers may delay start dates and/or withdraw job offers if an applicant tests positive for COVID-19 and/or has COVID-19 symptoms. The job offer should only be withdrawn if the employer needs the employee to start work immediately.

## OSHA Guidance on Preparing the Workplace

OSHA requires employers to comply with [existing safety and health standards and regulations](#) promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

OSHA recently issued a [thorough set of recommendations and guidelines](#) for employers to consult when preparing workplaces for the effects of COVID-19. In the introduction, OSHA notes that the guidelines are advisory except to the extent that any such guideline refers to or summarizes existing OSHA standards and requirements.

Given OSHA's existing requirements and recent guidance, employers should consult the CDC recommendations (summarized [here](#)) for returning employees to work and should also consider implementing additional protective measures in the workplace, such as:

1. Require employees to practice social distancing at work (e.g., staying at least six feet apart, limiting the number of occupants in offices and/or elevators, requiring office doors to remain closed when occupied, closing lunch and break areas, restricting occupancy and spacing, etc.).
2. Staggered arrival and departure times and/or work hours.
3. Closing certain stalls/urinals in the restroom to create adequate distance between individuals.
4. Limit one person to a vehicle, if possible.
5. Install high-efficiency filters and increase ventilation rates in the workplace.
6. Designate one person to clock employees in and out of work or record their arrival and departure times if clocking in would otherwise require employees to be in close contact with each other or to touch the same equipment.
7. Prohibit sharing of headsets, refrigerators, microwaves, computers, tools, etc.
8. Prop open doors to reduce touching of handles; provide no-touch trash cans, soap dispensers and hand sanitizer dispensers.
9. Install glass or plexiglass barriers where people have to meet to talk and exchange documents or materials (i.e., at secretarial work stations, customer service desks, etc.).
10. Perform daily health checks.
11. Encourage use of face masks, gloves, etc.
12. Utilize virtual instead of in-person team meetings.

## **New COVID-19 Poster from OSHA**

OSHA has issued a new poster listing steps all workplaces can take to reduce the risk of exposure to coronavirus. The new poster is available for [download in English](#) or [Spanish](#). The poster highlights 10 infection prevention measures every employer can implement to protect workers' safety and health during the coronavirus pandemic, including encouraging sick workers to stay home; establishing flexible worksites and staggered work shifts; discouraging workers from using other workers' phones, desks and other work equipment; and using Environmental Protection Agency-approved cleaning chemicals with label claims against the coronavirus.

While posting this poster is not mandatory, it may assist the employer in showing that it took good-faith steps to comply with OSHA's workplace safety requirements (as discussed further below).

## **Good Faith Efforts to Comply with OSHA Standards**

In guidance issued on April 16, OSHA stated that it will evaluate whether an employer made good faith efforts to comply with applicable OSHA standards by thoroughly exploring all options to comply. An employer should be able to demonstrate a good faith attempt to meet the applicable requirements **as soon as possible following the re-opening of the workplace**. Where the employer cannot demonstrate its good faith efforts to comply, a citation may be issued. Note further that on April 13, OSHA issued an enforcement plan, emphasizing that the most current CDC guidance should be consulted in assessing potential workplace hazards and evaluating the adequacy of an employer's protective measures for workers. This further underlines the importance of an employer staying up-to-date on guidance issued by OSHA, the EEOC and the CDC, along with that of state and local governments and public health agencies.

## **Employer's Duty to Record Cases of Work-Related COVID-19**

On May 26, 2020, OSHA issued new guidance regarding an employer's obligation to record all COVID-19 diagnoses among workers if the illness is "work-related;" specifically, if all of the following requirements are met:

- The case is a confirmed case of COVID-19, as defined by the CDC.
- The case is work-related, as defined by 29 CFR § 1904.5 (if exposure in the work environment either caused or contributed to the illness or significantly aggravated a pre-existing injury or illness).
- The case involves one or more of the recording criteria set forth in 29 CFR § 1904.7 (e.g., medical treatment, days away from work).

OSHA now requires all but small (ten employees or less) and low hazard industry employers to make a reasonable and good faith inquiry into whether any COVID-19 illness contracted by an employee was more likely than not contracted at work. OSHA has set forth factors to be used when determining whether an employer has complied with its obligation to make a reasonable and good faith inquiry and determination of work-relatedness. If after conducting a reasonable and good faith inquiry using the factors set forth by OSHA, the employer determines it is "more likely than not" that a workplace exposure played a causal role in the employee's COVID-19 illness, the employer is obligated to record that illness in compliance with OSHA's recordkeeping requirements.

