

Considerations for Returning to Workplaces in the Wake of COVID-19

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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As employers look to bring their workforces back to the workplace, they face a range of new guidance, regulations, statutes and orders issued by federal, state and local governments and agencies in response to the COVID-19 pandemic. Employers must assess and tailor their practices in light of these laws and guidance, and their own specific needs, which will vary widely by industry, geography and other factors. Companies and organizations will be well served by implementing COVID-19-related protocols and policies before employees return to the workplace, while also showing flexibility in accommodating any unique employee circumstances on an “as needed” basis. Key points for employers to allow workers to return to the workplace are outlined below, including: (i) preparing policies and the workplace; (ii) implementing the return of workers to the workplace; and (iii) special considerations for employees.

1. Preparing Policies and the Workplace

- **Source of Guidance and Rules:** Employers should follow the guidance, regulations, statutes and orders from federal, state and local governments and agencies, including the World Health Organization, Centers for Disease Control and Prevention (CDC), the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA), that address return to workplace issues for employees. Failure to follow such guidance could subject the employer to OSHA fines and penalties, EEOC claims brought by employees, or civil actions for negligence or public nuisance brought by employees and/or third parties.
- **Federal Government – Opening Up America Again:** The federal government issued guidelines for “[Opening Up America Again](#),” which provide a three-phased approach for state and local officials to reopen communities. State and local officials may tailor the application of the phases to local circumstances, and more specific guidelines may apply to certain industries. Certain gating criteria must be satisfied before this phased approach can commence, including (i) a downward trajectory of documented COVID-19 cases within a 14-day period or (ii) a downward trajectory of positive tests as a percent of total tests within a 14-day period.

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- Phase One advises employers to continue to encourage telework and, if possible, return employees to the workplace in phases. It also advises employers to close common areas or enforce strict social distancing, minimize nonessential travel and consider special accommodations for vulnerable workers.¹
- Phase Two advises employers to continue to encourage telework, close common areas or enforce moderate social distancing and consider special accommodations for vulnerable workers. This phase loosens social distancing measures and permits increased business travel.
- Phase Three permits employers to resume unrestricted staffing of workplaces.

The guidelines generally advise employers to develop and implement policies regarding: (a) social distancing and personal protective equipment (PPE); (b) temperature checks; (c) sanitation; (d) disinfection and limited use of common areas; and (e) business travel.

- **State and Local Stay-at-Home Orders:** In addition to federal guidelines, employers should follow state and local stay-at-home orders when returning employees to the workplace. State and local stay-at-home orders vary in how they define essential workers and the sequence in which various industries may bring workers back.²
- **OSHA and CDC Guidance:** OSHA and CDC have published voluntary guidance for employers on how to prepare their workplaces and workforce to prevent COVID-19 transmission. Some of the guidance provided by OSHA and CDC, among other best practices, are described below.³
- Employers should develop COVID-19-related policies and protocols for implementing preventative safety measures, as well as monitoring and responding to infections.

- Basic infection prevention measures may include:
 - identifying where and how workers might be exposed in the workplace to the novel coronavirus that causes COVID-19;
 - promoting handwashing and providing resources that promote personal hygiene, such as hand sanitizer, disinfecting wipes, tissues and no-touch trash cans;

- sanitizing the workplace regularly, including by cleaning and disinfecting surfaces and equipment;
- maintaining and updating facilities (e.g., installing high-efficiency air filters, increasing ventilation and installing sneeze guards);
- restricting nonessential business travel; and
- creating training for employees regarding proper sanitation and prevention techniques.
- Measures to monitor and respond to infections may include:
 - requiring workers to stay at home if they are sick;
 - monitoring for local outbreaks;
 - preparing to manage employees' leaves of absences under federal, state and local laws; and
 - developing policies and procedures for employees to report COVID-19 symptoms or diagnoses, or interaction with others with such symptoms or diagnoses.
- Employers should update personnel policies based on federal, state and local COVID-19-related laws with respect to paid sick leave and leaves of absences. Employers also must post all required notices with respect to these new laws. General sick leave laws and the Family and Medical Leave Act (FMLA) will continue to apply;
- Employers should consider drafting and implementing health certifications for employees and visitors at each worksite. The health certifications should include statements affirming that:
 - In the last 14 days the individual: (i) has not experienced COVID-19 symptoms, including cough, shortness of breath or difficulty breathing, or at least two of these symptoms: (a) fever;⁴ (b) chills; (c) repeated shaking with chills; (d) muscle pain; (e) headache; (f) sore throat; and (g) new loss of taste or smell;⁵ (ii) has not tested positive for COVID-19, or if tested positive, has subsequently tested negative for COVID-19, (see Section (1)(b)(iii)(2) below); and (iii) has not been exposed to any individual who has symptoms of or has tested positive for COVID-19;
 - If the individual has previously tested positive for COVID-19, the individual should affirm that their symptoms have resolved (including the resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough,

