



**Recommendations for
Reopening: Art Industry**



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General Return-to-Work Principles

The president announced the “Opening up America Again” plan on April 16. It offers non-binding guidance to state governors and local officials to make individual determinations about relaxing return-to-work and non-essential business closure orders depending on several critical factors. They are recommended to monitor virus-like symptoms, active COVID-19 cases, and local hospital resources to make the determination about which of three phases they should implement for their local area, state, or region if working in conjunction with other state governments.

During all three phases of the recovery period, the federal government recommends each employer follow three overarching guidelines:

1. Develop and implement appropriate workplace safety policies regarding:

- Social distancing and protective equipment;
- Temperature checks;
- Testing, isolating, and contact tracing;
- Sanitation;
- Use and disinfection of common and high-traffic areas; and
- Business travel.

Employers are encouraged to follow federal, state, and local regulations and guidance in developing these policies, informed as necessary by industry best practices.

2. Monitor the workforce for indicative symptoms.

Employers are encouraged not to let symptomatic people physically return to work until cleared by a medical provider.

3. Develop and implement policies and procedures for workforce contact tracing following a positive COVID-19 test in the workplace.

Employers should continue to ask infected employees to identify all individuals who worked in close proximity (within six feet) for a prolonged period of time (10 minutes or more to 30 minutes or more) depending upon particular circumstances, such as how close the employees worked and whether they shared tools or other items with them during the 48-hour period before the onset of symptoms. Employers should send home all employees who worked closely with the infected employee to ensure the infection does not spread.



Recommendations for Phase One of the Plan

Phase One is recommended to be implemented when three “gating” factors are met. First, there needs to be a downward trajectory of influenza-like illnesses and COVID-like syndromic cases reported in the area within a 14-day period. Second, there needs to be a downward trajectory of documented cases and positive tests as a percentage of total tests within a 14-day period (with a flat or increasing volume of tests). Third, the area hospitals need to be in a position to treat all patients without crisis care and have a robust testing program in place for at-risk healthcare workers.

During Phase One, employers are recommended to follow five steps:

1. Continue to encourage **remote work and telework** whenever possible and feasible with business operations.
2. If possible, return to work **in phases**.
3. Close **common areas** where personnel are likely to congregate and interact, or enforce **strict** social distancing protocols.
4. Minimize **non-essential business travel** and adhere to CDC guidelines regarding isolation following travel.
5. Strongly consider **special accommodations** for workers who are members of a **vulnerable population**. For purposes of this guidance, these include elderly individuals and those with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.

Recommendations for Phase Two of the Plan

Phase Two is recommended to be implemented in areas where there is no evidence of a rebound in COVID-19 cases, and that satisfy the Phase One gating criteria a second time. During Phase Two, employers are recommended to follow four steps:

1. Continue to encourage **remote work and telework** whenever possible and feasible with business operations.
2. Continue to close **common areas** where personnel are likely to congregate and interact, or enforce **moderate** social distancing protocols.
3. Businesses can resume **non-essential business travel**.
4. Continue to consider **special accommodations** for workers who are members of a **vulnerable population**. Encourage **remote work and telework** whenever possible and feasible with business operations.

Recommendations for Phase Three of the Plan

States and regions that have no evidence of a rebound of COVID-19 cases, and satisfy the gating criteria a third time, are ready to enter Phase Three. During this phase, the guidance is simple: employers can resume **unrestricted staffing** of worksites.



Workplace Safety

General Workplace Safety Considerations

Deciding to Reopen After Shelter-in-Place Orders are Lifted

The Centers for Disease Controls and Prevention (CDC) released guidance to assist employers in making decisions regarding reopening during the COVID-19 pandemic. You should continue to follow the recommendations issued by state and local health departments when determining the most appropriate actions to take. According to the CDC guidance, you should consider three questions when deciding whether to reopen:

1. Are you in a community no longer requiring significant mitigation?
2. Will you be able to limit non-essential employees to those from the local geographic area?
3. Do you have protective measures for employees at higher risk (e.g. teleworking, tasks that minimize contact)?

You should only consider reopening if you can answer “yes” to each of the three questions. Even if you can satisfy the three preliminary questions, you should only reopen if recommended safety actions are in place. The CDC’s recommended safety actions include:

- Promoting healthy hygiene practices;
- Intensifying cleaning, disinfection (e.g., small static groups, no large events);
- Canceling non-essential travel, and encouraging alternative commuting and telework;
- Spacing out seating (more than 6 feet) and staggering gathering times;
- Restricting use of any shared items and spaces; and
- Training all staff in above safety-actions.

The CDC also recommends you only reopen after you have implemented safeguards for the ongoing monitoring of employees, including:

- Encouraging employees who are sick to stay home;
- Establishing routine, daily employee health checks;
- Monitoring absenteeism and having flexible time off policies;
- Having an action plan if a staff member gets COVID-19;
- Creating and testing emergency communication channels for employees; and
- Establishing communication with state and local health authorities.

Workplace Safety Concerns When Employees Return

In addition to the Occupational Safety and Health Administration (OSHA) requirements applying to your workplace previously, you should expect additional employee concerns related to the coronavirus to continue for some time. This may vary depending on the location and the level of community transmission still active.