[Click here](#) for our detailed summary of OSHA's guidance, including the factors to be used when conducting the required inquiry of whether a COVID-19 diagnosis is "work-related."

## **CDC Guidance on Workplace Health and Safety**

The CDC has issued a significant amount of guidance regarding how businesses and employers should respond to the pandemic. Some key points concerning workplace safety and cleaning and disinfecting are as follows:

1. If an employee was present at the job site within 48 hours of testing positive, employers should follow [the CDC's cleaning and disinfecting guidelines](#). Cleaning staff should clean and disinfect all areas used by the ill person, especially frequently touched surfaces.

2. If it has been more than seven days since the person who is sick visited or used the facility, additional cleaning and disinfection are not necessary.
3. For electronics - such as tablets, touch screens, keyboards, remote controls, and ATMs - consider using wipeable covers. If there are no manufacturer's instructions for cleaning and disinfecting electronics, use alcohol-based wipes or sprays containing at least 70% alcohol and dry the surfaces thoroughly.
4. Employers should develop policies for worker protection and provide training to all cleaning staff on-site before assigning cleaning tasks (including when to use personal protective equipment (PPE); what PPE is necessary; how to properly put on, use, and take off PPE; and how to properly dispose of PPE).
5. Ensure workers are trained on the hazards of the cleaning chemicals used in the workplace per [OSHA's Hazard Communication Standards](#).
6. Comply with [OSHA's standards on bloodborne pathogens](#), including [proper disposal of regulated waste and PPE](#).
7. Employers should be using policies and procedures, engineering controls and PPE to reduce the spread of the virus in the workplace.
8. Employers should engage in a workplace hazard assessment to determine COVID-19 transmission risks in the workplace.

More detailed information and guidance from the CDC can be found using the links below:

- [Interim Guidance for Business and Employers \(Plan, Prepare and Respond to COVID-19\)](#).
- [Prepare your Small Business and Employees for the Effects of COVID-19](#).
- [Community Mitigation Framework](#).
- [Cleaning and Disinfecting Your Facility](#).
- [Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#).
- [Guidance for Institutes of Higher Education](#).

## Tennessee Guidance

### ***The "Tennessee Pledge"***

On April 20, Governor Bill Lee announced that the order requiring Tennesseans to remain at home will expire April 30, with the vast majority of businesses in 89 counties allowed to re-open on May 1.

On April 24, Governor Bill Lee issued the first guidance and best practices for Tennessee businesses to keep employees and customers safe as the state goes through a phased re-opening of the state's economy in 89 of the state's 95 counties, which has been titled the ["Tennessee Pledge - Reopening Tennessee Responsibly"](#) (the [Pledge](#)). The Pledge includes universal health and safety guidelines for all businesses in Tennessee, including those that are re-opening and those essential businesses that remained open while the Safer at Home Order was in place. These general health and safety protocols are based on guidance issued by the CDC and OSHA. The Pledge also includes some specific guidance for the restaurant and retail industries, including extensive sanitation efforts, the increased use of masks and gloves, and social distancing.

The governor acknowledged that the state **will not enforce** its recommendations. Instead, the state expects businesses to comply voluntarily and consumers to help make sure that businesses comply. The state is working with Shelby, Madison, Davidson, Hamilton, Knox, and Sullivan Counties on separate plans to reopen businesses in those counties.

## **“Roadmap for Reopening Nashville”**

The governor’s plan indicates that the state will coordinate with Nashville, Memphis, Knoxville, and Chattanooga on the re-opening process. Nashville has published a [four-phase plan for restarting the local economy](#) in a deliberate and graduated manner. According to the Nashville plan, Phase One will not begin until there is “a sustained downward trend in cases over 14 days.” In addition, Nashville must reach certain metrics regarding testing, tracking and enforcing quarantine strategies to identify cases and prevent transmission.

During the current “planning period,” all non-essential businesses should remain closed and [the Mayor’s Safer At Home Order remains in place](#). Except when performing essential services, citizens over age 65 and those with high-risk factors need to remain vigilant and shelter at home. Everyone should continue to work from home, if possible, and should wear “cloth masks” in public locations.

