

# COVID-19: Guidance for Employers on Reopening and Returning to Work

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# Introduction



# Web of Laws and Orders Impacting Reopening



# Web of Laws and Orders Impacting Reopening

- Federal, State and Local Executive Orders
  - Stay at Home/Shelter in Place Orders
  - Orders on Reopening/Resuming Activities
- Federal Laws (and State/Local Equivalents)
  - Title VII / ADEA
  - ADA
  - DOL / OSHA
  - NLRA
  - EPA laws
  - FFCRA
  - CARES Act (unemployment; PPP)



# Reopening Resource Materials

*COVID-19 Websites/Landing Pages from these Government Resources:*

- “Opening Up America Again” Guidelines – CDC & White House
- Opening Up State Guidelines (e.g., MO’s “Show Me Strong Recovery” Plan)
- CDC
- OSHA / HHS
- EPA (List N of disinfecting agents)
- EEOC
- State and Local Public Health Departments
- State Unemployment Agencies

*Reopening Guides/Templates from Chambers of Commerce, Industry Groups (e.g., International Franchise Association) & Private Companies (e.g., Lear Corp. Safe Work Playbook)*



# COVID-19 Return to Work Plans



# COVID-19 RTW Plans

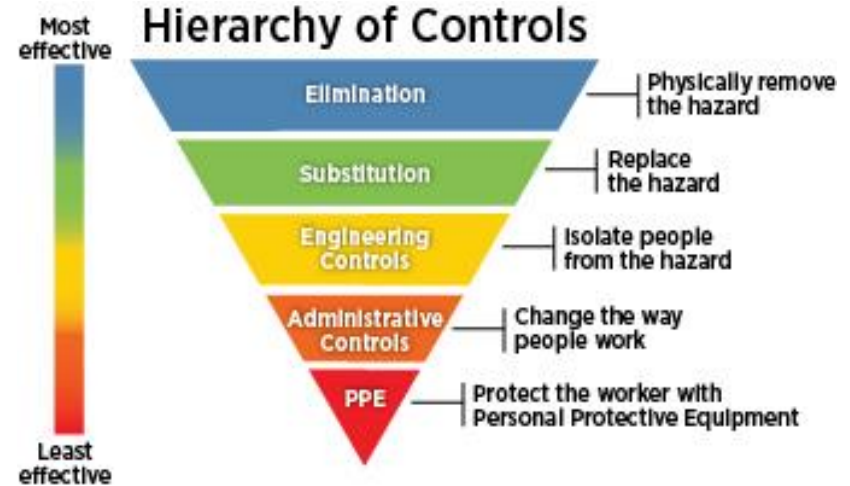
- Some states *require* a written plan (e.g., Minnesota)
- Good idea even if not required (multi-disciplinary plan)
- Consider Implementing a COVID-19 RTW Task Force or Team





# Key Components of RTW Plan

- Infection Prevention and Elimination Measures (including, e.g., Employee Health Screenings; Isolation Protocols)
- Other Safety Measures (Education, Training, Posters, Practices)
- Personal Protective Equipment?



Source: NIOSH



# Employee Health Screenings

# Screening Employees



# Normally an Employer Can NOT:

- Require current employees to undergo medical tests
- Ask current employees medical questions





# But these are not normal times.....



# Because of the pandemic, EEOC will allow:

Taking temperature of employees upon entry



# Because of the pandemic, EEOC will allow:

Asking employees if they have COVID-19 symptoms





# COVID-19 symptoms, per the CDC

- Cough
- Shortness of breath or difficulty breathing

*Or at least two of these symptoms:*

- Fever
- Chills
- Repeated shaking with chills
- Muscle pain
- Headache
- Sore throat
- New loss of taste or smell

# Because of the pandemic, EEOC will allow:

Testing for COVID-19



# Practical Considerations

Confidentiality

Logistics

Protecting the Screener

Pay for Screening Time?