Employees, and their family members, are likely to be anxious about returning to the public, including the workplace. There likely will be a need to follow some of the CDC and OSHA Guidelines, depending on the determined level of risk at the workplace and guidance from local, state, and federal authorities. This includes social distancing, frequent hand washing, cleaning and disinfecting work areas, adjusting the workplace to separate employees (including split-shifts, staggered breaks, and altering work stations), and appropriate personal protective equipment (PPE).

You may still need to monitor employee health, including asking about symptoms and taking temperatures, in the near future. Some of the newer safety practices put into place at the outset of the pandemic – prior to the shelter-in-place orders or the



ongoing practices by essential businesses – may need to continue until the virus has been more completely controlled through robust testing and contact tracing capabilities, vaccines, and other treatments.

You should also plan on training employees and demonstrating the new safety measures in place to protect them from further spread of the virus. The more employees understand what safety measures are being taken and why, the more likely there is to be employee buy-in, and the less likely employees may make complaints to OSHA or other third parties regarding perceived risk in the workplace. To be clear, employee complaints about perceived safety issues should be taken seriously and investigated, and you should not take any retaliatory action against employees who make such claims in good faith.

In addition to offering training to your workforce, make it a habit to check in with employees as often as possible to ensure they are comfortable with their work environment and the changes associated with returning to the workplace.

Social Distancing

Employees should continue to maintain a six-foot distance from others and otherwise observe social distancing in the workplace as work duties permit.

Cleaning Your Facility Prior to Reopening

[The CDC released guidance for cleaning and disinfecting public spaces](#) workplaces, businesses, schools, and homes. You should review this guidance when implementing your cleaning procedures. The CDC's guidance provides that for outdoor areas, you should maintain existing cleaning practices because viruses are killed more quickly by warmer temperatures and sunlight.

For indoor areas, the CDC recommends normal, routine cleaning for areas that have been unoccupied within the last seven days. For indoor areas that have been occupied within the last seven days, the CDC recommends frequently touched surfaces and objects made of hard and non-porous materials (glass, metal, or plastic) be cleaned and disinfected more frequently.

Frequently touched surfaces and objects made of soft and porous materials, such as carpet, rugs, or material in seating areas, should be thoroughly cleaned or laundered. If possible, the CDC recommends considering removing soft and porous materials in high-traffic areas. Surfaces and objects not frequently touched should be cleaned on a routine basis.



Considerations for Cleaning Cultural Sites, Art Galleries, Warehouses -

COVID – 19 Basics: Disinfecting Cultural Resources

<https://www.culturalheritage.org/resources/emergencies/collections-care-amid-covid-19>

- How long does the virus live on surfaces? 6 – 9 days.
- How long does it persist on historic surfaces? 6 – 9 days.
- If an object is contaminated, object should be *isolated* rather than *disinfected*.
- Do not use a wet fog solution in a museum or gallery setting to mass clean spaces because you will impact art surfaces negatively. No bleach.
- Rather than use fog cleaning around collections, focus cleaning effort on high risk areas like door knobs, railings, bathrooms with targeted cleaning.

For in-depth information about Collection Care, watch the National Park Service YouTube on Cleaning Cultural Sites:

https://www.youtube.com/watch?v=MkkDGUSPe54&feature=emb_rel_end

What kind of PPE should cultural institutions and galleries use:

<https://www.ncptt.nps.gov/blog/covid-19-basics-personal-protective-equipment-ppe/>

Considerations for Cleaning and Disinfecting – General Guidelines Not Art Specific -

To clean and disinfect:

- If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (note: “cleaning” will remove some germs, but “disinfection” is also necessary).
- For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
- Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer’s instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
- Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
- Gloves and gowns should be compatible with the disinfectant products being used.
- Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash. Follow the manufacturer’s instructions regarding other protective measures recommended on the product labeling.
- Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.
- Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks. Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.

If you are using cleaners other than household cleaners with more frequency than an employee would use at home, you must also ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA’s Hazard Communication standard (29 CFR 1910.1200). Simply download the manufacturer’s Safety Data Sheet (SDS) and share with employees as needed. Make sure the cleaners used are on your list of workplace chemicals used as part of the Hazard Communication Program.

You should maintain routine cleaning and disinfection procedures after reopening to reduce the potential for exposure.



Spatial Changes to Consider

You should consider adapting the physical workplace to permit implementation of social distancing to the extent feasible. If you have shared office arrangements, open floor work sites, or close common areas where employees are likely to congregate and interact, consider reconfiguring these spaces. You also should continue to encourage telework whenever possible and feasible with business operations.

Additional considerations for soft, non-permanent, spatial changes in the workplace prior to reopening including the following:

- Partitions between receptionists and others that may directly interact with the employees;
- Separating employees who work in adjacent cubicle spaces;
- Removing every other chair in break areas and lunchrooms;
- Adding partitions to tables where employees congregate during breaks;
- Requiring employees to walk in designated one-way lanes in hallways and corridors to avoid “head-on” pedestrian traffic;
- Consulting with landlords about converting communal restrooms to single-seat bathrooms to avoid close contact between users;
- Utilizing HVAC contractors to increase the number of air changes in your workplace;
- Arrange for food trucks or other food delivery services to serve employees outside to separate employees during lunch breaks;
- Providing hand sanitizer stations outside each restroom and each door that is commonly touched or used;
- Upgrading your teleconference equipment to allow for more teleconferences; and
- If possible, arrange for pick-up and drop-off delivery of packages to be done outside.
- Spatial requirements vary widely based upon the location at issue.



