KING & SPALDING

CRISIS PRACTICE

Coronavirus

LIFE SCIENCES AND HEALTHCARE

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Return to Work:

Basics for "Non-Essential" Businesses

While COVID-19 continues to impact communities across the country and world, businesses characterized as "non-essential" are beginning to reopen. As employees return to work, the United States Department of Labor Division of Occupational Safety and Health Administration (OSHA) issued new guidance for non-essential workplaces to follow in an effort to ensure worker safety.

Phased Guidance

OSHA tailored its guidance to the three phases of reopening identified in the White House's Guidelines for Opening Up America Again. During all phases of reopening, employers should implement strategies for basic hygiene (*e.g.*, hand washing, cleaning and disinfection of common and high-traffic areas), social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training that are appropriate for the particular phase.

- During Phase 1, businesses should consider making telework available when possible and "feasible" with business operations. OSHA does not define what constitutes feasibility under these circumstances. For employees who return to the workplace, employers should consider limiting the number of people in the workplace to maintain strict social distancing practices. Accommodations should be considered for workers at higher risk of severe illness, including elderly individuals and those with serious underlying health conditions. Special accommodations should also be considered for workers with household members at higher risk of severe illness. Non-essential business travel should be limited.

- During Phase 2, businesses should continue to make telework available where possible, but non-essential business travel can resume. Limitations on the number of people in the workplace can be eased, but employers should continue to maintain moderate to strict social distancing practices. Just as during Phase 1, employers should continue to accommodate vulnerable workers.

- During Phase 3, businesses may resume unrestricted staffing of work sites.

Reopening Plans

For all phases of reopening, employers should develop and implement a reopening plan with policies and procedures that address preventing, monitoring for, and responding to any emergence or resurgence of COVID-19 in the workplace or community. Specifically, employers' reopening plans should contain protocols for the following:

- *Hazard assessment* – Assess when, where, how, and to what sources of COVID-19 workers are likely to be exposed in the course of their job duties. Consider, among other things, exposures from members of the public (customers, visitors) with whom workers interact, as well as exposures from close contact with coworkers. While OSHA does not comment on the use of medical professionals for this assessment, use of such professionals is recommended best practice.

- *Hygiene* – Develop protocols for promoting hand hygiene, respiratory etiquette, and cleaning and disinfection. Provide soap, water, and paper towels for workers, customers, and visitors to wash their hands. Where soap and water are not feasible, provide hand sanitizer with at least 60% alcohol. Identify and regularly disinfect high-traffic areas and frequently touched surfaces or items with EPA-registered disinfectants.

- *Social distancing* – Implement practices for maintaining six feet of distance between all workers, customers, and visitors. These practices may include a limitation on business occupancy, demarcating flooring in six-feet zones, posting signage to remind workers, and posting directional signs in hallways and corridors to require one-way traffic patterns.

- *Identification and isolation of sick employees* – Develop protocols for worker self-monitoring, screening, isolating, and excluding from the workplace any employees with signs or symptoms of COVID-19. These protocols should include details about how and where a sick person will be isolated (in the event they are unable to leave immediately), and cleaning and disinfecting spaces the sick person has occupied. While ensuring employee privacy and compliance with the ADA, HIPAA, and other confidentiality obligations, employers may need to collaborate with local health officials to facilitate contact tracing and notification related to COVID-19 cases.

- *Return to work after illness or exposure* – Follow CDC guidance for discontinuing self-isolation and returning to work after illness, or discontinuing self-quarantine and monitoring after exposure.

- *Controls* – Consider implementing engineering controls (physical barriers, shields to separate workers, enhanced ventilation) and administrative controls (staggering work shifts, limiting breakroom capacity, practicing social distancing, replacing in-person meetings with video-conference calls), and ensure workers wear appropriate face coverings and providing appropriate PPE to minimize the exposure risks identified in the hazard assessment.

