

**Meltzer, Lippe,
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RETURNING EMPLOYEES TO THE WORKPLACE

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As restrictions on businesses are being lifted, employers are now considering how to reopen. Employers must consider how they are going to prepare their workplace for reopening and how they are going to ensure the safety of its workforce. The ongoing pandemic has presented a unique set of challenges from a reopening perspective. Developments in this area are fluid and guidance continues to rapidly change. This guidance will be supplemented, to the extent necessary, to ensure that best practices are being used when reopening your business.

Below please find all current considerations for employers who are preparing to return to work.

A. Preparing the Workplace

1. Occupational Safety and Health Act

The Occupational Safety and Health Act (“OSHA”) requires employers to provide employees with a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees.¹ The U.S. Department of Labor’s (“DOL”) Occupational Safety and Health Administration issued guidance preventing worker exposure to and preparing workplaces for COVID-19.² The guidance recommends employers consider conducting a risk assessment which will identify risk levels which includes identification of infected employees and policies aimed at continuing isolation to ensure proper control measures.³

2. Work-Place Preparation

In addition to OSHA regulations, employers should consult the U.S. Center for Disease Control and Prevention’s (“CDC”) recommendations for

¹ See 29 U.S.C. § 654(a)(1).

² <https://www.osha.gov/Publications/OSHA3990.pdf>

³ See United States Department of Labor, Guidance on Preparing Workplaces for COVID-19, March 2020.

maintaining a healthy work environment.⁴ Such recommendations include but are not limited to the following:

- Posting signs to encourage frequent hand washing
- Providing hand sanitizer at multiple locations
- Providing, requiring and encouraging the wearing of face masks for all employees⁵
- Increased environmental cleaning⁶
- Update or create new coronavirus-related policies and/or plans
- Discouraging the sharing of workstations, desks, offices, or phones, etc.
- Elimination of touch points (i.e. keeping doors open. eliminating coffee pots etc.)
- Continuing to enforce social distancing measures
 - . Ensure employees remain six feet apart.
 - . Limiting the number of employees per floor.
 - . Spreading out workstations.
 - . Implementing “one way” hallways or paths so employees do not walk past each other.
 - . Limiting the number of employees permitted in places like kitchens or bathrooms at any given time.
 - . Assigning time slots for visits to on-site cafeterias or coffee stations.

B. Employers are Permitted to Request Employee Testing Before Returning to the Workplace

As businesses begin to reopen, employers are permitted to test or request testing from returning employees for COVID-19 before allowing them back into the workplace. “Employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.”⁷

1. Temperature Screening

For those employees and visitors who are physically entering the workplace, employers are permitted to measure their body temperature. If electing to screen body temperatures, a log of the results should be maintained and all information should be kept confidential. Under the

⁴ See generally U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, Coronavirus Disease 2019 (COVID-19) Interim Guidance for Businesses and Employers, March 21, 2020. See also <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

⁵ For all New York State employers, Governor Cuomo issued an executive order requiring all essential businesses or entities to provide, at their expense, face coverings to employees in direct contact with customers or members of the public.

⁶ See generally U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, Coronavirus Disease 2019 (COVID-19) Cleaning & Disinfecting, <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>, (last visited May 4, 2020).

⁷ See United States Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> see also United States Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Americans with Disabilities Act (“ADA”), employers must keep all medical information confidential, including information related to symptoms of COVID-19 or a diagnosis of COVID-19. Additionally, this medical information should be stored separately from an employee’s personnel file.

2. Serology - Blood Testing

In addition to temperature considerations, an employer may require an employee to take and submit the results of a COVID-19 and/or Antibody blood test prior to returning to work. When deciding whether to require employees to submit to these blood tests, consider the following:

- The United States Food and Drug Administration (“FDA”) current position on accuracy and reliability of the testing.
- Confidentiality considerations relative to the submitted test results; and
- Wage and hour implications of mandated testing. Specifically, whether the time to adhere to an employers’ policy of mandated blood testing is deemed compensable time pursuant to the Fair Labor Standards Act or state wage payment laws

C. Considerations When Returning Employees to the Workplace

1. Soliciting Health Information from Employees Before Returning to Work

Before returning to work, an employer may ask its workforce questions to determine if they have or may have had COVID-19. Such questions include, but are not limited to, whether they have COVID-19 symptoms or whether they have been tested for COVID-19. Pursuant to the EEOC, employers should not ask employees whether they have family members who have COVID-19 or who exhibit symptoms of COVID-19. Instead, the EEOC recommends asking whether the employee has had contact with anyone who has been diagnosed with COVID-19 or who has symptoms of the virus.

2. Selecting Which Employees Can Return to Work

In determining who should return, employers must document their selection criteria and implement it according to a predetermined and documented “return to work plan.” It is imperative that the selection criteria used is based upon legitimate, non-discriminatory business needs and the criteria does not inadvertently have a disparate impact on protected classes (i.e., race, age, gender, etc.).

