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US COVID-19 Return-to-Work Toolkit

The COVID-19 public health crisis has created challenging and uncertain times for nearly every organization with operations in the United States (US), regardless of size or jurisdiction. As we start to see restrictions being lifted across the country, new challenges are emerging. Whether your organization has continued to maintain a physical workspace in the midst of the crisis, or switched to a partial or completely remote workforce and is considering, or already started developing a return-to-work strategy, you are undoubtedly aware of the complex web of federal, state, and local laws, regulations and guidance on every aspect of labor and employment, from workplace safety to layoffs, furloughs and reopening requirements.

This is the first edition of an evolving toolkit designed to help you navigate a rapidly changing legal and regulatory environment, and to help you plot your organization's course for the future. Within this toolkit you will find a detailed return-to-work checklist and a Q&A discussion that addresses common questions with uncommon depth and clarity.

The toolkit is just that - a tool you can use when carrying out your compliance and governance functions. For maximum effectiveness, the toolkit should be leveraged against your organization's existing legal requirements, policies, and contractual obligations. This exercise will provide you with full visibility into your organization's readiness to return-to-work. To that end, we recommend you undertake the following activities while you dive into the toolkit, including:

- **Review** existing policies, procedures, and handbooks for applicability and consistency with what follows in this toolkit.
- **Review** existing benefits, insurance, and retirement plans for any changes that may need to be made to align with the recommendations in this toolkit.
- **Review** existing insurance liability plans to ensure compliance or changes that may need to be made to align with the recommendations in this toolkit. We recommend you talk with your brokers and discuss such plans.
- **Review** any employment agreements or union agreements that might be applicable.
- **Update** your Board of Directors and the appropriate Board Committee regarding plans for communications and policies designed to protect the personal health and safety of employees, customers, business partners including suppliers, and the communities in which they work.

The information provided in this toolkit is for informational purposes only and should not be considered legal or professional advice, nor does it constitute a legal opinion. Every organization must develop its own policies, procedures and plan tailored to the realities of its industry, business, and the jurisdictions in which it operates.

We sincerely hope this toolkit and associated checklist will provide you with helpful information when navigating the ongoing COVID-19 crisis and your organization's return-to-work strategy.

Employment and labor



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Key Takeaways

There is a lot to chew on in this toolkit. So, if you read anything, read these six takeaways:

Takeaway #1 - Consider undertaking an immediate COVID-19 legal / regulatory gap and risk assessment.

The only true way an organization can fully understand and appreciate the scope of plans, policies and procedures necessary to continue operating or to reopen their physical business is to carefully map existing legal and regulatory obligations under federal, state and local laws and regulations, identify the gaps in their current compliance program and practices, assess the risk of those gaps, and create a prioritized remediation plan. This process not only reflects best practice from a corporate compliance perspective, it may also satisfy certain jurisdictional requirements for reopening, such as in California which requires reopening businesses to conduct and share the results of a risk assessment and site-specific safety plan prior to reopening. Ultimately, engaging outside counsel, such as Dentons, in this process may help keep certain communications and decisions protected under the attorney-client privilege and related doctrines.

Takeaway #2 - Leverage the organization's legal / regulatory gap and risk assessment to update existing and create new plans, policies and procedures.

The results of the legal / regulatory gap and risk assessment described in Takeaway #1 will result in a prioritized list of plans, policies and procedures that the organization should, and in some cases must, implement before reopening. OSHA and its state counterparts, for example, may require an Infectious Disease Preparedness and Response Plan and related safety plans prior to reopening. States such as California mandate risk assessments and site-specific safety plans. And several local jurisdictions require new leave and break policies to be developed and posted for employees. Additional policies and procedures that may need to be considered, and are outlined in this toolkit, include workplace safety, leave, accommodations, testing, screening, privacy, remote working and timekeeping.

Takeaway #3 - Tighten your third-party due diligence and management systems.

A core component of holistic corporate compliance and governance is oversight and due diligence when it comes to third-party contractors and vendors. Organizations should examine their existing third-party contractor relationships; update contract language where



appropriate to mitigate liability and risk; audit existing safety practices; and maintain situational awareness of contractor practices, data collection and exposure in their workplace. Several jurisdictions may also require third-party contractors and vendors to undergo training on new reopening policies and procedures, and to be considered when developing risk assessments and/or site-specific safety plans.

Takeaway #4 - Carefully craft a communications strategy with employees and third-parties.

Communication is king when it comes to reopening in this unpredictable environment. A carefully crafted communications plan should anticipate FAQ with employees, explain new policies and procedures, provide a mechanism for employees to submit complaints and concerns regarding workplace safety and other compliance issues, and align customer communications, third-party contractor/vendor communications, and communications with law enforcement and regulatory authorities with organizational risk and goals.