# Other Employee Safety Measures

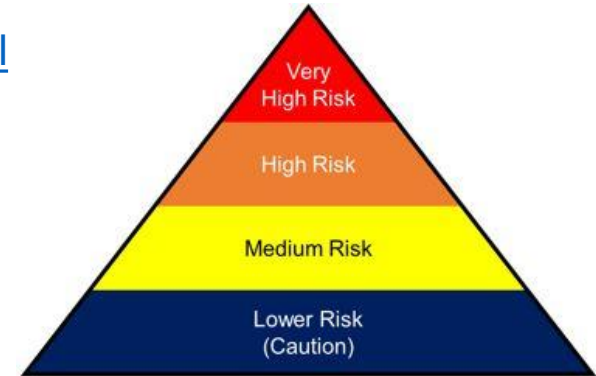
# Safety – Prevention Considerations and Measures

- Satisfy legal obligations to employees, vendors, customers and visitors and reduce risk of claims
  - OSHA
  - Workers' compensation
  - Negligence
  - Consider assumption of risk and liability waivers from vendors, customers, visitors, though may not be enforceable in all jurisdictions
- Business Considerations
  - Reduce employee refusal or resistance to coming into work
  - Improve employee morale and productivity
  - Reputational considerations

# Safety – Prevention Considerations and Measures

## Conduct Industry and Occupational Risk Assessment

- Federal OSHA risk assessment guidance online at:  
<https://www.osha.gov/SLTC/covid-19/hazardrecognition.html>
- Most common spread is through close contact with infected individual (within about 6 feet) via respiratory droplets
- Those who are symptomatic are most contagious, but asymptomatic individuals can be contagious
- Possible that may obtain COVID-19 through touching contaminated surface and then touching face (eyes, nose, mouth)



# Safety – Prevention Considerations and Measures

## Safety Prevention Measures for COVID-19 Plan

- Continue remote work as much as possible
- Ban or limit work travel to only critical, essential travel; monitor and address employee's personal travel
- Virtual, rather than live meetings and events, as much as possible
- Effective employee-wide communication methods
- Employee and visitor posters, education and training on prevention and response policies and protocols





# Safety – Prevention Considerations and Measures

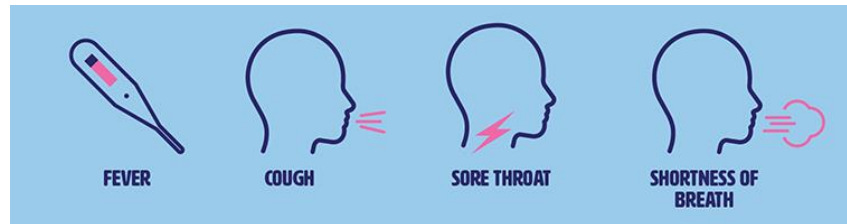
## Safety Prevention Measures for COVID-19 Plan

- Health screening program (may be required by state or local order)
- Assess and reconfigure ventilation systems as appropriate
- Physical distancing at company work locations
  - Address access, exit and “choke-point” areas
  - Address work spaces, common areas, and work schedules to space employees at least 6 feet apart as much as possible
  - Add protective barriers where duties preclude 6 feet distancing
  - Address distancing measures for vendor, customer or other third party interactions

# Safety – Prevention Considerations and Measures

## Safety Prevention Measures for COVID-19 Plan

- Illness and Time Off Policies
  - Employees should self-monitor own and household members' symptoms
  - Employees should be required to stay or go home if they or household member has positive test, is sick, and for certain other exposures
    - Per CDC: Cough, Shortness of Breath or Difficulty Breathing, Fever, Chills, Shaking, Muscle Pain, Headache, Loss of Taste/Smell
  - Consider isolation / sick room at worksite



# Safety – Prevention Considerations and Measures

## Safety Prevention Measures for COVID-19 Plan

- Illness and Time Off Policies
  - Medical documentation or not?
    - CDC guidance discourages test result or other medical documentation requirement
    - Balance privacy interests and potential lack of access to testing / medical providers against potential for abuse of time off and pay policies
    - FMLA and FFCRA limit information and documentation that employer can collect for covered leaves

