

[ADVOS.]

RETURNING TO WORK FOLLOWING COVID-19: GUIDANCE FOR EMPLOYERS

Summary as of 2020-0508

This summary is for high-level informational purposes, based on the information currently available, and is not intended as legal counsel. Please reach out to your ADVOS lawyer for counsel specific to your situation. If you are not an ADVOS client, please reach out to Whitney Harper (whitney.harper@advoslegal.com or 904-567-5311) with questions.

As businesses reopen and employees return to work, management teams will need to consider how to safely resume operation while complying with applicable employment laws. Below, we have summarized guidelines to help employers navigate this process:

Guiding Principles

- **Provide a Safe Work Environment.** OSHA requires employers to provide employees with a workplace free from recognized hazards likely to cause death or serious physical harm. In the case of a pandemic, employers must take action to protect employees from contracting the disease in the workplace.
- **Comply with Employment Laws.** Employers must also continue to comply with employment laws (including the ADA) prohibiting discrimination based on certain protected classes and providing other protections for employees.

How to Comply

- **Assess risk and plan for mitigation**
 - Consider the risk of exposure to COVID-19 for various roles (including employees, customers, vendors, and others), and potential methods for mitigating the risk
- **Implement infection prevention measures and workplace flexibilities** as appropriate, considering:
 - **Engineering controls** (i.e., installing air filters, increasing ventilation, installing sneeze guards or physical barriers, cleaning facilities and equipment)
 - **Administrative controls** (i.e., limiting facility access, encouraging sick workers to stay home, minimizing contact by using virtual meetings and telework, staggering shifts, and providing training on infection prevention)
 - Note: if an employee receives a reasonable accommodation for a disability in the workplace, a similar accommodation may also need to be made with respect to the employee's telework environment.
 - **Safe work practices** (i.e., providing resources and a work environment that promotes personal hygiene - tissues, trash cans, hand soap, sanitizer, disinfectants, disposable towels, etc., requiring regular hand washing, social distancing)
 - **Personal protective equipment** ("PPE") where appropriate (such as gloves, goggles or face shields, face masks – select based on hazard to the worker).
 - Note that **employers are obligated** to provide workers with PPEs if the

PPEs are necessary to keep employees safe while performing their jobs. The type of PPE required will depend on the risk of being infected while working, and the job tasks that may lead to exposure.

- **Identify and isolate sick employees**

- **Because COVID-19 has been declared a pandemic, employers CAN** do the following (note that under typical, non-pandemic circumstances, the ADA and other employment laws would generally prohibit most of these actions; they are permitted in connection with the pandemic because the ADA permits employers to take steps to determine whether an employee poses a direct threat due to a medical condition, and the potential spread of a pandemic illness due to an infected employee's presence in the workplace meets the "direct threat" standard):

- **Take employees' temperatures**

- Decide what temperature threshold you will use to designate a fever; provide reliable equipment and train the personnel who will be conducting the temperature checks
- If the employer is taking employee temperatures, it should be done for all employees who are entering the workplace (avoid the appearance of any discrimination)
- **IMPORTANT NOTE:** temperature records are considered a medical record and are subject to confidentiality requirements; all records related to employee temperatures must be maintained separately from standard HR files
- Employer can disclose to public health officials if it discovers an employee with fever

- **Send employees home** if they have COVID-19 or symptoms of COVID-19 (and require that employees stay home if they have COVID-19 or symptoms of it)

- **Ask employees about their symptoms** if they report feeling ill at work or call in sick, to determine whether they have or may have COVID-19

- Look to the CDC for current information about symptoms, recognizing that this information may be updated as we learn more about the pandemic. The CDC's guidance as to symptoms of COVID-19 is available [here](#).

- **Ask employees who have traveled** about where they traveled, to determine whether the current CDC guidance would recommend that the employee self-isolate for some period of time before returning to the workplace

- **Encourage employees to telework** as an infection-control strategy, or as a reasonable accommodation if employees are at high risk due to a disability

- **Require employees to use infection-control practices** (handwashing, covering coughs/sneezes, social distancing, wearing PPEs, etc.)

- **Ask employees why they were absent** from work if they are absent without explanation

- **Require a doctor's note certifying fitness to return to work** if an employee has been away from work due to the pandemic (note, however, that certification may be difficult to obtain if medical personnel are overrun)
- **Employers CANNOT:**
 - **Ask employees if they are at increased risk** of contracting COVID-19
 - **If an employee self-discloses that he or she is at increased risk, the employer must keep the information confidential.** If the employee requests an accommodation due to this increased risk (the underlying condition that creates the increased risk may be a disability, which would trigger the requirements of the ADA), the employer should engage in the ADA's analysis as to whether there is a disability and whether it can be "reasonably accommodated" without posing an undue hardship to the employer.
 - Compel employees to take a **vaccine** if one becomes available
 - **Discriminate** against or harass employees because of their national origin, race, or other prohibited bases
- **Communicate with employees and others**
 - Employees will need to understand leave policies, how to report concerns about illness or exposure, what the employer expects of employees to protect themselves and others (including what is required vs what is recommended), and how the employer is working to protect them
 - Customers, vendors and others will need to understand how the business is changing its practices, hours, services, etc.
 - In many cases, this is an opportunity to demonstrate core values and culture to help employees understand the imperatives and the objectives of any new policies.

Resources for Employers

- **CDC (Center for Disease Control)**
 - [CDC's COVID-19 hub](#)
 - [CDC: Symptoms of COVID-19](#)
 - [CDC's Guidance for Businesses and Workplaces](#)
- **USDOL (US Department of Labor)**
 - [USDOL's COVID-19 hub](#)
- **OSHA (Occupational Safety and Health Administration)**
 - [OSHA's COVID-19 hub](#)
 - [OSHA Guidance on Preparing Workplaces for COVID-19](#)
- **EEOC (Equal Employment Opportunity Commission)**
 - [EEOC's Guidance re: Pandemic Preparedness in the Workplace and the ADA](#)
 - [EEOC's Technical Guidance re: COVID-19 and EEO Laws](#)