

Coronavirus

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COVID-19 Return to Work Q&A: Premises Liability Issues

1. As I open my business to customers, could I be at risk of customer and employee lawsuits based on COVID-19?

Yes, you could be at risk for personal injury or other tort claims because under the law in most states, a business owner has a duty to exercise “reasonable care” to make the premises safe for its customers. Lawsuits have already been filed against large retailers in some states where employees claim they became ill at work. It is likely this trend will continue and expand beyond employees to customers and possibly other individuals, including vendors, package delivery contractors, etc.

2. How can I limit my risk of COVID-19 personal injury lawsuits?

You must be proactive and take concrete steps to implement reasonable measures to mitigate the risk of COVID-19 transmission at your business. You should not simply open your doors when stay-at-home orders are lifted.

First, you should monitor guidance and reference resources from state and federal agencies like the Centers for Disease Control and Prevention (CDC) and U.S. Department of Labor Occupational Safety and Health Administration (OSHA) as well as local public health departments. You should also monitor whether your business is subject to any new federal, state, or local laws, regulations, or ordinances related to COVID-19. These resources will play key roles in determining what standards will apply (meaning, “what is reasonable care” at my business).

Second, you should review your business to assess what potential COVID-19 risks exist and determine what changes may need to be made to comply with the public health regulations, recommendations, and guidance. You should develop return to work policies and procedures addressing these standards. At a minimum, you should consider basic infection prevention measures, including promoting employees to frequently wash their hands, requiring workers to stay home if sick, encouraging respiratory etiquette, etc. As you implement the policies and



procedures, document what you have done—take pictures of warning signs and the day you posted them, keep records of employee training logs, etc.

Third, if you see any unaddressed issues related to potential COVID-19 exposure, from employees not washing hands to not wearing face masks, you should take action to resolve the issue and document the steps you took and when. For example, if you see an employee not wash their hands, correct them and keep a record of it.

3. Do I have a duty to prevent transmission of COVID-19 at my business?

You have a duty to exercise “reasonable care,” which requires you to take steps to reduce the potential or actual spread of COVID-19. “Reasonable care” does not mean that you must eliminate the risk of COVID-19 transmission, but you must be deliberate and be proactive in assessing and implementing measures to address known or suspected COVID-19 risks.

4. What specific COVID-19 guidelines should I follow when I reopen?

As mentioned above, guidelines issued by the CDC, OSHA, local public health departments, and industry associations are helpful and will likely play a role in determining what constitutes “reasonable care” for purposes of tort liability. The specific measures and recommendations differ by industry. For example, if your business involves food and related issues, you should refer to the FDA website. If you operate a restaurant, you should consult the National Restaurant Association guidance. If you own a retail store, you should consider the Retail Industry Leaders Association. These are helpful starting points, but ultimately you will have to consider how they apply to your business and implement reasonable measures to provide a safe premises.

5. If I comply with all of the CDC guidelines, is that enough?

CDC guidelines are the recommended starting point and they should be followed. But you also should review and consider recommendations from local and state public health departments, industry associations, and other relevant agencies and groups.

6. Do I need to specially train my employees on COVID-19 protections before I reopen?

Yes. At a minimum, you should educate and train your employees on steps they can take to reduce the spread of COVID-19, including staying home if they are sick, informing a supervisor if they have a sick family member at home with COVID-19, washing their hands frequently with soap and water for at least 20 seconds, avoid touching their eyes, nose, and mouth, covering their mouth and nose when they cough or sneeze, clean and disinfect frequently touched objects, avoid other employees’ phones or other work equipment, and practice social distancing at home and work. You should also hand out summaries of these steps—in the appropriate language—to your employees.

7. Do all of my employees need to wear masks? What about customers?

According to the CDC, masks should be worn by employees working in public settings where social distancing measures are difficult to maintain, especially in areas of significant community-based transmission. In the immediate short-term, you should consider requiring your employees wear masks, and you should assume you will need to provide masks to all of your employees.

As for your customers, it will depend on the nature of your business. For example, CDC guidance says that everyone entering a pharmacy should wear a face covering. OSHA also recommends high-volume retailers consider offering face masks to customers. Several big box retailers are refusing entry to customers unless they wear masks. While maybe not required, taking steps like these will help minimize the potential risks of COVID-19 transmission and tort liability.



8. *Do I need to require all customers to use hand sanitizer before entering my business?*

Currently, neither OSHA nor the CDC has set a national standard on hand sanitizer use. However, OSHA requires that employers provide employees a place to wash hands or alcohol-based sanitizer containing at least 60% alcohol.

9. *Do I need to screen (including temperature checks) my employees, customers, vendors, and other people before coming into my business?*

According to the CDC, screening employees is an optional strategy employers may use. You are not currently required to conduct temperature checks before allowing employees, customers, and others to enter your business. However, because fever is one of the primary symptoms for COVID-19, you should consider whether temperature screenings for employees and others are feasible for your business. You need to have strong policies in place where sick employees are told to stay home and are not exposed to customers.

10. *What should I do if an employee comes to work with COVID-19 symptoms?*

Employees who have symptoms when they arrive at work or become sick during the day should immediately be separated from other employees and customers and sent home. It should be your policy that employees should not return to work until they have met the criteria to discontinue home isolation and have consulted with their healthcare provider and state or local health department.

11. *How do I keep employees and customers safe?*

The CDC recommends considering options to increase physical space between employees and customers such as opening a drive-through, installing partitions, and marking floors to guide spacing at least 6 feet apart, cleaning surfaces at least once a day, consider assigning a person to rotate throughout your business to clean and disinfect, scheduling handwashing breaks so employees can wash their hands, and consider scheduling a relief person to give cashiers and service desk workers an opportunity to wash their hands.

