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## ANALYSIS

# Returning to Work: Top Considerations for U.S. Employers

Determining when and how to return employees to the workplace requires U.S. employers to navigate a host of federal, state and local orders and guidelines that are constantly changing. While all states have permitted many businesses to reopen in some way, there are substantial variations in when and how each state—and even each county and municipality within each state—is permitting various industry sectors to return employees to the workplace. As a result, multijurisdictional employers are contending with different schedules, phases, requirements and guidelines depending on the states, counties, municipalities and industry sectors in which they operate.

Further complicating this unprecedented patchwork is that a growing number of jurisdictions are now pausing or even backtracking on plans to reopen in light of surging cases just as they had begun gradually lifting reopening restrictions on a state-by-state, county-by-county and municipality-by-municipality basis. These jurisdictional variations and moving targets present a new set of compliance challenges for national employers seeking a practical and manageable approach in returning employees to work.

Experienced counsel can provide companies with a full range of services from efficiently advising and updating employers on applicable requirements and guidelines to helping employers build a return-to-work plan tailored to their individual business

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Shook, Hardy & Bacon understands that companies are facing many challenges related to the global COVID-19 pandemic.

Shook guides its clients through crisis planning and management to help navigate the risks associated with emerging issues.

needs in compliance with these requirements and guidelines and as informed by the following best practices generally applicable to any business.

### **Develop a COVID-19 Assessment and Control Plan**

Designate a qualified workplace coordinator responsible for COVID-19 assessment and control planning. Identify the Coordinator to workers as the person to contact with COVID-19 concerns. As appropriate, the Coordinator will communicate with public health officials and management regarding health and occupational safety at the workplace. The Assessment and Control Plan should focus on minimizing the risk of worker, vendor and customer infection. This includes identifying operational conditions creating the potential for infection transmission and mitigating those hazards by implementing engineering and administrative controls. Businesses should develop specific training to educate workers about safe practices and modified work processes. Before implementing the Assessment and Control Plan, the Coordinator should reevaluate altered working conditions and procedures for any unintended hazards introduced into the workplace.

The Coordinator should regularly consult local, state and federal orders/guidelines and carefully review business operations to confirm compliance, as many states, counties and municipalities require businesses to:

- Implement COVID-19 plans, policies and/or certifications that include specific provisions;
- Train employees on particular COVID-19 prevention protocols;
- Comply with posting and/or signage obligations, and
- Implement certain screening, social distancing, cleaning and other health and safety protocols.

### **Preparing the Workplace for Reopening**

#### *Cleaning*

According to the Centers for Disease Control and Prevention (CDC), a workplace unoccupied for at least seven days will likely only need routine cleaning prior to reopening. When deciding which areas or items to disinfect, CDC recommends focusing on frequently touched surfaces and objects, including: tables, doorknobs, light switches, countertops, handles, desks, phones, keyboards, toilets, faucets and sinks, and, if applicable, gas pump handles, touch screens and ATMs.

#### *Proximity*

To learn more about Shook's Crisis Management and Response capabilities, please visit [shb.com](http://shb.com) or contact:



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If possible, employ mechanisms encouraging social distancing in the workplace. Staggering arrival/departure/break times, adding clock-in/out stations, reducing bottlenecks and considering use of communal areas (e.g., cafeterias and locker rooms) can facilitate creating distance between onsite personnel. Signage posted in high-traffic areas can also encourage all employees and visitors to observe proper social distance from one another.

### *Workspace*

While business-dependent, consider spreading workspaces, erecting barriers between workspaces, reconfiguring the placement of workspaces, and evaluating the HVAC system servicing workspaces. Add handwashing stations, hand sanitizer dispensers and disinfectant equipment, in addition to providing other prudent personal protective equipment (PPE).

### *Work Flow / Vendors / Customers*

To the extent possible, encourage continued remote working. Design proper layout and pathways for movement through the workplace by employees, vendors and customers. Consider the appropriateness of temperature testing and implementation of contact tracing programs.

### *Contingency Preparedness*

Incorporate contingency planning in the event workers are exposed to or become infected with COVID-19. Develop procedures to modify or reduce on-site presence, if the community experiences an increase in transmissions or local authorities impose restrictions.

## **General Health and Safety Guidance**

The Occupational Safety and Health Administration (OSHA) has issued the following helpful tips for preventing illnesses while at work:

- Frequently wash hands with soap and water for at least 20 seconds. When soap and running water are unavailable, use an alcohol-based hand rub with at least 60% alcohol. Always wash hands that are visibly soiled.
- Avoid touching eyes, noses or mouths with unwashed hands.
- Practice good respiratory etiquette, including covering coughs and sneezes.
- Avoid close contact with people who are sick.
- Stay home if sick.
- Monitor cleaning and disinfectant supply.

OSHA also suggests employers train employees returning to work on proper health and safety protocols, including hand washing, disinfecting workspaces, utilizing PPE if required and recognizing COVID-19 symptoms. Both OSHA and CDC offer free-to-print visual reminders about infection-prevention and spread-reduction practices.

OSHA has also issued guidance instructing nonessential businesses how to reopen. This guidance outlines three phases of reopening that:

1. begins by encouraging continued telework where feasible, special accommodations for higher-risk employees (and those with higher-risk household members), and limitations on non-essential business travel and the number of employees in the workplace in order to maintain strict social distancing practices;
2. then relaxes limitations on non-essential business travel and the number of employees in the workplace, while still encouraging telework where possible, strict social distancing practices, and special accommodations as identified in Phase 1, and
3. finally, eliminates restrictions in favor of resuming unrestricted staffing of work sites.

## **Health Inquiries**

The Equal Employment Opportunity Commission (EEOC) has issued and periodically updated guidance on disability-related inquiries and medical exams, confidentiality of medical information and return to work, including whether an employer may require certain screenings for employees returning to work.