Visitors at Your Institution, Gallery, Warehouse

A key aspect of keeping your employees safe is to ensure all visitors are healthy. Consider posting a notice at your entrance to discourage sick visitors from entering. *Sample wording for the notice is as follows:*

STOP

To do our part in preventing the spread of COVID-19 in our community and workplace, we are restricting access to this facility for anyone who may have recently been exposed to the virus. Please read this carefully:

By entering this facility, you are affirming and attesting that:

1. You have **not** in the last 14 days had any close contact with anyone who is either confirmed or suspected of being infected with COVID-19, including anyone who was experiencing or displaying any of the known symptoms of COVID-19 (listed in item C below); AND
2. You have **not** in the last month traveled to a restricted area under a Level 2, 3, or 4 travel advisory according to the U.S. State Department (including China, Italy, Iran, and most of Europe); AND
3. You do **not** currently experience or display, and you have **not** in the last 14 days experienced or displayed, any of the following symptoms:
 - Elevated temperature or fever of 100.4 or higher,
 - Cough,
 - Shortness of breath and/or difficulty breathing,
 - Loss of smell and/or taste,
 - Fatigue, or
 - Persistent headaches.

If you answered **YES** to any of the above statements, **you may NOT enter this building.**

Thank you for your cooperation.



Restrict Contact, Capacity, and Access

As part of your Institution, Gallery or Warehouse's phased approach, consider how you will limit person-to-person contact:

- Monitor the number of visitors, and restrict or prohibit access to certain areas of the facility.
- Online ticket registration/sales if this is an option for your museum or gallery. Alternatively, limit cash and paper receipt transactions. "Touchless" payment options are recommended.
- Providing digital visitor guides and materials instead of physical copies at the museum or gallery.
- Regulating or remove interactives (e.g., touchscreens, personal audio guides). As your plan progresses, you may consider installing hand sanitizing stations near these spaces for safer usage.
- Capacity restrictions for visitors including timed tickets for entry and monitoring traffic flow (e.g., only allowing a certain number of visitors in a space at a given time).
- No or limited access to theaters, cafés, high-traffic areas, and particularly tight spaces in the Museum or gallery. If you have multiple entrances, consider limiting access to only one or two.
- Cancelling or restricting group visits, guided tours, public programs, and special or private events until safe to offer them, and then limiting the number of participants.
- Using signage or barriers to enforce physical distancing guidelines, including at ticketing and information desks, in shops/cafés, and for security guards.
- Establish one-way flow through the museum and within galleries, to facilitate distancing.
- For outdoor spaces, closing restroom facilities and picnic areas, marking trails to encourage one-way travel, and closing off parking on streets next to your facility.

Contractors or Vendors at Your Institution, Gallery, Warehouse

If your employees are required to work at a third party's site, ask them to confirm in writing that CDC and OSHA COVID-19 guidelines are being followed prior to allowing your employees to work there.

For vendors or contractors coming to your facility, ensure advance communication with them to understand whether their COVID-19 policies and practices measure up to yours and develop an action plan if they do not.



Steps to Follow When an Employee is Diagnosed or Tests Positive for COVID-19

You should follow this four-step plan when addressing a confirmed COVID-19 case in your workplace:

1. Isolate/Quarantine Confirmed Employees

The infected employee should remain at home until released by a physician or public health official. If a medical note releasing the employee is unavailable, follow the CDC guidelines on when an employee may discontinue self-isolation, which contain specific requirements dependent upon whether the employee tested positive for COVID-19 and the symptoms exhibited.

2. Address and Isolate Employees Working Near an Infected Co-Worker

You should ask infected employees to identify all individuals who worked in close proximity (within six feet) for a prolonged period of time (10 minutes or more to 30 minutes or more) depending upon particular circumstances, such as how close the employees worked and whether they shared tools or other items with them during the 48-hour period before the onset of symptoms. Send home all employees who worked closely with the infected employee for 14 days under CDC Guidance to ensure the infection does not spread. While quarantined, those employees should self-monitor for symptoms, avoid contact with high-risk individuals, and seek medical attention if symptoms develop. Also, employers should maintain a log book of independent contractors, the dates of work, locations in the facility and contact details should more information be needed.

3. Clean and Disinfect Your Workplace

After a confirmed COVID-19 case, follow the CDC guidelines for cleaning and disinfecting the workplace. Your cleaning staff or a third-party sanitation contractor should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill person, focusing especially on frequently touched surfaces.

If using cleaners other than household cleaners with more frequency than an employee would use at home, ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA's Hazard Communication standard. Simply download the manufacturer's Safety Data Sheet (SDS) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of a Hazard Communication Program.

4. Notify Your Employees

Following a confirmed COVID-19 case, and as recommended by the CDC, notify all employees who work in the location or area where the employee works of the situation. You will want to do so without revealing any confidential medical information such as the name of the employee, unless the employee has signed an authorization to disclose their diagnosis. Inform employees of the actions you have taken, including requiring employees who worked closely to the infected worker to go home. Let employees know about your sanitizing and cleaning efforts and remind them to seek medical attention if they exhibit symptoms. The failure to notify employees at your location of a confirmed case may be a violation of OSHA's general duty clause, which requires all employers to provide employees with a safe work environment.