- *Workplace flexibilities* – Evaluate existing policies and, if needed, consider new ones that facilitate appropriate use of telework, sick or other types of leave, and other options that help minimize workers' exposure risks. Ensure workers understand how to make use of available options. For some employers, determining which of their employees are "essential" or "non-essential" may be a challenging task.

- *Training* – Train workers in the appropriate language and literacy level about their risks of exposure to COVID-19, what the employer is doing to protect them, and how they can protect themselves. Also, train workers about wearing cloth face coverings in the workplace, how to put on, take off, disinfect, maintain, store, and dispose of PPE.

- *Anti-retaliation* – Ensure workers understand their rights to a safe and healthful work environment, who to contact with questions or concerns about workplace safety and health, and prohibitions against retaliation for raising workplace safety and health concerns.

Relevant OSHA Standards

OSHA emphasized that its standards for PPE (29 C.F.R. 1910.132), respiratory protection (29 C.F.R. 1910.134), and sanitation (29 C.F.R. 1910.141) may be especially relevant for preventing the spread of COVID-19. However, even where there is no OSHA standard specific to COVID-19, employers have the responsibility to provide a safe and healthful workplace that is free from serious recognized hazards under the General Duty Clause (Section 5(a)(1)) of the OSH Act.

FAQs

1. *May employers conduct work-site COVID-19 testing?*

   Yes. But given the limitations on current testing capabilities, employers should act cautiously on negative test results.

2. *Can employers conduct work site temperature checks or other health screening?*

   Yes. Because people infected with COVID-19 can spread the virus even if they do not have signs or symptoms of infection, temperature screening may play a part in a comprehensive program to monitor worker health. In many workplaces, temperature screening efforts are likely to be most beneficial when conducted at home by individual workers prior to arriving at the work site, with employers' temperature screening plans relying on workers' self-monitoring and staying home if they have a fever or other signs or symptoms of illness, rather than employers directly measuring temperatures after workers arrive at the work site.

3. *What OSHA requirements must an employer follow when conducting health screening, temperature checking, or COVID-19 testing?*

   If an employer implements health screening or temperature checks and chooses to create records of this information, those records might qualify as medical records under the Access to Employee Exposure and Medical Records standard (29 CFR 1910.1020). The employer would then be required to retain these records for the duration of each worker's employment plus 30 years and follow confidentiality requirements. As explained above, employers need not make a record of temperatures when they screen workers, but instead may acknowledge a temperature reading in real-time. In addition, temperature records do not qualify as medical records under the Access to Employee Exposure and Medical Records standard unless they are made or maintained by a physician, nurse, or other health care personnel, or technician.

4. *Is there guidance on how to address the various health screening and medical issues associated with COVID-19 to avoid violating other labor, disability, and employment laws?*

   Yes. Employers are encouraged to review the EEOC's guidance regarding What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.

5. *When can employees who have had COVID-19, or illness consistent with COVID-19, return to work?*

   Employers should follow CDC or state and local guidance establishing conditions and timelines for sick workers returning to the workplace.

6. *How do I know if employees need PPE?*

Employers must conduct a hazard assessment in accordance with OSHA's PPE standard (29 CFR 1910.132), if applicable, to determine the PPE requirements for their unique work site. Employers subject to this standard must determine if PPE (such as gloves, surgical masks, and face shields) is necessary for employees to work safely after considering whether engineering and administrative controls and safe work practices (such as social distancing or the use of cloth face coverings) can effectively mitigate identified hazards. Employers should consider modifying worker interaction—both among coworkers and with customers, visitors, or other members of the general public—in order to reduce the need for PPE, especially in light of potential equipment shortages. OSHA previously issued guidance on the use, training, fit testing, and disinfecting practices for PPE and cloth face masks.

K&S Experience

Our team of Environmental, Health & Safety and employment lawyers is well-versed and experienced in developing return to work policies and protocols that comply with local, state, and federal laws and regulations. We also field lawyer teams to handle the multitude of other legal challenges that may arise following reopening of workplaces including tort litigation, crisis management, insurance coverage challenges, and business continuity.