¹ Under the guidelines of Opening Up America Again, the term "vulnerable individuals" means: (i) elderly individuals or (ii) "[i]ndividuals 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."

² See a multijurisdictional chart of orders maintained by MultiState [here](#).

³ See [OSHA Guidance on Preparing Workplaces for COVID-19](#) and the [CDC's Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#).

⁴ According to the [CDC](#), a fever is defined as subjective fever (feeling feverish) or a measured temperature of 100.4°F (38°C) or higher.

⁵ See [CDC, Symptoms of Coronavirus](#).

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shortness of breath)) and the individual has subsequently received negative COVID-19 test results from at least two consecutive nasopharyngeal swab specimens collected at least 24 hours apart (see Section 3(d)(iii)(2) below); and⁶

- The individual understands that affirming each of the above statements is required to be permitted to enter the worksite.

2. Considerations in Implementing the Return of Workers to the Workplace

- **Training and Information:** Employers should train and inform employees on COVID-19-related office policies and procedures by:
 - providing return-to-work documents, such as wage payment notices and other onboarding paperwork and updated policies, protocols and procedures;
 - training workers and disseminating information on minimizing contact and practicing personal hygiene, including handwashing and covering coughs and sneezes;
 - considering whether policies and procedures may trigger any bargaining rights with respect to unionized workforces; and
 - training workers on the use of PPE (*e.g.*, gloves, goggles, face shields, face masks and respiratory protection).
- **Contact Minimization:** Implementing policies to minimize contact between employees, such as:
 - enforcing social distancing;
 - modifying seating and workspaces to create more distance between workers;
 - decreasing the number of employees in the workplace at any particular time by:
 - staggering work cycles (*e.g.*, separate into A, B and C teams with each team taking a different one-week or two-week shift in the workplace);
 - creating extra shifts to spread workers throughout the workday; and
 - cross-training workers across different jobs.
 - ceasing or limiting the use of communal spaces (*e.g.*, cafeterias, break rooms, gyms);
 - implementing capacity limits for meeting rooms;
 - discouraging employees from sharing work equipment, including tools, phones, desks or office supplies;
 - considering telecommuting and, alternatively, which positions should return to work at the worksite in order to best perform their job duties and in what order workers should return to the workplace; and
 - replacing face-to-face meetings with virtual communications.
- **Recent Guidance:** The CDC and OSHA have issued joint guidance on exposure risks among meat and poultry processing workers, which may signal best practices outside of this industry. The agencies' guidance focused on creating distance between workers by employers taking steps such as:
 - modifying they layout of the facility so that workers are always at least six feet apart, including on processing lines, when clocking in or out, and when taking breaks;
 - using signs to remind worker to maintain social distancing when working and on breaks;
 - installing physical barriers to separate workers from each other; and
 - designating workers to monitor social distancing standards in the workplace.
- **Employees Who Report Illness:** An employer may ask employees who call in sick during the COVID-19 pandemic if they are experiencing symptoms of the virus. Additionally, employers may require employees to leave the workplace if they exhibit symptoms of COVID-19. Information about an employee's symptoms must be maintained as a confidential medical record in compliance with the Americans with Disabilities Act (ADA).
 - If an employee is diagnosed with COVID-19, employers should send the employee home immediately, disinfect the surfaces in their workspace, inform other employees who had contact with the employee of possible exposure and maintain the confidentiality of the infected employee's medical information as required by the ADA.
 - Under the ADA, employers may require that employees returning to the workplace provide a doctor's note certifying fitness for duty. Nonetheless, due to the overloading of the health care system and the current need to address active cases of COVID-19, doctors and other health care professionals may be unable to accommodate patients seeking fitness for duty documentation. Employers should be flexible in permitting varying approaches, such as e-mails or stamps from local clinics certifying that the employee does not have COVID-19.
- **Employee Health Screenings:** Under the ADA, employers may screen employees for COVID-19 when entering the workplace. For example, this may include checking temperature, administering a COVID-19 test, asking questions regarding symptoms or requiring self-reporting for all individuals entering the workplace.