Suspected COVID-19 Cases

If you have an employee suspected of having COVID-19, you should follow the same steps above as if you had a confirmed case in your workplace.

Relaxed Shelter-In-Place Order Issues

After shelter-in-place orders are lifted, you can ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu. You should continue to monitor your workforces for indicative symptoms, and not allow symptomatic individuals to physically return to work until cleared by a medical provider.



Shelter-in-place orders being lifted does not mark the end of the pandemic. The CDC states employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace.

As noted, check in with all employees on a regular basis to ask about their well-being. This is especially important for those who are home sick or in self-isolation. Your efforts to engage employees will prove beneficial during this time.

Employees Refusing to Work When a Shelter-in-Place Order is Lifted

Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

The threat must be immediate or imminent, which means an employee must believe death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring employees to work with patients in a medical setting without PPE at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work.

You should follow guidance issued by the CDC and OSHA to ensure employees are not in imminent danger. Once again, this guidance is general, and you must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

Keep in mind if you terminate an employee who refuses to work, even where there is no imminent danger to your employees, the employee may still file an OSHA whistleblower claim. If you can establish there was no hazard to your employees by your company’s compliance with OSHA and CDC guidelines, the whistleblower claim likely will be dismissed.

Even employees age 65 or older can only refuse to return to work if they reasonably believe they will be in imminent danger.

It is recommended during Phases One and Two, vulnerable individuals continue to shelter in place. An elderly employee could refuse to return to a worksite during these phases. The plan recommends during Phase Three, vulnerable individuals can return to work, but should practice physical distancing.

Employees Reporting to Work Sick or Refusing to Leave When Exhibiting Flu-Like of COVID-19 Symptoms

Remind the employee you are asking them to leave. Try to make them understand the reasons why their departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available such as paid sick leave, use of accrued vacation, or something else that may appease them, explain these benefits and how the employee can use them.

If the employee still refuses to leave the workplace, you can consider explaining the employee is now trespassing on private property and if they do not leave you will be forced to call local law enforcement to escort them off the premises, or terminate the employee for insubordination. Termination of the employee, however, should be considered a last resort. Given the current climate, you will need to also consider public perception related to taking overly strong adverse action against an employee expressing concerns or apprehension related to the coronavirus.



Requiring Employees to Notify Employer if Exposed or Have Symptoms or Tested Positive for COVID-19

If an employee begins experiencing COVID-19 symptoms at work, you should require the employee to notify their supervisor. If an employee begins experiencing symptoms while not at work, has been exposed to someone exhibiting symptoms, or has tested positive, the employee should contact your company by telephone or email and should not report to work.

Employees who are suffering from symptoms should be directed to remain at home until they are released by a medical provider or, if that is not an option, symptom-free for at least three days without fever, achieved without medication, and no respiratory issues, and seven days after symptoms first appeared.

Taking Employee Temperatures and Other Medical Tests

An employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

The Americans with Disabilities Act (ADA) requires any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 as they would pose a direct threat to the health of others.

Consistent with the ADA standard, you should ensure any tests you administer are accurate and reliable. For example, you may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Make sure to check for updates, as this is a rapidly developing field.

You may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Remember accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Any testing is considered a medical exam and must be conducted in a confidential way and the results need to be maintained in a separate medical file. Further, PPE should be provided to employees administering the test, as well as training on how to properly use the PPE. For those that may have an exposure to bodily fluids as part of their job, you should provide proper training on blood borne pathogens. This includes taking temperatures.

Although you can take employees’ temperatures when entering work, if you collect or distribute any medical information about the employees, you could face a privacy related claim concerning the storage of information. If you choose to measuring temperatures, use a real time thermometer and immediately notify the employees if their temperature is above 100.4 degrees Fahrenheit in a private setting.

Masks In The Workplace

You can allow your workers to wear masks if it makes them feel safe. Under the OSHA respiratory protection standard a respirator must be provided to employees only “when such equipment is necessary to protect the health of such employees.” The CDC’s April 3 guidance, however, recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain, especially in areas of significant community-based transmission. This guidance remains in effect. The CDC recommends the use of simple cloth face coverings to slow the spread of the virus, given that a significant portion of individuals with COVID-19 lack symptoms.

The simple cloth face coverings recommended by the CDC can be made at home from common household materials. The CDC made clear the cloth face coverings being recommended are not surgical masks or N-95 respirators, which it recommends reserving for healthcare workers. The cloth face coverings are not subject to OSHA’s respiratory protection standard.



Do not refuse an employee's request to wear a mask. However, you should recommend the employee use a cloth face covering, as suggested by the CDC, instead of a surgical mask. You may also want to require cloth face coverings where employees cannot avoid working within six feet of others. If you are located in a jurisdiction where masks are required to be worn, follow the provisions of the order to avoid claims from employees.

It should be noted, if you mandate your employees wear masks at work, you are responsible for providing and paying for the masks. Additionally, if you require employees to wear the face coverings, then OSHA's PPE standard likely applies. OSHA's PPE Standard applies to "all protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers."

Miscellaneous Safety Considerations

COVID-19 and OSHA Recordkeeping

OSHA recently published guidance for enforcing their recordkeeping requirements for cases of COVID-19. Recognizing the difficulty in determining whether COVID-19 was contracted while on the job, OSHA will not enforce its recordkeeping requirements that would require employers in areas where there is ongoing community transmission to make work-relatedness determinations for COVID-19 cases, except where:

1. There is objective evidence that a COVID-19 case may be work-related; and
2. The evidence was reasonably available to the employers.

