

Employers Reopened and Employees Returned to Work . . . Now What?

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08.20.2020

As more businesses begin to open their doors and dip their toes into the “new normal” of operating in the age of COVID-19, they have had to quickly become quasi-experts on juggling the various rules, regulations, and ever-evolving guidance from the countless entities and government agencies that have weighed in on the proper response to the virus.

At this stage of the pandemic, most employers have likely (and hopefully) created a workplace safety plan and various policies and procedures relating to COVID-19 with the goal of keeping employees and customers safe and healthy when they return to work and business.

As a recap of key considerations for such plans, employers around the country now understand, and have learned with collective experience over the past several months, that effective and successful COVID-19 policies and procedures for the workplace include, at a minimum, the three following primary aims or components:

- **Keep it out**
 - Keep COVID-19 out of the workplace through appropriate and lawful screening of employees, including at-home or entry screening for temperature and symptoms, among other things.
 - Remember: No antibody testing as a condition of employment or entering the workplace per the EEOC
- **Stop the spread**
 - Limit the spread or potential spread of coronavirus in the workplace through thoughtful and well-informed policies, including but not limited to:
 - Social distancing measures, enhanced cleaning and sanitizing, reducing shared workspaces, permitting remote work where possible, promoting wearing of masks, providing personal protective equipment to employees, and limiting occupancy;
- **Know how to effectively respond**

- As an employer, react uniformly and appropriately, in line with existing policy and plan in place, when an employee or customer tests positive for COVID-19, has symptoms of COVID-19, or has been in close contact with a positive case

What is Next for Employers?

As these safety plans and policies become more familiar, some employers may be concerned about next steps—what now and what happens next? Of particular concern to employers are likely notions of how businesses can reduce potential exposure or liability for future claims when the business has done all it can to ensure the well-being of their employees and customers by adopting and enforcing safety plans. There is no simple answer but there are best practices.

While some states have passed or are considering passing liability shields for businesses, not all have done so. Additionally, even to qualify for such protection, employers will likely still need to act reasonably and in compliance with updated guidelines for the safe opening and operating of the business. Below are a few initial, key takeaways for employers looking to mitigate the potential for claims now or liability for future claims:

- **Don't stop believing in the authoritative guidance.** It will help protect you.
 - Businesses at this point should not become fatigued or complacent in following the new guidance from federal, state, and local health authorities. This is no time to let up.
 - Follow the latest CDC, OSHA, state, and health authorities' guidance and be sure to maintain awareness of updates or changes.
- **Communicate.** Communication to employees and customers is key. Clarify not only the COVID-19 plan and policies you create, but also the related expectation of employees and others. Good communication also builds trust and confidence in the business.
 - Clear messaging, inside and outside the workplace, is critical, detailing expectations for the workplace or for customers entering, such as mask wearing, social distancing, or requirement of no symptoms prior to entry.
- **Enforce your COVID-19 plan and policies.** A plan for the sake of a plan or a policy for the sake of a policy will not protect the employer from future claims and liability. Employers should take steps to implement and enforce any plans and procedures they establish related to coronavirus.
 - The best laid plans are only as effective as how they are implemented and the extent of compliance by employees, who must abide by them.
 - Enforcement and compliance by employees is critical to get the benefit later on of having responsive policies in place.
 - Enforcement should be even-handed and applied without regard to any legally protected category to prevent even the perception of discrimination.

What Lies Ahead—Anticipated Claims and Litigation Related to COVID-19

Employers and their lawyers should begin looking ahead to ensure the policies in place now will support and mitigate liability in the future, as there will likely be an influx of claims and cases related to employment and COVID during this uncertain and unprecedented time. As of Aug. 19, more than 400 employment-related COVID-19 cases had been filed by employees/former employees in courts across the nation, and we are only a few months in.

Importantly, COVID-19 presents the challenge of multiple overlapping issues. Some issues may implicate other laws or regulations that are not necessarily top-of-mind for employers at this time. COVID-19 could involve numerous other considerations and factors, and there is the potential for overlap among the ADA, ADEA, FMLA, FFCRA, workers compensation, WARN Act or mini-WARN Act, OSHA, FLSA, NLRA, Title VII, and others.

