



MITIGATING THE RISKS FROM COVID-19 AS AMERICA RETURNS TO WORK

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As COVID-19-based governmental restrictions begin to loosen, employers eager to reopen their doors will inevitably consider just how “normal” business operations can be initially. One key consideration for these employers is the risk of potential liability to their employees, customers and visitors with regard to COVID-19. Typically, businesses are governed in their conduct by laws and regulations or the common law on negligence standards. However, as we have all heard in the past few weeks, these are “unprecedented times,” and there is little jurisprudential direction for the path ahead. With respect to laws and regulations, businesses are currently guided by the federal government’s nationwide orders; orders issued by the various state governors; and, in certain places, county-wide directives. With respect to the common law, businesses are left to analogize other workplace threats, such as occupational disease and toxic exposure, to the COVID-19 era workplace.

Below is a guide for businesses seeking to reopen over the coming months about the standards they should follow to create safe workplaces and to mitigate the risk of COVID-19 liability in the future.

For starters, one of the biggest questions on every employer’s mind is:

Q. When can I bring employees back to work?

A. The answer is, it depends. The Federal Coronavirus Task Force issued its guidelines, outlined in a three-phase system, to reopen America’s economy. However, these are only recommendations, and,

ultimately, each state's government will dictate when and how each state will reopen, whether according to the suggested federal guidelines or otherwise.

On May 1st Governor Greg Abbott is not renewing the state's shelter in place order and is placing Texas into Phase 1 of the federal guidelines. He indicated the state would proceed into Phase 2 of the guidelines on May 18th if there is not a spike in cases. More information on the federal guidelines and Governor Abbott's recent loosening of shelter in place restrictions can be found [here](#).

Q. What are the risks in reopening my business?

A. COVID-19 presents a unique challenge because for almost all other premises risks, an employer has control over the risk, such as the condition of the premises, the safe conduct of the workers or the industry standard condition of fixtures and equipment. Businesses unquestionably have a duty to address and mitigate these reasonably controllable risks. COVID-19 presents a new frontier in defining the scope of a business's duty to protect individuals from a risk not necessarily originating within its premises and over which the employer may not have reasonable control. Businesses should follow all orders and regulations from national, state and county leaders. This includes following federal Occupation Safety and Health Administration (OSHA) and Centers for Disease Control (CDC) guidelines with respect to minimizing the risk of transmitting COVID-19. In addition, businesses should create a COVID-19 policy in which they detail the reasonable steps they are taking for maintaining the health of their employees and customers and establishing a reasonably safe work environment.

State and Local Regulatory Guidelines and Requirements from OSHA

State and Local authorities, as well as OSHA and the CDC, have released guidelines in preparing workplaces for COVID-19. These guidelines address topics such as: (1) the number of people allowed in a premises; (2) premises cleanliness standards; (3) social distancing guidelines; (4) in some cases, testing of employees prior to reporting to work; (5) mandatory quarantine periods for individuals infected with or exposed to the virus; and (6) wearing of masks by visitors and workers. The most recent OSHA guidance can be found [here](#); the most recent CDC guidance can be found [here](#); recent statewide guidance for Texas can be found [here](#); and Dallas County's most recent guidelines can be found [here](#).

Employers' Duty to Establish Reasonable Procedures to Mitigate the Risks from COVID-19

Beyond the baseline of guidelines recommended by federal, state and local authorities, we can draw upon lessons learned from prior occupational diseases and toxic exposures to navigate the COVID-19 era. In evaluating potential liability under common law negligence standards, we look at what steps a business took to reasonably protect employees and customers from harm and whether a failure on the part of the business to take those steps caused the harm at issue. With COVID-19, this means we will be evaluating what steps the company took to protect workers and customers from exposure to the virus and whether any failure on the part of the company caused someone to be exposed and harmed.

