

Preparing For Employees Returning To Work In The COVID-19 Era

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Presented by



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Agenda

1. Illinois Stay At Home Executive Order 2020-10
2. OSHA Guidance on Preparing Workplaces for COVID-19
3. EEOC Pandemic Guidance
4. Discussion

Agenda



Illinois Stay At Home Executive Order

- In effect from March 21, 2020 at 5:00 p.m. through April 30, 2020, for now.
 - Stay at home or place of residence. With exceptions as outlined below, all individuals currently living within the State of Illinois are ordered to stay at home or at their place of residence except as allowed in this Executive Order.
 - Non-essential business and operations must cease. All businesses and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below. For clarity, businesses may also continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e., working from home). All Essential Businesses and Operations are encouraged to remain open.
- Are you an “Essential Business and Operation”?

Illinois Stay At Home Executive Order: Are you an “Essential Business and Operation”?

- a. Stores that sell groceries and medicine
- b. Food, beverage, and cannabis production and agriculture
- c. Charitable and social services
- d. Media
- e. Gas stations and businesses needed for transportation
- f. Financial institutions
- g. Hardware and supply stores
- h. Critical trades
- i. Mail, post, shipping, logistics, delivery, and pick-up services
- j. Educational institutions
- k. Laundry services
- l. Restaurants for consumption off-premises
- m. Supplies to work from home
- n. Supplies for Essential Businesses and Operations
- o. Transportation
- p. Home-based care and services
- q. Residential facilities and shelters
- r. Professional services
- s. Day care centers
- t. Manufacture, distribution and supply chain for critical products and industries
- u. Critical labor union functions
- v. Hotels and motels
- w. Funeral services



What Should I Do To Prepare The Workplace for Employees Returning To Work?

OSHA Guidance On Preparing Workplaces for COVID-19

- There is no specific OSHA standard covering COVID-19.
- Accordingly, the OSHA general duty clause, Section 5(a)(1) of the Occupational Safety and Health Act, applies. It requires that each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm. The general duty provisions can be used by OSHA only where there is no standard that applies to the particular hazard and the employer has its own employees exposed to the alleged hazard.
- All the following elements are necessary for OSHA to prove a general duty clause violation:
 - 1) The employer failed to keep the workplace free of a hazard to which its employees were exposed.
 - 2) The hazard was recognized.
 - 3) The hazard was causing, or was likely to cause, death or serious physical harm.
 - 4) There was a feasible and useful method to correct the hazard.

Recording Workplace Exposures to COVID-19

- OSHA recordkeeping requirements at 29 CFR Part 1904 mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.
- COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:
 1. The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
 2. The case is work-related, as defined by 29 CFR 1904.5 (Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment); and
 3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

Update or Prepare A Pandemic Plan

- Employers should consider updating or preparing pandemic plans to address specific exposure risks, sources of exposure, routes of transmission, and other unique characteristics of COVID-19.
- In drafting the plan, consider:
 - the general public, customers, and coworkers;
 - sick individuals or those at high risk of infection;
 - non-occupational risk factors at home and in community settings;
 - a worker's individual risk factors (e.g., older age; presence of chronic medical conditions, including immunocompromising conditions; pregnancy); and
 - controls necessary to address those risks.

Prepare to Implement Basic Infection Prevention Measures

- Employers should emphasize basic infection prevention measures, such as good hygiene and infection control practices (e.g., frequent handwashing with soap and water or alcohol-based hand rubs, respiratory etiquette, and routine cleaning and disinfection with EPA-approved products). They should also consider whether they can establish flexible work arrangements, such as telecommuting or varied work hours. In addition, they should encourage sick employees to stay home.

Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate

- Employers should develop procedures for employees to report when they are sick or experiencing symptoms, encourage prompt identification/isolation, and encourage self-monitoring if potential exposure is suspected, consistent with ADA/EEOC guidance.