This waiver of enforcement does not apply to employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services), and correctional institutions in areas where there is ongoing community transmission. These employers must continue to make work-relatedness determinations.

Workplace Privacy

Maintaining Information About Employees

If you maintain temperature or testing information for employees, you should take care to strictly limit access to this information to limited employees who have a need to know the information for personnel management purposes. You should also ensure appropriate security measures are taken to avoid inadvertent or malicious access to the information by third parties, or other employees.

To the extent testing results suggest or confirm a positive diagnosis for COVID-19 and lead to a decision to send an employee home, you should maintain a record of the testing results and treat the record as an employment medical record. All other information should only be retained as long as necessary to manage risk during the COVID-19 crisis and should be permanently deleted once it is no longer needed.

Anti-Body Testing

The FDA has not yet officially approved any antibody testing kits which are commercially available and which provide instantaneous results. Up to 70 or more companies have marketed some form of such tests. Unfortunately, the validity and effectiveness of some of these testing kits have been called into question which, in turn, has led to concerns about whether the kits may, among other things, create a false sense of security, or insecurity.

It is also not currently clear whether this type of testing can be performed outside of a clinical setting. This analysis may ultimately turn on individual state laws. With this backdrop, and given the rapidly evolving nature of this issue, you should consult with counsel before implementing this type of on-site testing.



Obligations Under Biometric Privacy Acts

For purposes of the Illinois Biometric Information Privacy Act (BIPA), a biometric identifier is defined as including “retina or iris scans, fingerprints, voiceprints, or hand scans or face geometry.” The definition expressly excludes “human biological samples used for valid scientific testing or screening,” “information captured from a patient in a health care setting or information collected, used, or stored for health care treatment,” or an “image or film of the human anatomy used to diagnose, prognoses, or treat an illness or other medical condition or to further validate scientific testing or screening.”

The recently amended New York SHIELD Act similarly defines “biometric information” as including “data generated by electronic measurement of an individual’s unique physical characteristics, such as a fingerprint, voice print, retina or iris image, or other unique physical representation or digital representation of biometric data which are used to authenticate or ascertain the individual’s identity.” These definitions would not appear to include testing results or the results of a temperature test performed by an employer, which is used to screen for possible illness and not to authenticate an individual’s identity.

As the methods and means for testing evolve, and to the extent you may eventually have the ability to perform antibody or other testing directly on employees, you should seek advice regarding whether information collected to perform the tests could conflict with any applicable biometric information privacy laws.

Human Resources Considerations

General HR Strategy

Preparing for Employees Returning to Work

Preparation and communication are of utmost importance as a crisis like COVID-19 is anxiety and stress ridden. Having a thorough plan in place to establish a safe and healthy workplace and sharing the plan provides peace of mind for your employees and their families. In addition, it establishes credibility for you, your function and your company as you will be organized, competent and prepared.

Some factors to consider include:

Structure: Implement a structure to ensure a high degree of preparedness for every possible scenario to ensure a safe workplace and the ability to deliver products and services to your customers. This is especially important to ensure consistency within each worksite and across multiple worksites. Consider developing:

- Strategy and response committees with clear roles and responsibilities which includes members from key functions;
- Decision-making outline to address key decisions such as closure, travel, positive case response, who should be consulted and who is final decision-maker;
- Protocols and procedures; and
- Policies.

Communication/Education/Training: Establish clear communications to employees and management about new processes and expectations for their return to work. This includes addressing:

- Timing (before return to work, pre-shift, and during shift);



- Signage posted at all points of entry and key locations to effectively share and remind employees of the new requirements;
- Communications drafted and ready to go in the event of a positive COVID-19 case within the workplace; and
- Business plans and impact.

Safe Workplace Protocols: Establish processes to prevent potential infection in accordance with WHO/CDC/OSHA guidelines. This includes addressing:

- Social distancing rules for work areas and common areas such as restrooms, employee entrances and exits, vending/food service, conference rooms, and break areas;
- PPE and other mitigation measures if social distancing is not possible;
- Visitor, contractor and vendor access; and
- Positive case response and management.

Cleaning/Disinfection: Create protocols including frequency of cleaning of work stations and common areas, increased sanitizing stations, inventory and restocking requirements, and disposal of PPE in accordance with WHO/CDC/OSHA guidelines. Besides routine cleaning and disinfection procedures, you should address deep cleaning and disinfection after a potential or confirmed exposure.

Healthy Workforce: Implement daily health/risk screenings to confirm the health and exposure of employees and anyone entering the work site. This could include screening measures at home and at the workplace.

When employees trust you are being honest and transparent in your communications, and you are taking every step possible to ensure their safety, they will be more likely to return to work and perform their jobs as required. Frequent and strategic communications are a necessity until the fear of coronavirus is behind us.

Communications Plan

This pandemic has shown a robust communications strategy and action plan are more important than ever. During a crisis like this, people generally want to know how it affects them and their jobs, what they need to do at home and at work, and how the organization is impacted by and handling the crisis. Many organizations develop key messages, talking points and holding statements to be utilized for a number of different scenarios that may occur including return to work, response to positive COVID-19 cases, reduced operations, temporary closure, etc.