# Safety – Prevention Considerations and Measures

## Safety Prevention Measures for COVID-19 Plan

- Hygiene habits (hand-washing, covering coughs and sneezes, no handshaking or other physical contact, etc.)
- Cleaning and sanitization measures
  - Frequent cleaning and sanitizing of facilities, equipment, tools, etc.
  - Provide employees with cleaning and sanitizing products (e.g. soap and water, hand sanitizer, tissues, wipes, trash receptacles)
  - Prohibit or discourage use of other employees' equipment, devices and tools





# Safety – Prevention Considerations and Measures

## Safety Prevention Measures for COVID-19 Plan

- Personal protective equipment (PPE)
  - Face masks
  - Shields / barriers
  - Gloves
  - Other



# Should You Require PPE? Is OSHA Implicated?



# Facial Coverings

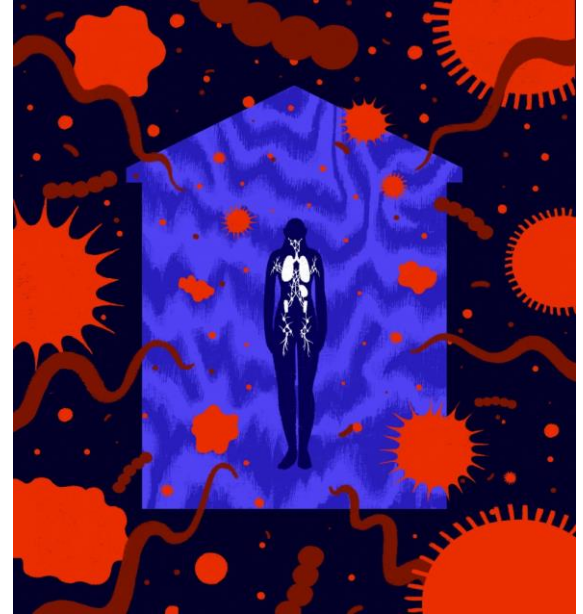
- Many state and local mandates require/strongly encourage use of facial coverings/masks
- See OSHA's *Guidance on Preparing Workplaces for COVID-19*
- Don't confuse facial coverings with respirators (N95s)
  - “Note: a face mask (also called a surgical mask) . . . on a patient or other sick person should not be confused with PPE for a worker; the mask acts to contain potentially infectious respiratory secretions at the source (i.e., the person's nose and mouth).”
- MN OSHA: “Masks and face coverings are *not* regarded as PPE.”
- If protective device is truly PPE, OSHA (state equivalent) employer obligations follow
- Regardless, it is wise to assess hazards and train employees on facial coverings

# Employees Who Don't Want to or Cannot Come to Work



# Issues in Returning Employees to Work

- **Returning Employees may be:**
  - Sick
  - Exposed
  - Caring for a sick family member
  - Caring for a child whose school or daycare is closed
  - Concerned, High-risk
  - Concerned, Living with someone High-risk
  - Experiencing physical or mental disability



# Issues in Returning Employees to Work

- **Complex intersection of multiple legal and business considerations**
  - Statutes, regulations, “Guidance”
    - OSHA: General duty of safe workplace
    - Leave laws: federal, state & local including new emergency leave laws
    - ADA & other disability laws: duty to consider accommodation
    - Non-discrimination laws (Title VII, ADEA, state & local laws)
    - National Labor Relations Act
    - Wage & Hour laws
    - Unemployment insurance regulations
    - Web of Guidance: what counts