Below are groupings of the primary types of claims/litigation that we expect will be most common in the employment arena in light of COVID-19. It is critical that employers begin considering and preventing such claims or suits by creating and implementing safe, clear, and strong policies on the pandemic. The best practice for employers at this stage of the pandemic: follow the guidelines.

- **Follow the guidelines and protocol!** Although CDC and related agency guidance for reopening and for employers is not “mandatory,” implementing policies and procedures in line with CDC and health authority guidelines is critically important in fending off potential future litigation or liability. Implementation and adherence to these guidelines will show that you acted reasonably and took necessary steps to keep employees and customers safe during the pandemic, based on government recommendations.

Employee Safety Claims

- Workers compensation and employee claims relating to coronavirus illness or diagnosis
 - Employee claims s/he became infected with COVID-19 in the workplace and seeks to recover damages
 - Under South Carolina law, as a general rule, workers compensation is the exclusive remedy for employees seeking to recover for injuries in the workplace
 - This is also true during the COVID-19 crisis. While creative lawyering and the unprecedented nature of this pandemic may result in some case outliers, employees are generally limited to recovery under the workers compensation scheme alone
- Employee leave for COVID related illness and/or to care for a child
 - FFCRA and (or) FMLA.
 - Enforcement is ongoing
 - DOL Wage and Hour Division on Aug. 11, 2020 issued a news release noting that following an investigation, a trucking and warehousing service company’s Charlotte, N.C. branch violated the FFCRA paid sick leave provision, and was ordered to pay back wages to the employee. The news release is available [here](#).

Employee Discrimination Claims

- Employee discrimination claims could result from uneven or spotty enforcement of policy or plan from terminations, layoffs, reduction in pay and/or hours, even if unintentional.
 - Potential implication of Americans With Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and Title VII, among others.
 - See the EEOC guidance relating to these types of claims and COVID-19, available [here](#).
 - Those charged with enforcing such policies should be trained and know how to apply them across the board.
 - Exercise caution in implementing and enforcing any and all COVID-19 safety policies. Apply these policies evenly across the entire spectrum of employees.
 - Document decisions and rationales behind layoffs, terminations, and related employment decisions that resulted from the pandemic.
 - Be sure to document legitimate reasons or rationales for adverse employment decisions are objective.

OSHA—Update on OSHA Complaints and Investigations:

- According to an agency spokesperson, OSHA received more than 8,150 COVID-19-related complaints between Feb. 1 and Aug. 4. As of this writing, federal OSHA had opened 801 inspections, only 38 of which have been closed. Of the 38 closed, 32 employers were found to be in compliance and six were issued hazard alert letters. OSHA continues to encourage workers, however, to share complaints by phone or online complaint form. The agency's enforcement information is available [here](#).
 - OSHA's up-to-date guidelines and recommendations for preparing workplaces for COVID-19 are available [here](#).
 - OSHA's up-to-date enforcement guidance and record-keeping requirements in connection with COVID-19 are available [here](#). In addition to employers' general duty under Occupational Safety and Health Administration (OSHA) to provide safe and healthful workplaces for employees, OSHA also imposes recording obligations on employers.
 - Under OSHA's record-keeping requirements, COVID-19 is a recordable illness and employers are responsible for recording a case if it: (1) is confirmed as a coronavirus illness; (2) is work-related as defined by 29 CFR 1904.5; and (3) involves one or more of the general recording criteria in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.