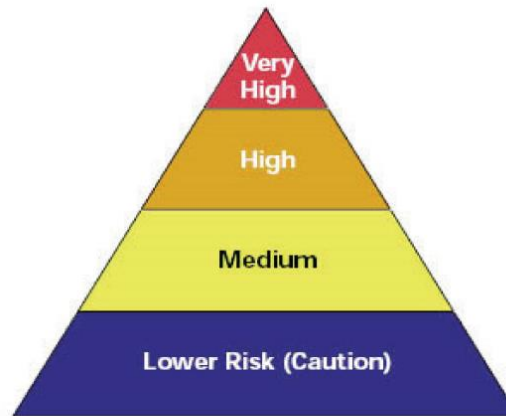
Implement Workplace Controls

- OSHA recommends preventing exposure to COVID-19 hazards through the following:
 - Engineering Controls: Implement exposure reduction solutions, such as installing high-efficiency air filters, increasing ventilation, and installing physical barriers (e.g. drive through windows for customer service).
 - Administrative Controls: Change work policies or procedures, including encouraging sick employees to stay home, altering work schedules, discontinuing nonessential travel, training employees for proper PPE (see below) use, and preparing communication plans.
 - Safe Work Practices: Provide resources that promote personal hygiene, such as tissues, no-touch trash cans, hand soap or alcohol-based hand rubs containing at least 60 percent alcohol, and disinfectants to clean surfaces.
 - Personal Protective Equipment (“PPE”): Provide, based on type of job tasks, protective equipment to protect employees from exposure. Examples include gloves, goggles, face shields, face masks, and respiratory protection, when appropriate. These can change depending on assessment of job-specific and geographical factors. Check for updates on the OSHA website and the Centers for Disease Control and Prevention (“CDC”) website for regular updates of recommended PPE.

Risk Levels

The risk of exposure “to the virus that causes COVID-19 during an outbreak may vary from very high to high, medium, or lower (caution) risk[,]” and depends on circumstances unique to each type of setting. OSHA has developed the following pyramid classification that depicts the probable risk distribution to aid employers in determining appropriate precautions. The OSHA Guidance recommends a combination of engineering and administrative controls, safe work practices, and PPE based on the risk levels.

**Occupational Risk Pyramid
for COVID-19**



OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Very High Exposure Risk and High Exposure Risk

- Very High Exposure Risk: this category covers jobs with a high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures. Workers in this category include medical providers, laboratory personnel, and morgue workers who are performing aerosol-generating procedures (e.g., intubation, cough induction procedures, autopsies) or handling specimens from known or suspected COVID-19 patients.
- High Exposure Risk: This category covers jobs with a high potential for exposure to known or suspected sources of COVID-19, such as medical providers, medical transport workers, and certain mortuary workers who are treating, transporting, or preparing people who are known or suspected sources of COVID-19.
- Recommended Action: Very High and High Exposure Risk: These recommendations generally apply in health care and mortuary settings. Most workers in these categories likely need to wear PPE, including gloves, a gown, a face shield or goggles, and a face mask or respirator.

Medium Exposure Risk

- This category of jobs includes those that require frequent and/or close contact with (i.e., within six feet of) other people who may be infected with the virus that causes COVID-19, but are not known or suspected COVID-19 patients.
- Those who may have contact with the general public, e.g., schools, high-population density work environments, some high-volume retail settings)
- Recommended Action: Employers should provide employees with general guidance and common-sense methods to reduce exposure and monitor recommendations by the CDC for updates. For engineering controls, consider installing physical barriers, such as clear plastic sneeze guards, where feasible. For administrative controls, consider offering to ill employees and customers face masks or reusable face shields that can be decontaminated. Where appropriate, limit customer and public access to worksites or restrict access to certain areas. Consider minimizing face-to-face contact, and communicate the availability of health resources.

Lower Exposure Risk (Caution)

- This category covers jobs that do not require contact with people known to be, or suspected of being, infected with the virus that causes COVID-19 nor require frequent close contact with (i.e., within six feet of) the general public.
- Recommended Action: Employers should provide employees with general guidance and common-sense methods to reduce exposure and monitor recommendations by the CDC for updates. **No additional engineering controls or PPE are recommended at this time.**

A Shout Out To My Sister, Jane



What Can I Ask An Employee Before He/She Returns to Work?

EEOC Pandemic Preparedness Guidance

- Originally issued in 2009 during the spread of the H1N1 pandemic (swine flu) and updated March 19, 2020 to incorporate updates regarding the COVID-19 pandemic
- www.eeoc.gov/laws/guidance/upload/pandemic_flu.pdf

Can you take the temperature of employees returning to the workplace?

- EEOC has explained in the Updated 2020 EEOC Pandemic publication that, at the present time, the COVID-19 pandemic permits an employer to take the temperature of employees who are coming into the workplace.
- EEOC says that employer can bar employee from premises if refuses to have his temperature taken, or refuses to answer questions about whether has COVID-19, or has symptoms associated with COVID-19, or has been tested for COVID-19

Can you exclude employees from the workplace?

- Employer can exclude employees from physically coming into the workplace with COVID-19 or symptoms associated with COVID-19; e.g., persistent, dry, hacking cough.
- Can exclude someone from the workplace if he poses a direct threat under the ADA.
- Can you ask a single employee, as opposed to asking all employees, questions designed to determine if she has COVID-19? If you have a reasonable belief, based on objective reasons, such as displaying symptoms of COVID-19, to ask an employee directly, then it is permissible at this time to ask if has COVID-19.