⁶ See [CDC, Ending Home Isolation](#).

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- Employers may conduct temperature checks on employees during the COVID-19 pandemic; however, some individuals with COVID-19 do not present a fever. All temperature check results are considered confidential medical information under the ADA, and should be stored in a confidential manner separate from the employee's personnel file. Certain states may require disclosure notices prior to testing based on the jurisdiction's privacy laws. Employers should consider having temperature checks administered by a medical professional in a private location near the entrance of the workplace to prevent potentially infected individuals from entering the workplace.
 - Employers may administer a COVID-19 test to detect for the presence of the virus before allowing an employee to enter the workplace. Employers should ensure they are following up to date guidance from the U.S. Food and Drug Administration and CDC with respect to which tests are considered safe and reliable. Initial testing does not ensure that the employee will not acquire the virus in the future, so employers should consider continued testing depending on continued conditions of COVID-19.
- **Facilities Maintenance:** Employers should review their existing leases to, among other things, (i) understand how fixtures installed for implementing preventative safety measures will be dealt with upon the termination of such leases; (ii) determine if any physical changes to the leased premises or changes in the maintenance and management of the leased premises to prevent the spread of COVID-19 violate any existing tenant use or maintenance covenants or facility rules and regulations; and (iii) ensure landlords are complying with their building infrastructure, common area and common facility (e.g., elevators) maintenance covenants and implementing such maintenance in a way that reduces the risk of the transmission of COVID-19. Employers also should review their existing service contracts to ensure that service providers' obligations will not increase the risk of employee exposure to COVID-19 and communicate with service providers (e.g., cleaning service providers) to ensure they are following protocols to minimize the spread of COVID-19. Employers, landlords and service providers should work collectively to adapt beyond existing contractual obligations to maintain and update building infrastructure and facility upkeep protocols, which may include:
 - clean air management (e.g., air filter changes, increasing ventilation by opening doors and windows);
 - fixtures (e.g., installing touch-free trash receptacles, doors, light switches, plumbing fixtures and hand sanitizer dispensers, and removing revolving doors);
 - physical space (e.g., consider reconfiguring workplace layouts by spreading working spaces at least six feet apart); and
 - cleaning services (e.g., address sanitization efforts, ensure all building staff wear PPE, manage cleaning supplies inventory).
- **Avoiding Potential Discrimination Claims:** Employers should consider which employees are brought back from furloughs or layoffs in the early phases of opening a workplace and stage subsequent returning groups in a way that avoids any discriminatory treatment or influence in decision-making (i.e., consider factors such as performance, seniority or department-specific needs rather than age, race or sex). Although certain populations, such as those over 65 years old or who are immunosuppressed may be "vulnerable individuals," neither age nor medical condition should be considered as a factor when initially making employment-based decisions. However, a vulnerable individual may require an accommodation (see Section (3)(d)(iv) below).

