

# Opening for Business? Issues for Employers

May 4, 2020

As states and municipalities begin to ease shelter in place restrictions, employers who have been closed or operating at reduced capacity are anxiously awaiting a return to more normal operations. Reopening will not, however, mean an immediate return to the way things were in February 2020. Employee health and safety will continue to be a primary concern. It will also be extremely important for businesses to take actions that give employees and customers confidence in working for and patronizing the business.

Each business will have unique reopening considerations to take into account, such as the amount of in-person interaction with the public, physical distancing logistics in the workspace, protective equipment, cleaning practices, and employee exposure and illness policies. Some actions will be dictated by the applicable governmental authorities who define the rules for reopening. There is, however, some general guidance which should be useful to consider as employers begin to plan for a reopening.

1. *What is the Exposure Risk?* Thinking about what contact your employees will need to have with co-workers, customers, and vendors will help focus attention on possible rules for social distancing, protective equipment, or alternative work arrangements. The federal Occupational Safety and Health Administration (OSHA) has published a guide for assessing the exposure risk for various jobs. For each risk level, suggested mitigation strategies are proposed. These will provide employers with ideas for steps that can be taken, as well as some indication of the level of response that is appropriate given the nature of the business. This guidance is available at <https://www.osha.gov/Publications/OSHA3990.pdf>.
2. *How Will You Clean the Physical Environment?* Every employer, from the smallest office to the largest manufacturing plant, will need to consider how the workplace is cleaned, in light of the latest knowledge about the SARS-CoV-2 virus. Last week, the Centers for Disease Control and Prevention (CDC) issued "reopening" guidance on cleaning and disinfecting workplaces to attack possible coronavirus exposure. This guidance is available at <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.
3. *Will You Screen Employees?* In normal times, asking current employees medical questions or requiring them to take medical tests would be prohibited by the Americans with Disabilities Act and similar state laws, except in very limited circumstances. In a series of pronouncements over the last few weeks, however, the Equal Employment Opportunity Commission (EEOC) has made clear that these are not

normal times. The EEOC has announced that, in the current environment, employers are free to take the temperature of each employee on a daily basis, an act that normally would be seen as a medical test. The EEOC has also said that employers may ask employees certain medical questions, including specifically asking the employee if he or she is experiencing any of the symptoms which the CDC lists as being indicative of COVID-19. Most recently, the EEOC also announced that employers can require testing of employees for COVID-19. Even though these expanded options are available to employers, appropriate confidentiality protocols must still be observed and other practical logistics need consideration, such as how to screen workers in an effective manner without a screener being exposed to COVID-19.

4. *What Will You Do About Higher Risk Employees?* Some employees may be reluctant to return to a work environment with others if the employee or a loved one has an underlying health condition that puts them at higher risk in the event of contracting COVID-19. Other employees may not be at higher risk, but may resist return to work out of fear of exposure. Employers should think ahead of time about how to address such matters, taking into account their obligation under OSHA to take reasonable measures to provide a safe work environment, workers' compensation risks, and their operational needs.
  
5. *What Will You Do If There Is an Exposure?* Obviously, reopening a business does not mean COVID-19 has been tamed. Are you prepared to deal with an employee who begins to exhibit worrying symptoms during the workday or who calls in to say they have been exposed? What should you do if an employee or customer that has been in contact with your other workers or customers tests positive for COVID-19? These are issues that should be considered before the exposure occurs so that you are prepared to address these scenarios, which clearly will become realities for some businesses. The CDC and OSHA provide some guidance, depending on the situation. The protocol an employer chooses to follow will likely require that certain employees be trained in order to effectively carry out responsive measures.
  
6. *What Is Your COVID-19 Plan?* Some governmental reopening strategies require that an employer have a plan that addresses the above issues and other COVID-19 issues. For example, the governor of Minnesota has issued a reopening order that requires employers to have a written COVID-19 plan and the order includes a sample plan that meets the state's requirements. See [https://www.dli.mn.gov/sites/default/files/pdf/COVID\\_19\\_business\\_plan\\_template.pdf](https://www.dli.mn.gov/sites/default/files/pdf/COVID_19_business_plan_template.pdf). Even if not required by a governmental authority, a written plan is important to show employees, customers, and potentially government regulators that an employer is taking the COVID-19 risks seriously and taking appropriate action. A plan can also be useful for training purposes and to ensure consistency in responding to situations as they occur.

Employers will be navigating uncharted waters as the economy begins to open up. Careful planning based on COVID-19 risk and response considerations will be important to help that process go as smoothly as possible.



For more information, please contact Brian Woolley; Megan Anderson; Labor, Employment, and Higher Education Practice Group Chair Kathryn Nash; or your regular Lathrop GPM contact.