All essential businesses and non-essential businesses should begin preparations for later phases and should be prepared to certify to the local health department that they have written plans and can reliably perform the following functions before advancing to later phases (although the plan is silent as to the details regarding this certification process):

1. Screen daily all employees for respiratory symptoms. Workers in close contact with each other should be screened daily with temperature checks as well. Business plans should specify protocols for different categories of employees.
2. Advise employees with symptoms to remove themselves from the workplace and to go be tested. Encourage employees to quarantine until they receive test results. Establish policies and procedures to help employees who are in isolation or quarantine.
3. Set expectations for frequent hand hygiene and wearing of cloth masks by employees where appropriate or able.
4. Elevators should limit occupancy to allow six-foot passenger distances and provide cleaning supplies within each elevator for use on buttons.
5. Hand sanitizer should be placed on every floor near elevators.

These relatively simple and limited precautions do not cover sufficiently all of the federal rules and regulations that will apply to businesses when they re-open, so Nashville businesses must be cognizant of their obligations imposed by OSHA and the EEOC, as well as CDC guidance.

## **Frequently Asked Questions**

Below are some frequently asked questions regarding returning employees to the workplace, but keep in mind that the facts and circumstances in each case will determine what is required and/or reasonable.

### ***What should we do if an employee does not want to return to work based on concerns about COVID-19?***

There are several issues to consider if an employee refuses to work:

**Dangerous Work Conditions.** An employee’s right to refuse to work or to perform a specific task is protected under OSHA regulations if **all** of the following conditions are met:

1. Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so.
2. The employee has refused to work in “good faith,” which means that the employee must genuinely believe that an imminent danger of death or serious bodily injury exists.

3. A reasonable person would agree that there is a real danger of death or serious injury.
4. There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

**Compliance with Applicable Workplace Safety Guidelines.** Assuming the return to work would not violate a state or local stay-at-home order and would not expose the employee to unreasonable risk or unsafe work conditions, an employer should confirm that it is following CDC, OSHA and public official guidelines related to COVID-19. Requiring an employee to return to work while failing to implement reasonable and/or mandatory safeguards could result in an OSHA claim or a claim for wrongful termination.

**Disability-Related Concerns.** If the employee explains that he/she does not want to return to work because he/she has a qualifying disability under the ADA that causes him/her to be more susceptible to COVID-19 complications, the employer should treat the employee's request/refusal as a request for an accommodation under the ADA and follow its normal process, including requiring documentation from a physician (where applicable) and engaging in the interactive process regarding potential accommodations. Likewise, if an employee has a mental impairment (e.g., anxiety disorder or post-traumatic stress disorder) that renders him/her unable to perform the essential functions of his/her job, the employer should engage in the interactive process to determine if a reasonable accommodation exists.

**Leave of Absence, PTO and Discharge.** Assuming the ADA is not an issue, there is no federal law that provides paid leave or job-protected leave to a non-disabled employee who chooses not to report to work due to speculative concerns that he/she might be exposed to COVID-19. Under these circumstances, the employer may place the employee on an unpaid leave of absence and/or require him/her to use his/her accrued PTO. If no leave of absence, PTO, or vacation time is available to the non-disabled employee who chooses not to return to work, the employer may discharge the employee. The employer does not have to allow a furloughed employee to remain on furlough if there is work available.

### ***Should an employer require mandatory testing for COVID-19? Which tests? How frequently?***

On a federal level, there is no current requirement that employers administer any form of mandatory testing of its employees related to COVID-19. However, employers have the option of administering regular temperature checks or COVID-19 tests.

At a minimum, employers should consider the following:

1. Taking the temperatures of all employees daily.
2. Requiring symptomatic employees to be tested.
3. Diligent monitoring of his/her co-workers while awaiting the test results.

If an employee's test comes back positive, testing his/her co-workers may be appropriate.

Unless an employer implements thermal scanning technology to discreetly measure the body temperature of employees in the workplace, we recommend that such temperature screenings take place in a private room and that the recording of temperatures is treated as a confidential medical record under the ADA.