# Issues in Returning Employees to Work

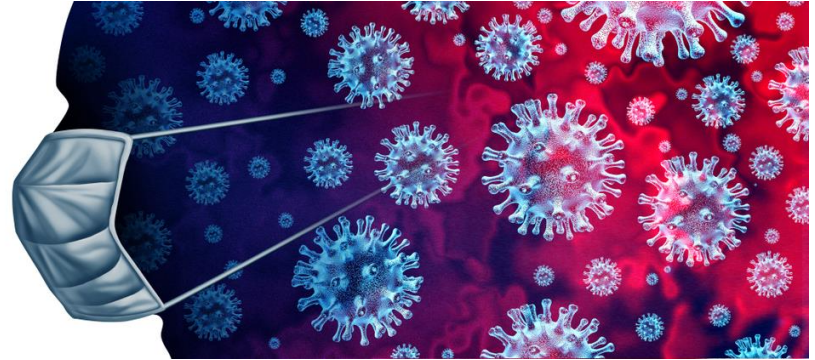
## Affirmative Employer Duties & Employer Rights

- **Contract obligations:** Evaluate any to employees under individual contracts or collective bargaining agreements
- **Leave rights & policies:** Evaluate for paid or unpaid time off options:
  - FMLA, FFCRA (EPSL & E-FMLA), Personal Leave, Union layoffs, state & local laws
- **Insurance and benefits:** Evaluate (e.g. health insurance, COBRA, workers' compensation, short and long-term disability)
- **Incentivize sick and exposed individuals to stay home?** Consider modifying/flexing time off & attendance policies and voluntary pay incentives
- **Employee “waivers”:** Consider acknowledgment & agreement to safety measures, assumption of risk and liability
  - Despite limited application and enforceability in scope & jurisdiction

# Issues in Returning Employees to Work

## Affirmative Duties: Employer Initiation

- Notice to employees: Consider potential duty to notify employee(s) of leave rights such as EPSL or E-FMLA
- Be especially mindful of age and disability discrimination laws
- Consider potential duty to offer accommodation when need for accommodation is “open and obvious”
- Observe privacy and confidentiality of medical information





# Issues in Returning Employees to Work

## Reasonable Accommodation of a Disability

- Definition of disability: includes *substantially limiting* condition that is *not temporary*
- May be physical or mental
- Interactive process of reasonable accommodation
- Analysis must be individualized, case-by-case
- Analysis may be different for each situation; blanket policies must be explored
  - Same analysis in pandemic may yield different result than before
- “Reasonable accommodation” may include:
  - deviation from policy
  - different work location (including remote work), schedule, or duties
  - leave of absence

# Issues in Returning Employees to Work

## Potential voluntary accommodation for vulnerable workers

### Accommodation is not reasonable where it:

- presents a direct threat to the health or safety of the employee or others, or
  - creates an undue hardship on the business
- 
- **If you offer accommodations:**
    - ensure a confidential process
    - limit, as much as possible, gathering of data that might make employer vulnerable to later claims of discrimination

# Issues in Returning Employees to Work

## Protection of worker speech and conduct related to safety & health

- National Labor Relations Act
  - Concerted activity
  - Work stoppage rights for safety
- Whistleblower laws
- Non-retaliation provisions of numerous laws
- OSHA general duty clause



# Issues in Returning Employees to Work

## Wage & Hour Compliance Issues

- **Exempt:**
  - general rule: pay full salary for any work week in which they do any work
    - limited exceptions don't include employer-initiated absences
  - if pay reduced due to hours reduction, ensure that any weekly exempt salary requirement is still met or temporarily reclassify as non-exempt; document changes
- **Non-exempt:** pay for hours actually worked
  - Donning & doffing
  - Temp taking & other check-in time
  - WFH: time recording, meal and rest breaks

# Issues in Returning Employees to Work

- **Federal & state unemployment laws:** regular & emergency
  - Eligibility requirements generally
    - *Involuntarily* unemployed
    - Available for work
    - Searching for work
- **Refusal to Work**
  - UI: May result in ineligibility
    - Justified refusal per state law?
  - PPP: Refusers may be excluded from count of those not returned for forgiveness purposes
- **Refusal to Test/Observe policies**
  - Disciplinary prerogatives
- **Scared to Work:** Prevention & Reassurance Measures
  - Clear & transparent communications





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