Under the Americans with Disabilities Act (ADA), an employer may conduct the following types of screenings and inquiries:

- Asking an employee whether he or she is experiencing symptoms of COVID-19, such as fever, chills, cough, shortness of breath or sore throat. Other symptoms identified by CDC may also include loss of smell or taste, as well as gastrointestinal issues.
- Taking an employee's temperature.
- Requiring a doctor's note before an employee returns to work. However, given the shortage of available healthcare providers, employers should be flexible and allow local clinics to provide a form, stamp or e-mail indicating that the employee does not have COVID-19 before returning to work. Note that some jurisdictions have orders and/or guidance that prohibit employers from requiring a healthcare provider's note to validate the illness or return to work, while other jurisdictions require an employee with a suspected but unconfirmed COVID-19 diagnosis to obtain a healthcare provider's note clearing a return to work if the employee wants to return before completing a self-isolation period.

- Administering a test to detect the presence of COVID-19. EEOC emphasizes that employers administering tests review guidance from the Food and Drug Administration (FDA) regarding accurate and reliable tests, especially given the risks of false-positive or false-negative results.

The Workplace Coordinator should remain current on acceptable practices, confidentiality concerns and record-preservation requirements related to testing and tracing.

### **Providing Reasonable Accommodations to Employees**

Even if an employer offers screenings to employees and otherwise maintains a clean workplace in accordance with OSHA and CDC guidelines, there may be employees who do not feel safe returning to work due to pre-existing conditions or illnesses that put them at higher risk of contracting COVID-19. The pandemic has led to an increased number of requests for accommodations from employees, including such higher-risk employees, those who cannot wear face coverings due to a disability and those with mental health conditions that may cause them to feel significant anxiety due to COVID-19.

Under the ADA, such requests should be analyzed on a case-by-case basis through engaging the employee in an interactive process to determine if there is a reasonable accommodation that can be provided without undue hardship. For example, to the extent an employee's job duties may be performed remotely, allowing the employee to continue working from home may be a reasonable accommodation. Employers could also consider temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment. The Job Accommodation Network (JAN) offers [examples](#) of accommodations related to COVID-19.

### **If an Employee Becomes Sick**

If an employer learns one or more of its employees may have contracted COVID-19, OSHA again has issued guidance to reduce potential infection spread.

First, the ill employee must immediately leave the workplace and isolate. Depending on the severity of the individual's illness, he or she might be able to return home or seek medical care on his or her own, but some individuals may need emergency medical services.

Second, the employer should thoroughly clean and disinfect all surfaces and areas potentially touched by the infected employee.

OSHA recommends using disinfectants that have been registered with the Environmental Protection Agency (EPA). Employers should also consider hiring an environmental cleaning company to ensure a thorough cleaning of the workplace and reduce the risk of additional infections.

Third, the Workplace Coordinator should comply with any applicable reporting requirements.

### **Make Necessary Adjustments for Wage and Hour Compliance**

Certain operational changes may implicate federal and/or state wage and hour requirements. For example, employers should:

- Consider whether changes to an employee's compensation and/or job duties impact the employee's exempt status;
- Ensure that hazard pay, attendance bonuses, return/retention bonuses or other compensation designed to incentivize employees is properly calculated into the regular rate of pay for purposes of paying overtime;
- Consider jurisdictional variances as to whether and how employers must pay workers for time spent being screened for COVID-19 symptoms and time waiting to be screened; and
- Ensure compliance with state meal and rest break requirements, especially if staggering arrival, departure and/or break times to promote social distancing.

### **Remain Flexible**

Given the uncertainty surrounding COVID-19 for both employers and employees, flexibility is key in ensuring that returning to work does not result in unjustified hardship for employees. While employers may not be mandated by law to accommodate certain requests—such as those for parents without childcare due to the pandemic or employees who may be caring for sick family members—employers should at least engage with those employees to try to find a solution that will not disrupt business operations. Lastly, employers should maintain open lines of communication and encourage employees to reach out with questions or issues.

## **Additional Resources**

[Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration](#)

[OSHA: Guidance on Preparing Workplaces for COVID-19](#)

[OSHA: Guidance on Returning to Work](#)



[EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)

[U.S. Chamber of Commerce: Implementing a National Return to Work Plan](#)

[National Governors Association: Summary of Public Health Criteria in Reopening Plans](#)

[WHO: Considerations for public health and social measures in the workplace in the context of COVID-19: annex to considerations in adjusting public health and social measures in the context of COVID-19, 10 May 2020](#)

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## PREVIOUS PRIMERS

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**Is COVID-19 an Excuse for Your Performance?**

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**RESOURCES**

## Selected Bench Guides

**Georgia Pandemic Bench Guide**

[Co-Authored by Shook Partner Josh Becker]

**Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators**

[National Center for State Courts]

**Additional State Public Health Bench Books**

[Centers for Disease Control and Prevention]

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## Resources for Employers

**Equal Employment Opportunity Commission**

[Americans with Disabilities Act; Rehabilitation Act]

**Department of Labor**

[Unemployment; Workplace safety]

**Department of Labor Wage & Hour Division**

[Families First Coronavirus Response Act]

**Occupational Safety and Health Administration**

[Work safety and exposure risk]

**California Employment Development Department**

**New York Labor Department**

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## Additional Resources

**Association of Corporate Counsel COVID-19  
Resource Center**

**Bloomberg Law Coronavirus Outbreak News**

**Bain & Co. Coronavirus Economic Impact Report**

**Law360 Court Status and Closures List**

**National Center for State Courts: Court News  
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**WestLaw Global Coronavirus Toolkit**

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