Determine your audience, their concerns, the avenues you will use to communicate with them, the frequency of communication and who will provide the communications. In addition, there are a number of key stakeholders to consider, both internally and externally:

Employees: Your goal is to ensure employees you have a solid plan in place to maintain a safe workplace and a healthy workforce. Consider your communication to them in advance of their return to work and while at work. Key points will include date(s) to reopen/scale up operations, proactive measures to ensure a safe workplace, new protocols, pre-screening, etc. Keep your signage, procedures and messaging simple. Do not fear over communicating.

Management and Supervisors: Special attention should be given to preparing members of this team as they are on the front lines when responding to employees during this pandemic. Conduct advance training sessions for management and supervisors to prepare them on all new policies and protocols and how to respond to employees with questions or concerns. An emphasis on active listening, two-way communications, quickly identifying and resolving employee issues, and being proactive in checking



in with employees are all good practices to ensure a positive employee relations environment in your organization. Once back to work, ensure timely updates are shared with them on an ongoing basis regarding impact to the business (customers, supply chain issues, staffing status, positive cases within the workplace, policy and protocol changes, and FAQ).

Contractors, Vendors and On-Site Visitors: They will need to understand protocol for access to your workplace as well as new rules impacting them.

Suppliers and Customers: Your start-up plan may need to be coordinated with your customers and suppliers. In some cases, discussions on risk mitigation, inventory management and capital may be necessary so you can prioritize accordingly.

If you are a large employer, consider if pro-active outreach and periodic updates to community VIPs or the local health department would be helpful as your workforce returns in the coming weeks.

Engaging Employees During Social Distancing

Some communication and recognition activities common before COVID-19, such as large employee meetings or company events such as picnics, cannot take place now in the same manner as they were pre-pandemic. You will need to evaluate “cultural activities” that were in place, if they can occur with or without modification, if they should be eliminated for a period of time and how they might be replaced.

This is actually a great opportunity for engagement. Ask your employees which activities they value the most. If activities have to be eliminated or modified, get their input and ideas on what can be done instead. You can see which activities are truly valued by employees and how they can be modified or replaced with activities having meaning to your team and still accomplishing your communication and recognition goals. Of course, thorough communication to your employees during this process will help them recognize your efforts to maintain a safe and healthy workplace.

Policies and Best Practices

Policies Impacted or Needing to be Changed

You will need to implement measures to ensure the health and safety of your employees but may also need to change other policies and practices to accommodate the new normal. A thorough analysis of existing policies should be undertaken to include adjustments made for recent legislation. Some of the policies may include:

- Attendance;
- Vacation/Paid Time Off;
- Remote work;
- Work hours, including start/stop time, breaks, lunch times, flexible hours, and staggered work hours;
- Timekeeping including clock in/out procedures;
- Leave policies including sick leave;
- Travel policies including business and personal travel; and
- Information technology and usage.

In addition, you may need to work closely with your IT/IS team as many of your changes in policies and the new local, state and federal laws may impact your HRIS system.

Employers who are not otherwise limited by a collective bargaining agreement can issue new policies or handbooks when returning employees to work. This may be a good opportunity to update policies, procedures and handbooks.



If you modify policies by reducing benefits such as PTO, vacation, or holiday pay and you are uncertain whether or when you will return the benefits to pre-COVID-19 days, it may be more practical to wait to update and finalize your policies at a later date. If you intend to maintain the modified policies for a significant length of time, issuing a new handbook may be in order.

Returning Furloughed or Terminated Employees

Generally, most employees returning from furlough or a temporary layoff do not need to be “re-hired” in the traditional sense. If these employees stayed on your payroll, most employers can simply return the employee to their prior position at the same pay rate and benefit eligibility as the employee left. You should document the return-to-work date using your normal personnel action form document. If there are any significant changes to wages and benefits for the returning employee, those changes should be communicated in writing.

If you terminated employees and wish to re-employ them, the best practice would be to put the “applicant” through your company’s normal application screening process, even if you forego formal interviews. This should include an application, I-9 form (depending on the length of time the employee has been terminated) and the normal hiring paperwork. This process may also include criminal background and credit checks, drug test, and post-offer/pre-employment physical exams.

Once you have re-hired the individual, you should require the incoming employees to execute all new hire paperwork.

Returning employees to work may be a good opportunity to review personnel files for completeness to determine whether there are critical missing documents in the file. The returning employee should be asked to complete those upon return. Also check to ensure medical information, including workers’ compensation documents return-to-work notes and any other documents which contain an employee’s medical information are separated from the personnel file. Under the Americans with Disabilities Act and many state laws, employee medical information must be stored in separate confidential medical files.

Employment Law Posters

In addition to the numerous employment law related posters you have been required to post in locations throughout your facilities, every employer covered by the Families First Coronavirus Response Act (FFCRA) must post in a conspicuous place on its premises [a notice of the FFCRA](#). You may satisfy this requirement by emailing or mailing the notice to employees or posting it on the internal or external website.

Implementing a Voluntary Attendance Policy

Voluntary attendance policies allow employees to voluntarily cease work and stay at home during a temporary period, without the fear of traditional consequences such as discipline, termination, and adverse performance reviews. However, if implemented improperly, these policies run the risk of modifying the at-will employment relationship with your employees and limiting your termination rights with respect to those who avail themselves of the policy. To limit this risk, avoid express guarantees employees using the policy will not be subject to termination, or other adverse consequences that may become necessary if economic conditions worsen and include express language the policy does not alter the at-will relationship and all modifications to the at-will relationship may only be done through a signed writing executed by the employee and a company representative.