Causation presents an interesting issue in evaluating potential COVID-19 liability. Employees and customers have the burden of proving that their exposure more likely than not occurred at the premises or

in the workplace, rather than from another location. Is that a bright line standard? Not exactly, but as we look to prior toxic tort litigation for guidance, if the person can prove that exposure at work or while visiting a business was a substantial factor (even if not the *only* factor) in bringing about the harm, they may be able to meet the legal standard for causation. Therefore, it is critical that businesses establish procedures that reasonably protect individuals within their premises from dangerous conditions. In the case of COVID-19, that means businesses should put into place reasonable (not perfect!) procedures to protect workers and visitors from the virus.

Standards of Care

“Standards of care” establish those specific steps that businesses must implement in order to satisfy their duties to protect employees and visitors. These duties vary from industry-to-industry. For example, there may be higher standards of care in nursing homes, which have the most vulnerable population to this virus, than in manufacturing facilities where that same population does not exist. In implementing standards for various industries, the balance is between: (1) the level of risk to visitors and employees in that particular workplace; and (2) the reasonable (not perfect!) steps that the business should take to mitigate that risk.

Follow National, State, and County Guidelines

The first place premises owners should turn is the latest versions of the COVID-19 orders issued at various levels of government which establish the guidelines designed to cover our daily conduct, both inside and outside the workplace, linked above. Also, make sure all required postings referenced in this guidance are prominently displayed in the workplace or on company computer portals.

Additional Recommended Steps to Provide a Safe Workplace in the World of COVID-19

In addition to following all national, state, and county guidelines, the list below provides examples by industry of steps companies can take to help mitigate risk in the COVID-19 era: it is organized starting with the workplaces where the highest standard of care needs to be exercised.

Health Care Facilities, including Hospitals, Nursing Homes and Assisted Living Facilities

All employees must self-screen before going into work, including taking their temperature and checking for other COVID-19 symptoms. If an employee has a temperature of 100.4 or higher or other COVID-19 symptoms, he or she must notify the designated COVID-19 company representative and must remain home and follow step 4.

1. All employees wear masks while at work, unless removing the mask is necessary for communicating or some other required purpose.
2. All employees are administered COVID-19 tests every 2-3 weeks, or as readily available.
3. Any employee experiencing symptoms must get tested immediately and must remain in quarantine until receiving a negative test or being symptom-free for at least 14 days.
4. Any employee testing positive must be quarantined until they have been symptom-free for 14 days minimum.

5. Heightened cleaning and disinfecting standards and more frequent cleaning of surfaces
6. Maintain 6 feet of separation from other employees and adjust workstations to provide appropriate spacing.
7. All employees must wash or disinfect their hands upon entering work and after any interaction with employees, patients, or handling items in the business, including food, supplies, etc.
8. For nursing homes and assisted living facilities, implement new standards for residents on social distancing, handwashing and occupancy of common areas.

Home Health Workers

1. Steps 1-5 above.
2. Any patient whose breathing is not otherwise compromised must wear a mask during visits.
3. To the greatest extent possible, follow social distancing guidelines.
4. All employees must wash or disinfect their hands upon entering work and after any interaction with employees, patients, or handling items in the business, including food, supplies, etc.
5. Advise patients that they need to confirm they are not experiencing symptoms prior to workers presenting at their home. For patients testing positive, if possible, delay the visit; if not possible, adjust the logistics of the assignment.
6. Allow workers to disengage from the assignment if the patient is displaying COVID-19 symptoms or has tested positive.

Retail, Restaurants, and Hospitality

1. All employees wear masks while at work, unless removing the mask is necessary for communicating or some other required purpose.
2. Monitor spacing of tables for customers to allow for 6 feet separation, and no more than 6 customers at a table. Occupancy in the state is limited to 25-50% depending on number of cases in a particular county.
3. Create a plan that allows for 6 feet of separation while customers wait for tables or to-go orders.
4. *Restaurant Dining requires no condiments, silverware, flatware, glassware, or other items left on an unoccupied table. Employees should only provide customers condiments upon request and in single use portions. Restaurants should use disposable menus only and provide a new copy to each customer. If buffet is offered, then require employees to serve food to customers from buffet.
5. Any employee experiencing symptoms must get tested immediately and must remain in quarantine until receiving a negative test or being symptom-free for at least 7 days.