3. Excluding Employees

Employers may lawfully exclude an individual with COVID-19, or who is exhibiting symptoms, from the workplace for the health and safety of the workforce. If an employee is diagnosed with COVID-19, or he or she is exhibiting symptoms associated with COVID-19, employers are permitted to send him or her home.

4. An Employee Refuses to Return to Work

If an employee is refusing to return to work, consider why he or she is refusing to return and the potential outcomes. To that effect, consider reasonable accommodations or allowing the individual to work from home. To the extent an accommodation or teleworking is unavailable, consider sick leave, paid time off, or a leave of absence. Please be advised, fear of the virus or

potential exposure to the virus may not trigger recently enacted state or federal regulations for purposes of leave and failure to report to work may be treated as job abandonment.

5. *An Employee Refuses to Comply with Procedures*

If an employee refuses to answer health and safety questions, or refuses to submit to a medical examination, an employer may prohibit that employee from entering the workplace. If an employee is hesitant to comply due to confidentiality concerns, ensure him or her that the information is being maintained safely and will be kept entirely confidential to the greatest extent possible.

6. *Staggering Shifts and Hours*

When returning employees to work, the CDC recommends implementing staggered work schedules to reduce the number of employees in a workplace at any given time. Indeed, in Governor Cuomo's multi-phased plan for the reopening of New York State requires that businesses "adjust workplace hours and shift design as necessary to reduce density in the workplace."

7. *An Employee is Demonstrating Symptoms of COVID-19 After Returning to Work*

It is imperative that those responsible for screening are instructed on how to handle employees who are infected with, or who are exhibiting symptoms of COVID-19, after they have returned to work. Employers should inform all employees who were in contact with the infected individual that they may have had contact with someone who has, or may have had COVID-19. Please be advised, the identity of the infected individual may not be revealed without written permission from the infected individual.

D. COVID-19 Incubation Timelines to Consider For Staff Returning to the Workplace

Employers should also take into consideration the latest CDC guidance relative to incubation periods as they create timeline for employees to return to work. In all circumstances, the CDC recommends individuals discuss returning to work with their personal healthcare provider to best assess if they pose no threat to coworkers.

1. *Unconfirmed COVID-19 With Prior Symptoms*

- Refers to an employee who: (1) had a cough and/or fever (i.e. symptoms); (2) has not sought testing for COVID-19; and (3) is now asymptomatic. Based on current CDC guidelines these employees may return to work if:
 - . At least ten (10) days have passed since symptoms first appeared;
 - . The employee shows no symptoms for at least three (3) days without the use of any fever-reducing medicines;
 - . There is an improvement in respiratory symptoms; and
 - . The employee has received two (2) consecutive negative COVID-19 test results.

2. *Confirmed COVID-19 and Asymptomatic*

- Refers to an employee who has tested positive for COVID-19 but is asymptomatic. This employee must remain in isolation following their diagnosis and, based on current CDC guidelines, these employees may return to work if all of the following circumstances are met:

- At least ten (10) days have elapsed since the date of the positive COVID-19 test result before the employee retakes the exam;
- The employee subsequently receives two (2) consecutive negative COVID-19 test results.

3. *Confirmed COVID-19 With Symptoms Not Requiring Hospitalization*

- Refers to an employee who has tested positive for COVID-19 and has become ill due to the virus. These employees were those who self-isolated at home and did not require hospitalization. Based on current CDC guidelines, these employees should be able to return to work under the following conditions:
 - The employee shows no symptoms for at least three (3) days without the use of any fever-reducing medicines;
 - There is an improvement in respiratory symptoms;
 - At least ten (10) days have elapsed since the date of the positive COVID-19 test result before the employee retakes the exam; and
 - The employee subsequently receives two (2) consecutive negative COVID-19 test results.

4. *Confirmed COVID-19 With Symptoms Requiring Hospitalization*

- Refers to an employee who has tested positive for COVID-19 and has become ill due to the virus requiring hospitalization. These employees are subject to the same circumstances as those identified in number “3” above. However, the CDC recommends rigorous testing before they may return to work since they may experience longer periods of viral detection compared to those with mild or moderate symptoms.

The return to work must be undertaken as mindfully as possible in efforts to avoid unintentional consequences which may range to from litigation exposure to the potential re-exposure of the workplace to the virus itself. There is no one size fits all for businesses. Each employer must analyze its space, workforce and industry and develop measures that implement the above guidance, as well as future guidance provided by the CDC as well as federal, state and local governments.

Meltzer Lippe remains committed to partnering with our clients and friends to continue to assist them through this transition. Please do not hesitate to contact your Meltzer Lippe attorney with any further questions.

We wish you continued good personal and business health.

The Co-Chair of Meltzer Lippe’s Labor and Employment Group,

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