3. Special Considerations for Employees

- **Families First Coronavirus Response Act:** Employers with 50 or more employees are covered by the FMLA, which entitles eligible employees to take job-protected, unpaid leave for certain family and medical reasons. The Families First Coronavirus Response Act (FFCRA), effective April 1, 2020, expanded the FMLA and created the new Emergency Paid Sick Leave Act.⁷ The FFCRA applies to employers with fewer than 500 employees and provides the following employee entitlements:
 - An employee is entitled to Emergency Paid Sick Leave if he or she is unable to work or telework and is: (i) subject to a federal, state or local quarantine or isolation order related to COVID-19, (ii) advised by a health care provider to self-quarantine due to concerns related to COVID-19 or (iii) experiencing COVID-19 symptoms and seeking a medical diagnosis. Employees also are entitled to Emergency Paid Sick Leave if they are unable to work or telework and are caring for an individual covered by either (i) or (ii) above. Full-time employees are entitled to 80 hours of Emergency Paid Sick Leave, and part-time employees are entitled to a prorated amount based on the average number of hours worked over a two-week period. If taking Emergency Paid Sick Leave to care for themselves, employees are paid at the greater of: (i) the employee's regular rate of pay, (ii) the applicable federal minimum wage or (iii) the applicable state or local minimum wage. Pay is capped at \$511 per day or \$5,110 in the aggregate. If taking Emergency Paid Sick Leave to care for another individual, employees are paid at two-thirds of the aforementioned rates of pay, and pay is capped at \$200 per day or \$2,000 in the aggregate.
 - An employee is entitled to Emergency Paid Sick Leave and expanded FMLA leave if he or she is unable to work

⁷ Please see [here](#) for a Skadden chart analyzing the FFCRA.

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or telework due to a need to care for the employee's child whose school or place of care has been closed or child care provider is unavailable due to COVID-19. FMLA leave provides for 12 weeks of leave within a 12-month period. The first 10 days are unpaid (unless the employee otherwise receives Emergency Paid Sick Leave or elects to substitute any accrued leave), and the remainder (up to 10 weeks) is payable at two-thirds the employee's regular rate of pay. Pay is capped at \$200 per day or \$10,000 in the aggregate. Employers are entitled to refundable tax credits for wages paid under the FCCRA's Emergency Paid Sick Leave and expanded FMLA leave provisions.

- Employers should adhere to existing and newly implemented federal, state and local orders, statutes and regulations, as well as the employer's policies for providing additional paid sick leave or extended leaves of absences.
- **Commuting Concerns:** Employers should consider employee commuting issues (e.g., use of public transportation) when opening a worksite. If an employee has an ADA-qualifying disability, employers should consider accommodations for the employee(s), which may include providing for working hours during times when fewer people are traveling or at times when the employee can arrange alternate transportation without causing an undue hardship to the employer. In appropriate cases, employers also may consider establishing optional shuttles to transport workers to the workplace.
- **Continued Telecommuting:** Employers should consider policies for employees who generally do not telecommute, but ask to do so because of a general safety concern about returning to the workplace. Employers are generally permitted to deny these requests but may wish to consider placing employees who do not want to work on site on unpaid leave or requiring them to use vacation or paid time off for leave, rather than terminating their employment.
- **Unemployment Insurance Benefits:** Unemployment insurance benefits will be impacted.
 - If an employer calls an employee back to the workplace and the employee refuses to return either because the employee would prefer to collect unemployment insurance benefits or the employee has general concerns about exposure to COVID-19, the employee would not qualify for such benefits under state programs, in addition to the new temporary federal programs called Pandemic Unemployment Assistance (PUA).
 - If an employee qualifies for unpaid medical leave — including unpaid medical leave because the individual has a compromised immune system by virtue of a serious health condition — the employee may not be eligible for unemployment insurance benefits under state programs because

the employee is not “able or available to work.” However, the employee would be eligible for unemployment insurance benefits under PUA.

- PUA allows an employee who is not eligible for state benefits to collect PUA unemployment insurance benefits if the employee is not able or available to work due to one of these delineated COVID-19-related reasons in Section 2102(a)(3)(A)(ii)(I) of the CARES Act:
 - The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
 - A member of the individual's household has been diagnosed with COVID-19.
 - The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19.
 - A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work.
 - The individual is unable to reach their place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency.
 - The individual is unable to reach their place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency.
 - The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19.
 - The individual has to quit his or her job as a direct result of COVID-19.
 - The individual's place of employment is closed as a direct result of the COVID-19 public health emergency.
- **EEOC Guidance:** The EEOC provided guidance in a publication interpreting EEO laws, including the ADA and the Rehabilitation Act.⁸ Employers should consider employee accommodations and adhere to federal nondiscrimination laws.⁹

⁸ See EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”

⁹ State and local laws may provide additional protections.