Takeaway #5 - Training, training, training. In order to demonstrate compliance with any new or developing federal, state and local requirements, it will be essential to demonstrate that employees and related agents

and contractors have been trained in, and understand, the full scope of policies and procedures. This may be especially important as it relates to workplace safety and new COVID-19 testing regimes, as confusion and inconsistency can result in increased exposure and liability risk.

Takeaway #6 - Communicate with the Board. Where applicable, organizations should ensure they update the Board of Directors and the appropriate Board Committees regarding plans for communications and policies designed to protect the personal health and safety of employees, customers, business partners including suppliers, and the communities in which they work. The Board has the duty to monitor management's efforts to identify, prioritize and manage potentially significant risks to the business and its operations, which may require more regular updates from management to the Board between regularly scheduled board meetings. Documentation of these discussions and communications will be critical. Depending on the nature of the risk impact, there may be issues that are appropriate for the full Board, the Audit Committee and/or the Human Resources Committee. Some approvals of the Board may also be necessary, but the key is communication by management to the Board.



Toolkit Checklist

Workplace Health & Safety		
Advance Planning	Task	Toolkit Section
	Create or update Infectious Disease Preparedness & Response Plan to align with CDC and OSHA guidance. Create or update additional workplace safety plans to align with state-specific requirements.	1.1
	Create or update risk assessments and site-specific safety plans, as required by state and local jurisdictions.	
	Stand-up a return-to-work taskforce that oversees all operations, policy development, communications, and strategy relating to COVID-19 workplace changes.	
	Create a set of re-entry to the workplace policies and handbooks for employees and vendors.	
	Identify posters and other communications that will be posted in the workplace and distributed to employees electronically.	
	Train employees on all new workplace safety policies and procedures, and maintain records of training completion.	
Cleaning & Ventilation	Task	
	Identify and implement cleaning protocols for high-risk and high-touch areas and surfaces throughout the workplace.	1.2
	Ensure cleaning protocol aligns with federal, state, and local requirements and guidance on workplace cleaning.	
	Identify and make available appropriate PPE for cleaning crew and other individuals, as appropriate, within the workplace.	
	Identify and contract with third-party vendor(s) to perform cleaning services, where appropriate.	
	Conduct a risk assessment of current ventilation systems to determine if changes need to be made to align with federal, state, and local requirements and guidance.	
	Consider adopting, or revising an existing incident response plan for COVID-19 exposures in the workplace.	

Physical Distancing	Task	Toolkit Section
	Create policies and procedures for creating physical distancing within the workplace, including protocols for distancing workstations, creating unilateral pathways in hallways and common areas, and potential staggering of work shifts.	1.3
	Identify physical spaces, structures and floor plans that may require remediation. Consult with experts (e.g., interior designer, space planner) on space planning and design issues relating to physical distancing within the workspace.	
	Consider staggered schedules, especially for those employees that share physical workspaces.	
	Distribute policies and procedures for physical distancing within the workplace, and implement training and support on new policies and procedures.	
Hygiene & Reducing Transmission	Task	Toolkit Section
	Consider structural changes to promote personal hygiene and reduction of transmission, such as touchless entry systems, elevator controls, hand sanitizer supplies, etc.	1.4
	Create policies and procedures that promote personal hygiene and transmission prevention, such as not using other workspaces, hand washing, and not sharing tools, equipment and other commonly shared office items.	
	Implement training and support for new hygiene protocols.	
	Create policies and procedures relating to the wearing of face masks that align with federal, state and local guidance and requirements.	
Screening	Task	Toolkit Section
	Create policies and procedures for the screening of job applicants, contractors and employees, including symptom tracking and temperature reading, where appropriate, and ensure said programs align with federal, state, and local requirements.	1.5
	Consider technologies for temperature reading, including thermal thermometers and/or body scanning technology.	
	Create symptom tracing and testing protocol, and communicate the same to employees.	
	Identify physical standards for temperature reading and/or other screening mechanisms, including flow of workforce and protocols for those responsible for taking the temperatures.	
	Map data privacy and cybersecurity legal and regulatory obligations to ensure appropriate notice and security around screening data is maintained.	