Paid Sick Leave

When employees return from furlough, any accrued paid sick or family leave pursuant to a state or local law, more than likely must be made available to the employee when they return to work. Most state and local laws have restoration provisions for employees who were terminated within a certain amount of time. Further, many employees who will be returning to work were not terminated in the first place.

Hiring Strategies

You may screen job applicants for COVID-19 after making a conditional job offer as long as you do so for all entering employees in the same type of job.



Although you can delay the start date of an applicant who has COVID-19 or symptoms associated with COVID-19, normal policies of non-discrimination to the hiring process should be followed. As such, an applicant age 65 or older or one who is pregnant does not justify unilaterally postponing the start date or withdrawing a job offer due to higher risk for COVID-19. You can choose to allow telework or discuss with these individuals if they would like to postpone their start date.

Reasonable Accommodations

If an employee asks for an accommodation for a medical condition during the COVID-19 pandemic, you can ask questions or request medical documentation to determine if the employee has a disability as defined by the ADA.

Remote Work Considerations

The COVID-19 pandemic has shown many employers the values and efficiencies associated with remote work. If your business will continue remote work practices consideration should be made for proper infrastructure, implementation, remote work plans and a comprehensive remote work policy.

First, assess or re-assess your technological capabilities. Ensure you have implemented sufficient security and privacy protocols to protect your business.

Second, determine whether your remote workers had the equipment needed to get their job done. Ensure they will continue to have access to the proper equipment and that remote “help desk” assistance can be provided on a long-term basis.

Third, evaluate the effectiveness of your work assignments, communications systems, and attendance and timekeeping records.

Finally, review your existing remote policy to determine whether it needs updating. If you did not have a remote work policy consider implementation of one. A remote work policy needs to be adjusted to fit your business needs and your organization’s expectations for your workforce. This might include separate policies for exempt and non-exempt employees.

Although some employees may have a real preference for working from home, you can refuse remote work so long as the employee is not seeking a reasonable accommodation under the Americans with Disabilities Act (ADA). If an accommodation is being requested, you should conduct an interactive process with the employee to determine whether an obligation exists to provide such or another accommodation.

Business and Continuity Management

In order to ensure continuity in critical business process, you need to consider what would happen if your CEO, CFO, IT team, front-line supervisors or payroll coordinator tests positive for COVID-19 and cannot work. The COVID-19 pandemic has shown the importance of having a business continuity plan in place. If your organization does not have a plan in place, now is certainly the time to do so to ensure you able to provide needed products and services to customers.

Be upfront with your employees about this activity and ask for their input so you have the best possible information and ideas on the table as you develop your plan. Identify essential process in your operations. Then ensure those processes are thoroughly documented so they can be carried out by other individuals. Back-up employees should be identified and cross-trained on these processes including systems access required to perform the job. In the event key individuals are unavailable to work, a short-term and long-term succession plan should be adopted to provide stability in daily operations of the organization.



Now is the time to analyze and plan, understanding that those plans need to be flexible as circumstances evolve in the coming months.

Documentation During and After COVID-19

This pandemic has presented challenges we probably never thought we would encounter. Documentation may not be at the forefront of our minds when we think about crisis management – but it should be.

Many organizations are experiencing turnover. When people leave, so does a significant amount of institutional knowledge. This knowledge may be very useful the next time, but you may no longer have access to it if someone is no longer an employee.

In addition, most crises have many common components. By having an established starting point, you can focus on other critical matters demanding your attention. While it is still fresh on your mind, take a few hours to document. Consider maintaining any documents related to the following:

- **Your project plan.** Include key elements, dates and responsible parties identified.
- **Your logistical plan.** Where, when and how did you meet? What challenges did you face? How did your daily operations change?
- **Technology and HR systems.** Were there any gaps in your information technology needing to be corrected? If you have multiple locations, did the technology work across the entire enterprise? What was the impact to your HRIS and other HR systems?
- **Policies and procedures.** Do you have a policy inventory? What policies were changed based on the crisis? What key decisions were made related to employees?
- **Communications.** Maintain a copy of the communications you sent to your employees and other key stakeholders. Were your communications effective? What gaps existed in your communications strategy? Are you planning to survey your employees to gauge their reaction to the way you managed this crisis?
- **Reflection.** How did you manage this crisis? What was employee morale throughout this crisis? What gaps existed in your preparation? Did you react quickly enough?

By taking time to document what happened, you will create a road map for your future crisis planning, minimize company risks and improve the efficiency with which you manage the next major event.

Families First Coronavirus Response Act (FFCRA) and Emergency FMLA

If an employee is recalled any time before December 31, 2020 and the person indicates they are unable to return because of one of the qualifying reasons for Emergency Paid Sick Leave (EPSL) benefits or Emergency Family and Medical Leave Act (EFMLA) leave under the [Families First Coronavirus Response Act \(FFCRA\)](#), they may be entitled to the EPSL benefit or EFMLA benefit. Further, if an employee returns to work, they will then be potentially eligible for these benefits until December 31, 2020 if subsequently covered by a qualifying reason making them unable to work or telework.