6. Any employee testing positive must be quarantined until they have been symptom-free for 7 days minimum.
7. An employee who has had close contact to a person who tested positive must self-quarantine and cannot return to work for at least 14 days from the last date of exposure.
8. Heightened cleaning and disinfecting standards and more frequent cleaning of surfaces.
9. All employees must wash or disinfect their hands upon entering work and after any interaction with employees, other customers, or handling items in the business, including food, merchandise, etc. Contactless payment should be preferred; however, when not available, minimize contact and employees and customers wash or disinfect hands after the payment process.
10. Maintain 6 feet of separation from others and adjust workstations to provide appropriate spacing.
11. All employees must self-screen before going into work, including taking their temperature and checking for other COVID-19 symptoms. If an employee has a temperature of 100.4 or higher or other COVID-19 symptoms, he or she must notify the designated COVID-19 company representative and must remain home and follow step 4.
12. Consider dedicating a certain period of time each day for only at-risk customers or delivery of items to vehicles to reduce the need for at-risk customers to enter the business.
13. Make hand sanitizer, disinfecting wipes, soap and water, or similar disinfectant readily availability to employees and customers.

Warehouse Operations and Manufacturing

1. Observe proper social distancing and adjust workstations to provide appropriate spacing.
2. Recommend employees wear cloth face coverings over their nose and mouth, or if available, face masks.
3. Any employee experiencing symptoms must get tested immediately and must remain in quarantine until receiving a negative test or being symptom-free for at least 14 days.
4. Any employee testing positive must be quarantined until they have been symptom-free for 14 days minimum.
5. All employees must wash or disinfect their hands upon entering work and after any interaction with employees or handling merchandise. .
6. Heightened cleaning and disinfecting standards and more frequent cleaning of surfaces.
7. Make hand sanitizer, disinfecting wipes, soap and water, or similar disinfectant readily availability to employees.

Potential Employee Response Issues

Q. How do I respond to an employee's challenges to the adequacy of our COVID-19 policies, their enforcement, or an employee's general skepticism of the safety in returning to the workplace?

A. From a legal standpoint, if employers follow guidelines like those discussed above, beyond those required by federal, state and local authorities, they have satisfied their responsibility to provide a reasonably safe premises. Employers can, of course, take additional steps to those above if they choose. However, employers are not compelled to bend to the will of individual employees who have additional recommendations.

If an employee has been advised by a health care professional that he or she cannot come to work because they have a compromised immune system or need special treatment because of a health condition, then an employer should engage in an open dialogue with the individual to determine if they can accommodate the especial medical needs, which may include allowing the employee to work from home, or allowing the employee to maintain strict isolation in the office until the pandemic ends, or the employee has clearance from medical providers to safely return to work as usual.

Q. What if an employee experiences symptoms of COVID-19 and wants to return to work sooner than the 7 day self-isolation period?

A. The employee must obtain a medical professional's note clearing the individual for return based on an alternative diagnosis.

Written COVID-19 Policy and Acknowledgement

Finally, in combating the risk of an employer's liability as it relates to COVID-19, an employer should create a COVID-19 written policy outlining all of the safeguards implemented by the company to protect workers (e.g., instructing employees to socially distance, frequently wash their hands and take their temperatures prior to reporting to work). This policy should be communicated to all employees, and, when possible, a business should require each employee execute an acknowledgement of receipt and understanding of the COVID-19 procedures and safeguards, as well as a commitment to follow the procedures. If not feasible, at a minimum, an employer should communicate this policy to all employees through any means available, including email, an internal portal and/or display the policy in a common work area or breakroom so that the policy is commonly understood, and, importantly, followed by all employees.

If you have questions or would like to discuss further, please contact Jay Wallace, Alana Ackels or Sydnie Shimkus.

Related Practices

Labor and Employment



Practice Area Contact

Alana K. Ackels

Sydney A. Shimkus

Jay M. Wallace