If an employer cannot find an infrared/forehead thermometer, it may require employees to take their temperatures at home and attest that they do not have any fever or elevated temperature. In the alternative, an employer may have employees acknowledge that their showing up to work constitutes their attestation that they do not have a fever. Note that time spent having someone take your temperature or waiting for such screening may qualify as compensable work time under the Fair Labor Standards Act.

### ***What if an employee comes to work with symptoms of COVID-19 or develops symptoms while at work?***

An employer should send the employee home or prohibit the employee from reporting to work, as applicable, pending a COVID-19 test.

If the employee is confirmed positive for COVID-19, the employer may also notify the employee's co-workers (vendors, visitors, etc.) who may have had contact with the employee of their possible exposure. Such notification must not identify the diagnosed employee by name. Per CDC guidance, the employer may also consider sending home (for at least 14 days) all co-workers with whom the diagnosed employee had **close contact for a prolonged period of time**. According to the CDC, factors to consider when defining "close contact" include proximity (within six feet), the duration of exposure (e.g., longer exposure time likely increases exposure risk), whether the infected individual had symptoms (e.g., coughing likely increases exposure risk), and whether the infected individual was wearing a facemask (which may block respiratory secretions from contaminating others and the environment). The CDC has also explained that current data is insufficient to precisely define the duration of time that constitutes a "prolonged" exposure. Recommendations vary on the length of time of exposure from 10 minutes or more to 30 minutes or more. Brief interactions are less likely to result in transmission; however, symptoms and the type of interaction (e.g., did the infected employee cough directly into the face of the co-worker) remain important.

Finally, an employer with a confirmed case of COVID-19 in the workplace should clean and disinfect the facility per CDC guidelines as discussed herein and may require negative test results or fitness for duty releases from physicians before allowing the diagnosed employee and the exposed co-workers to return to work.

### ***Can an employer require employees to wear face masks?***

Yes. The EEOC issued guidance stating that an employer may require employees to wear [protective gear](#) (e.g., masks and gloves) and observe [infection control practices](#) (e.g., regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible, not an undue hardship on the operation of the employer's business under the ADA or Title VII and if providing such accommodation does not pose a direct threat to the employee or others.

### ***Must an employer require employees to wear face masks?***

At this point, there is no federal requirement that employees wear face masks in the workplace. However, the CDC recommends that everyone wear "cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) especially in areas of significant community-based transmission." We expect that many state and local governments will also recommend or require that employees wear face masks in the workplace as the economy reopens.

Note that face masks as contemplated by the CDC do not include N-95 or surgical masks, which should be reserved for healthcare workers and first responders. Rather, the CDC advises the use of simple cloth face coverings, whether it be a mask constructed from cloth or a scarf tied around an individual's head to cover his/her nose and mouth.

## **May an employer ask employees about symptoms of COVID-19?**

Employers are free to ask employees about COVID-19-related symptoms or diagnoses to keep their workforce safe. For example, if an employee calls in sick, an employer can ask the employee if he/she is experiencing COVID-19-related symptoms, such as fever, cough, chills and shortness of breath. Employers may also require employees to report to Human Resources immediately if they experience such symptoms while at work or are diagnosed with COVID-19. Any record made with respect to employee symptoms or diagnoses must be treated as a confidential medical record under the ADA.

## **An employee has traveled to a high-risk area or is living with someone who has been diagnosed with COVID-19. What may an employer do?**

Employers may place these employees on quarantine from work so long as the employer does so consistently (to avoid allegations of disparate treatment). It appears that the common period for quarantine is 14 days.

If the employee is not entitled to Emergency Paid Sick Leave under the Families First Coronavirus Response Act (FFCRA), the period of quarantine may be unpaid or an employee may be permitted to use accrued PTO to cover the period of absence. Click [here](#) for our summary about paid leave under the Families First Coronavirus Response Act (FFCRA).

Note that the CDC has released [guidance related to “critical infrastructure workers,”](#) stating that they may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community. A potential exposure means being a household contact or having close contact within six feet of an individual with confirmed or suspected COVID-19. The additional precautions set forth by the CDC include:

1. Measuring the employee's temperature and assessing symptoms before each workday.
2. Self-monitoring of symptoms.
3. Employees use of a mask in the workplace for 14 days after the last exposure.
4. Employee social distancing in the workplace.
5. Routine cleaning and disinfecting of the workplace.

If you have questions about considerations for employers for crafting a plan to the workplace, please contact one of the authors.

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