The FFCRA provides if an employee was laid off or otherwise terminated on or after March 1, 2020, and rehired or otherwise re-employed by the employer on or before December 31, 2020, they will be entitled to EFMLA if they were on the employer's payroll for 30 or more of the 60 calendar days prior to the layoff or termination.

Employees are not entitled to EPSL or EFMLA if, at the time of their request, you have 500 or more employees. If a new employee is hired as part of the return to work process and they used their 80 hours of EPSL at their previous employer, they are not entitled to additional EPSL. However, if they have taken some, but less than 80 hours of EPSL, they are entitled to the remaining portion if the employer is covered by the FFCRA.



If an employee does not want to return to work because they are scared to be in the work environment, you are not required to allow them to work from home. Even the DOL regulations to the FFCRA state telework does not have to be provided unless it is agreed to or allowed by an employer. If you otherwise have work for the employee to perform at the worksite, just being “scared” to come back to work would generally not be a qualifying reason under EPSL.

However, if the employee is in a “vulnerable” category, they might be eligible for EPSL depending on the specifics of the situation and whether they have been advised by a health care provider or are subject to a specific quarantine or isolation order because of their vulnerability. In addition, anxiety or similar issues could raise potential Americans with Disabilities Act (ADA) issues and necessitate discussion of reasonable accommodation through the interactive process, including consideration of accommodations such as working from home or additional leave time for an employee who may have already exhausted their EPSL.

It is best to consult with employment counsel to walk through these issues before making a final decision. If there is not a FFCRA or other medical or disability issue, you may be forced with a choice of instructing the employee to return to work (and the potential they might quit) or terminating the employment relationship. Again, this decision would be best made in consultation with counsel.

Wrongful Death/Personal Injury/Workers’ Compensation

Workers’ compensation insurance generally covers injuries or illnesses caused unintentionally by an accident or exposure in the work environment. However, because the damages recovered in a workers’ compensation claim are generally capped by statute, plaintiffs’ lawyers may ignore the statutory workers’ compensation system. They may instead file a lawsuit in court claiming intent or willfulness, as they recognize the potential recovery may be much higher. In some states, the worker may file both a workers’ compensation claim and a lawsuit. An employee may attempt to bring claims via a tort claim of negligence or wrongful death in civil court.

Generally, under normal workers’ compensation procedures, the burden is on the employee to establish their injury or illness was directly caused by their duties. However, states are already considering shifting that burden for cases involving COVID-19. Illinois became the first state to shift that burden, issuing an emergency amendment creating a rebuttable presumption a “First Responder” or “Front-Line Worker” who contracts COVID-19 contracted the virus at work. Expect further states to enact similar emergency laws in the coming weeks and months.

Best Practice for Defending a Wrongful Death or Personal Injury Lawsuit

The best defense is to prevent the lawsuit from ever occurring. Prudent workplace safety practices for employers concerning COVID-19 include:

- Follow the [CDC's Interim Guidance for Businesses and Employers](#) including best practices for social distancing, guidelines for cleaning and disinfecting the workplace, and quarantining employees who have an exposure to a confirmed COVID-19 case, found at [CDC's Public Health Recommendations for Community Exposure](#). Send employees with confirmed cases home until released by a medical professional or until they meet the [CDC's Guidelines for Discontinuation of Self-Isolation](#).
- Ensure that employees are provided and properly wearing all required PPE.
- Educate your employees and engage with them. Constantly remind employees of the symptoms of COVID-19 and urge them to seek medical attention if symptoms appear. Check in with isolated sick employees at least once a day to ask about their health. An employee with whom you engage will be less likely to seek litigation against their employer. An employee’s family will also appreciate this courtesy. If a COVID-19 death does occur, reach out to and embrace the family and extend genuine heartfelt condolences.



- Inform employees of confirmed cases of COVID-19 in the workplace. The CDC recommends employers notify potentially exposed co-workers of confirmed cases. Err on the side of transparency. Although no case law currently exists, OSHA may ultimately determine a failure to notify employees of a confirmed COVID-19 case is a violation of OSHA's general duty clause, the agency's generic requirement to maintain a safe work environment.

Claims by Non-Employees, Including Customers, Vendors and Visitors

Generally, claims by non-employees will not be covered by workers' compensation laws or insurance. Those claims are likely to be brought via a tort claim of negligence in civil court. The same guidance as above applies. Be prepared to demonstrate you followed CDC and OSHA guidance to reduce any transmission of the virus. At this time, that will be the best proof the company acted reasonably in light of the risk. Document the efforts you took, whether through training, posting signs, changed procedures, or equipment purchased and implemented.

Steps to Take if a Lawsuit is Filed

If a lawsuit is filed, take immediate steps to defend the claim, including the following:

- Notify counsel and all insurers who may provide coverage for such a claim, including your general liability, workers' compensation, and premises liability insurers.
- Determine, with the advice of counsel, if early dismissal of the lawsuit is possible. A workers' compensation exclusive remedy statute may in fact apply, resulting in a quick resolution to the lawsuit, leaving only a worker's compensation claim.
- If the lawsuit proceeds, prepare witnesses and gather documents to demonstrate the company's COVID-19 response plan and measures, representing your commitment to employee safety during the pandemic. You may also have the lawsuit dismissed if you can show that, given your safety practices, it was nearly impossible for the disease to be contracted at work or due to the company's actions or omissions.

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