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- Certain employees with preexisting mental health conditions that may be exacerbated due to the COVID-19 pandemic may now be entitled to a reasonable accommodation upon returning to work. For example, employees with mental health disorders such as anxiety or post-traumatic stress disorder may experience increased difficulty with disruptions to daily life due to the COVID-19 pandemic. Employers should engage in an interactive process with these employees for any accommodation requests.
- Employers may not ask employees who do not have COVID-19 symptoms to disclose whether they have any underlying medical condition that may make them particularly vulnerable to COVID-19. However, if an employee voluntarily discloses that he or she has a specific medical condition or disability that puts him or her at increased risk of COVID-19 complications, the employer may seek confirmation from a treating physician and should ask the employee what type of accommodations may be needed while engaging in an interactive process. The employer should keep all such medical information confidential and separate from employee personnel files.
- If an employer requires employees to wear protective equipment such as gloves, face masks or coverings, it is best practice either to provide this equipment to employees or to reimburse employees for such equipment. For example, many jurisdictions are recommending or mandating that individuals wear face masks or coverings when in public. Employers also may require, or permit on a voluntary basis, the use of face masks or coverings in the workplace. While many employers are generally not required to provide face masks or coverings to employees, some state laws prohibit employers from requiring employees to pay for business expenses. Additionally, some jurisdictions now expressly require employers to provide face masks or coverings to employees due to the COVID-19 pandemic.
 - While there are no specific OSHA requirements covering COVID-19 exposure, some requirements may apply to prevent occupational exposure to COVID-19, including: (i) OSHA's PPE standards, which require the use of gloves, face, eye and respiratory protection in certain industries and under certain conditions, and (ii) the General Duty Clause, Section 5(a)(1) of the Occupational Health and Safety Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Failure to abide by OSHA standards may result in fines or penalties for the employer. OSHA also has published Guidance on Preparing Workplaces for COVID-19. Although the guidance is voluntary, an employer failing to adhere to the health and safety measures set forth in the guidance may potentially be presumed to be in violation of OSHA's General Duty Clause for failing to furnish workers with a place of employment free from hazards.¹⁰
 - The CDC has issued guidance recommending face masks or coverings to be generally worn in public to prevent the transmission of COVID-19; however, OSHA has not issued guidance as to whether these face masks or covering are considered PPE. If employees are required to wear PPE under OSHA guidelines (for specific worker groups based on workplace hazards), then employers should provide such equipment at no cost to employees.¹¹ Employers are required by OSHA to provide training to each employee who is required to use PPE. Employers may allow employees to use their own PPE (and are not required to reimburse the employee for that equipment); however, the employer is responsible for assuring the adequacy and sanitation of such employee-provided equipment. Employers should ensure that all OSHA PPE standards are followed when requiring employees to use face masks.
 - Employers should consider that some employees may require accommodations due to a need for modified PPE. For example, an employee with a disability may require a reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks) or a religious accommodation under Title VII (e.g., modified PPE due to religious garb). The employer should communicate with the employee regarding the requests and, if feasible, provide an accommodation, unless it would cause an undue hardship to the employer under the ADA or Title VII.
 - **Workers' Compensation:** Employees who contract COVID-19 in the workplace may bring a workers' compensation claim. Workers' compensation claims do not require that the employee prove negligence on the part of the employer, but they are limited in the amount of recovery and often covered by insurance. The standard for workers' compensation claims varies by state, however, employees generally must show that they contracted the disease in the workplace and that exposure to the disease was caused by conditions peculiar to the workplace. It may be difficult for employees who contract COVID-19 to

¹⁰ See [OSHA, Guidance on Preparing Workplaces for COVID-19](#).

¹¹ See [29 CFR 1910.132, Personal Protective Equipment](#).

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prove that they were exposed to and contracted COVID-19 during their regular course of work (rather than through other public interactions). Workers' compensation often serves as an exclusive remedy and employees seeking workers' compensation are precluded from pursuing litigation in many cases. However, in some jurisdictions, employees can avoid the workers' compensation exclusivity limitations by establishing intentional misconduct or gross negligence by the employer.

Given the frequent legal developments occurring during this rapidly evolving situation, employers should seek guidance from counsel. Best practices for employers may vary based on state and local laws or on industry-specific guidance, and employers should tailor approaches to their specific circumstances.

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