For Your Reference—Convenient Links to Key COVID-19 Guidance and Information

What are the most up-to-date protocols, guidelines, and recommendations of which employers should be aware? For ease of reference, the following is a summary of relevant guidelines that employers should make efforts to implement in the workplace to the extent the information fits within their industry. While the list is not exhaustive, key areas are highlighted, that should be taken into account in crafting and updating any policy, procedure, or COVID-19 workplace safety plan:

- Applicable state and local laws, executive orders, regulations, and state-specific health guidance
 - In South Carolina, SCDHEC has useful guidance and recommendations, most of which tracks CDC guidance, available [here](#) and [here](#).
 - Other South Carolina resources for employers are available through Accelerate SC [here](#).
 - In North Carolina, NCDHHS has guidance about the three-stage reopening process and guidance for reopening available [here](#).
 - The North Carolina governor's current executive order directs that the state is to be in Phase 2 of reopening until at least Sept. 11. More details about the phased reopening and status of the executive order are available [here](#).
 - Be aware of state, local or municipal mask or related ordinances or laws as well.
- CDC. It is generally accepted that the CDC guidance on reopening and handling of COVID-19 in the workplace is the gold standard. While not mandatory, employers should take care to comply with the guidance and recommendations as those are applicable to their business and/or industry.
 - CDC guidelines and information are available [here](#) and [here](#).
 - Navigate and peruse the website. There is a lot of helpful information and recommendations that can help reduce the potential of COVID-19 in the workplace, and therefore can help mitigate the risk of future liability or claims.
 - CDC has industry-specific guidance and general guidance that all should follow.
- OSHA. OSHA updates and guidance on preparing the workplace for reopening in light of COVID-19 are available [here](#) and [here](#).
- White House. Related White House guidelines for Opening Up America Again are available [here](#). This guidance is generally used in conjunction with CDC and OSHA guidelines.
- EEOC. EEOC and related agency guidance on reopening in midst of the COVID-19 pandemic and implications of various employee issues and concerns, including but not limited to ADA, ADEA, high risk individuals, potential discrimination, and related questions – are available [here](#) and [here](#).
- DOL. DOL guidance, regulations, and information related to working in the age of COVID-19, including but not limited to FFCRA and other leave issues, are available [here](#) and [here](#).

Additional Updated COVID-19 Guidance and References:

- **New CDC Updates:** CDC on July 20 updated guidance on isolation protocol and how to respond following a positive test for COVID-19. The new protocol is available [here](#).
 - This changed guidance is critical as there have been a large number of new cases and positive tests recently across the nation, and the increase in positives does not seem to have slowed.
 - CDC has changed its recommendations on how to handle discontinuation of isolation of individuals with COVID-19 not in health care settings.

- CDC stated that accumulating evidence now supports a symptom-based approach rather than testing-based approach.
- Businesses should strive to respond in line with CDC recommendations.
- Additional information updated as of Aug. 16 regarding how to handle individuals with COVID-19 is available [here](#).
- **New FMLA Forms:** In June 2020, DOL published new, updated FMLA forms that employers may use in connection with FMLA records. Note that no specific form is necessary, but this is a helpful resource that complies with DOL requirements. Updated forms are available [here](#).
- **New OSHA Updates and Webinar:** OSHA on June 25 provided a webinar for stakeholders and others regarding COVID-19 in the manufacturing and construction industries. It is available on-demand [here](#).
 - While the webinar primarily addressed the two specific sectors, the tips and issues discussed could be applicable to a number of other industries and businesses.
 - The acting OSHA administrator advised employers in construction and manufacturing to “take a good, hard look at what your people are doing and what adjustments you can make” to prevent worker exposure to COVID-19.
 - She also posed suggestions, including building in a way to ensure that workers are not so close together; building with workers six feet apart; frequently cleaning and disinfecting high-touch items on jobsites; and ensuring workers are provided the PPE they need.
 - The acting administrator also advised employers in these industries to perform a job hazard analysis and update their disaster recovery plans to include COVID-19.

Make no mistake, the pandemic has introduced new and heightened levels of risk for businesses, their employees, and their customers. While the country will eventually come out of this crisis, the after-effects will be considerable and potentially long-lasting. That is why it is incumbent that employers take the right steps now to create safe workplaces and customer environments. To ignore or delay this obligation is to invite liability claims now—and in the future.

Nexsen Pruet’s employment team stands ready to assist with any employment-related COVID-19 issues that may arise.