Confidentiality of Medical Information

- Generally, medical information about employees must be kept confidential.
- Manager who learns and confirms that employee has COVID-19 can report to appropriate management at the company on a “need to know” basis the identity of the employee
- A non-management employee can report a co-worker’s symptoms or knowledge that the co-worker has COVID-19 to a supervisor.
- Efforts should be made to keep identity of employee confidential
- Employer may notify public health authorities if it learns that an employee has COVID-19. The CDC “strongly encourages” coordination by employers with state and local health officials where the employer is aware of an affected employee so that timely and accurate information can guide appropriate local health responses.
- The CDC guidelines provide that if an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace. However, employers must maintain confidentiality and not identify the affected employee, as the ADA and state medical privacy laws generally prohibit employers from disclosing employees’ confidential medical information to other employees (including managers), such as whether the individual has a communicable disease.

COVID-19 and HIPAA

- Threshold Question: Is your organization a Covered Entity or a Business Associate?
- Does HIPAA allow a covered entity to share the name or other identifying information of an individual who has been infected with, or exposed to, the virus SARS-CoV-2?
 - A covered entity may share the name or other identifying information in certain circumstances, including: (i) disclosure is needed to provide treatment, (ii) notification is required by law, (iii) to notify public health authorities, (iv) when first responders may be at risk of infection or (v) when disclosure to first responders is necessary to prevent or lessen serious threat to the health and safety of a person or the public.
- Covered Entities and Business Associates must make reasonable efforts to disclose the minimum necessary amount of information to accomplish the purpose of the disclosure.

Keep other protected categories in mind

- Cannot exclude an employee who is 65 or older because the CDC has identified this age group as being at higher risk of contracting COVID-19
- Cannot layoff or furlough a pregnant employee to protect her because of concern about possible exposure to COVID-19
- Cannot exclude employees of certain national origin because of concerns about COVID-19
- Be mindful of increased possibility of hostile environment due to origins of COVID-19
- Unclear at this point whether COVID-19 is a disability under the ADA.

What if your employees refuse to return to work?

- After shelter-in-place orders expire, employers may experience problems returning employees to work if they feel that there is an ongoing risk of exposure to themselves or to vulnerable family members.
 - Examples:
 - Employees with health issues that may be exacerbated by exposure to COVID-19
 - Employees who reside with high-risk or immunocompromised family members
 - Employees who must utilize public transportation to commute to work
 - Employees who rely on daycare facilities for their children while they are at work
- While COVID-19 is not necessarily a disability in and of itself, an employee may have a disability that puts him at greater risk of severe illness if he contracts COVID-19, and therefore asks for a reasonable accommodation. Employer may verify that employee has a disability and discuss why the accommodation is needed and the type of accommodation that would meet the employee's concerns.
- These laws do not require employers to accommodate employees for reasons other than their own disabilities.

Can employers “over-accommodate”?

- *Legally*, it is required that you create a safe working environment according to the guidelines set forth by OSHA, EEOC and ADA.
- *But, ethically*, you may feel obligated to do more, at least until health care officials and government officials agree on whether the risk has substantially been mitigated.
- When the current public health crisis ends, employer may not need to continue an accommodation that had been granted because of COVID-19. If temporarily suspended an “essential function,” such as being present at the office, it does not need to continue the accommodation if the COVID-19 crisis has subsided.

Address individualized concerns fairly and consistently

- You will likely have to phase back into full operations and handle individualized concerns as they arise.
- Best practices:
 - Communicate to employees your intention to return to “business as usual,” describe the steps you have taken to make the workplace safe, and offer a process whereby employees can confidentially raise individual concerns.
 - Engage in an “interactive dialogue” with employees who raise concerns. Assess whether you are able and willing to temporarily or permanently accommodate the employee, even if the concern does not relate to the employee’s own health condition or disability. Consider telework, flexible hours, PPE, part-time work, or leave of absence options. Communicate the applicable timeframe.
 - If you cannot accommodate the employee without undue hardship, consider not returning the employee to work.
 - Keep track of each request and your response to ensure fair and consistent application of the process among protected groups. Do not retaliate against employees who make requests.
- Risks of individualized assessments include allegations of discrimination based on protected traits and OSHA claims, so maintaining a consistent approach is critical.

EBG Coronavirus (COVID-19) Resource Center

- <https://www.ebglaw.com/coronavirus-resource-center/>

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Epstein Becker Green Coronavirus News and Updates

Employers throughout all industries, and particularly those within health care, are now grappling with how to deal with the various implications of the coronavirus (COVID-19) on their businesses and workforce.

Click on the tabs above for materials related to your topic of interest. On mobile, tap the menu icon above. The "All Topics" tab is organized chronologically for the latest developments.

Please [subscribe for email notifications](#) and revisit for updates.



Leave You With One Final Question



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DISCUSSION

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