12. *Do I need to redesign my business to accommodate social distancing strategies?*

Yes. OSHA guidance recommends that high-volume retailers (1) install physical barriers, such as clear plastic sneeze guards where feasible, (2) consider limiting customers' public access to certain portions of your business, and (3) consider strategies to minimize face-to-face contact. You need to consider changes to your operations, store layout, etc. to practice sensible social distancing and maintain 6 feet between co-workers and customers, where possible. This may mean removing or reconfiguring workstations, opening every other cash register, skipping tables, installing plexiglass partitions, limiting the number of customers inside your store, not allowing guests to congregate, changing traffic paths, etc. You should also consider whether you can implement new "touchless" services that minimize contact between employees and customers, including curbside pickup, requiring credit cards or mobile payment services (Apple Pay, Venmo, PayPal), etc.

13. *Is there a limit on the number of customers I can have in my space at any time based on COVID-19?*

All businesses have occupancy limits set by local fire codes—and those must still be followed. As mentioned above, the CDC is recommending that businesses implement social distancing strategies that could include limiting the number of customers in your stores at any given time. You will need to consider whether this is feasible, and if so, how many people your store can safely accommodate at any given time while maintaining 6 feet of separation. In areas with higher rates of community-based transmission, there may be stricter emergency occupancy and customer limits.

14. *We have elevators and stairs in my business? Are there limits on how many people can use an elevator? What about bathrooms?*



Neither OSHA, the CDC, nor any other agency has provided hard and fast limits on how many people can use an elevator at one time during the COVID-19 disaster. However, because an elevator is a confined space with little ventilation and has commonly touched surfaces, it is an area where the risk of transmission may be significantly higher. You should monitor elevator use and stairs on a regular basis, and you should consider limiting access to only those individuals that require the elevator such as disabled persons and those requiring additional assistance.

The same applies to bathrooms. Take steps to increase ventilation, where possible, such as opening a window, and consider installing physical controls that allow doors to be opened without touching door handles. Also, be sure to provide sufficient quantities of soap and single-use disposable towels and consider having your employees more frequently monitor bathrooms to ensure sufficient supplies exist at all times. You should discontinue use of air-powered hand dryers.

15. If a customer tries to return a product purchased before the COVID-19 emergency, do I have to accept the return?

There is no guidance that requires stores to honor returns during the COVID-19 pandemic. However, given that many areas have been under or are still under stay-at-home and shelter-in-place orders, you may consider extending typical return times to account for the inability of customers subject to these orders to return items.

16. Do I need to take special steps to clean my store in this COVID-19 environment? How often should I clean my store during the day?

Yes. You should routinely clean and disinfect all areas, paying particular attention to frequently used surfaces, such as doorknobs, handrails, counters, etc. Disinfection should be done with EPA-approved disinfectants and appropriate gloves and protective equipment for the chemicals should be worn at all times while cleaning. Some areas, including commonly touched surfaces may need to be cleaned several times per day based on level of use. You should train employees on the proper disposal of PPE and cleaning supplies, which may be implicate OSHA standards governing regulated waste.

17. What guidelines should I follow in cleaning my business?

You should follow CDC recommendations and any local or state recommendations.

18. Do I need to keep records of all COVID-19 cleanings?

In addition to frequent cleaning of commonly touched surfaces discussed above, you should continue to follow your normal cleaning practices. You need to be prepared to demonstrate your cleaning measures, including, when you cleaned, what you cleaned, what you used to clean, and who cleaned different areas within your store. If possible, consider identifying one employee who is responsible for floating around the store and cleaning surfaces at regular intervals throughout the day.

19. Do I need to put up special signage notifying customers and employees about COVID-19? Are there specific requirements for signage (i.e., size, text, etc.)?

Yes, posting special signage at the entrance and throughout your business space is recommended. You should consider posting signs warning customers of the risk of public exposure to COVID-19, requiring customers maintain at least 6 feet between themselves and others at all times, notifying them of any tables or workstations that are not available, requiring mask use, encouraging the use of hand sanitizers throughout the store, prohibiting sick people from entering your store, etc.

Currently, neither OSHA nor other agencies have issued specific requirements regarding size, format, size of text, or content of the signage. As a general rule, however, you should place signage where it can be easily seen by



customers; signage should be sufficiently large for customers to identify and read the posted content; text should be appropriately sized and be legibly typed or printed, and signage in multiple languages should be considered.

20. *If I see a customer or employee not wearing a mask or appears to be sick, what action should I take? Should I ask them to leave?*

The most important thing is that you respond quickly and address the risks. If a customer removed their mask and you are requiring customers to wear masks at all times, you need to instruct the customer to put the mask back on. If a customer is sick or exhibiting symptoms of COVID-19 and refuses to wear a mask, it may be necessary to ask them to leave the store. You can offer to help them using other social distancing measures like curbside pickup, etc.

21. *I understand Congress may be passing legislation that would protect businesses from COVID-19 lawsuits? Will that protect me?*

Over the past several months, several congressional leaders have discussed the possibility of including liability protections for businesses related to COVID-19. However, others oppose COVID-19 liability protections. At this time, it remains uncertain whether COVID-19 liability protections ultimately will become law. With this uncertainty, you should not rely on the possibility of COVID-19 liability protections taking effect and take all necessary steps to prepare your business to minimize the risks of COVID-19 exposure and transmission.

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