Workplace Communications & Reporting		
Employee Communications	Task	Toolkit Section
	Create communications plan to convey new policies, procedures, and safety plans and risk assessment results to returning and existing employees.	2.1
	Identify core communications team to handle employee requests, clarifications and HR concerns.	
	Create internal reporting mechanism where employees can channel concerns regarding workplace safety and compliance.	
Compliance Personnel	Task	Toolkit Section
	Identify and appoint head of compliance, if not already a position within the organization.	2.2
	Map regulatory and legal obligations as it relates to reopening, at the federal, state and local levels.	
	Identify and map contractual obligations as it relates to vendors and reopening communications and procedures.	
Third-Party Communications	Task	Toolkit Section
	Identify vendors and contractors that may be impacted by reopening strategy and new COVID-19-related policies and procedures.	2.3
	Identify applicable regulators, law enforcement, and government officials that may be contacted during COVID-19-related investigations.	
	Develop communications plan for third-party vendors, government and law enforcement.	
EEO, Accommodations & Leave		
EEO	Task	Toolkit Section
	Update and refresh anti-discrimination, anti-harassment and anti-retaliation policies to align with new and emerging federal, state and local guidance and requirements.	3.1
	Update and distribute training on anti-discrimination, anti-harassment and anti-retaliation policies.	

Accommodations	Task	Toolkit Section
	Update or create new policies and procedures to address employee leave requests under federal, state, and local guidance and requirements.	3.2
	Update or create new policies and procedures to address employees who either refuse to come to work or refuse to comply with safety protocols upon return to work.	
	Update or create new policies and procedures to address accommodation requests and ensure the interactive process is consistently applied, as required by federal, state and local guidance and requirements.	
	Update or create new policies and procedures to address customer requests for safety related accommodations, or refusal to comply with existing safety protocols (e.g., refusing to wear a mask, refusing to comply with newly posted safety protocols, requesting additional safety protocols).	
Leave	Task	Toolkit Section
	Amend existing policies and procedures relating to paid sick leave to align with the Families First Coronavirus Response Act (FFCRA), if applicable.	3.3
	Review all state, county and municipal paid sick leave, expanded family leave and other leave laws, and revise policies and procedures to align with such requirements, if applicable.	
	Train employees on all new leave policies and procedures, and maintain records of training completion.	
	Designate individual to oversee and coordinate all new leave requests.	
	Prepare policies enforcing policies and procedures to prevent against fraudulent leave requests.	
	Ensure third-party leave-processing vendors follow and comply with the organization's updated paid sick leave policies and procedures.	

Layoffs, Furloughs & Hiring

Returning Furloughed & Terminated Employees	Task	Toolkit Section
	Ensure compliance with municipal and county requirements for “right to recall” for existing and/or former employees.	4.0
	Ensure compliance with federal, state and local law relating to partial workweek payments for salaried, exempt employees if individuals are returned mid-week.	
	Consider the resumption of benefits suspended during furlough.	
	Consider the need for new-hire documentation and renewed background checks and drug screening upon return to the workplace.	
	Consider health-screening policies and procedures for new hires and returning employees, and communicating said policies and procedures prior to return-to-work.	
	Ensure applicable policies regarding accrual of paid time off or other forms of leave during furlough are consistently applied to all returning employees.	
	Resolve requests for additional leave, accommodation or additional time off.	
	Address continued accrual and seniority issues occurring during furlough.	
	Consider whether returning furloughed employees will require new hire documentation (i.e., constitute a new hire under applicable state and local law).	
New Terminations/ Furloughs	Task	
	Consider selection criteria to avoid claims of disparate impact on protected classes of employees.	4.0
	Consider impact of termination on benefits, such as the partial termination of a qualified retirement plans, impact on ACA coverage and reporting obligations, and/or impact on COBRA and mini-COBRA laws.	
	Consider severance eligibility under employment contract and/or policy.	

	Consider whether the federal Worker Adjustment and Retraining Notification Act (WARN Act) or state mini-WARN Acts are triggered, and if so, whether the requirements under the same have been met.
	Consider whether protected activity is involved, potentially implicating National Labor Relations Act (NLRA) issues.
	Consider paid time off benefits, and those that must be paid out at termination pursuant to policy and state and local law.
	If applicable, review employment and collective bargaining agreements to determine requirements for termination, severance eligibility, and other related issues.
	Consider whether any customer contracts will be impacted by the termination of a key employee.
	Consider implications on COBRA or state mini-COBRA obligations triggered by the adverse action.
	Consider whether the employee requires an accommodation to perform his or her job functions, and whether the organization has adequately engaged in the interactive process.

Privacy

Job Applicant & Employee Privacy	Task	Toolkit Section
	Map existing data privacy obligations under applicable federal, state and local data privacy laws and regulations.	5.1
	Create appropriate notices for job applicants and employees, as appropriate under applicable federal, state and local data privacy laws and regulations.	
	Consider developing job applicant and employee privacy policies, where appropriate.	
	Implement training and support for employees on data privacy issues and risks, including those associated with temperature screening and tracing applications, where appropriate.	

Third-Party Privacy	Task	Toolkit Section
	Map existing data privacy obligations under applicable data privacy laws at the federal, state, and local level, and as appropriate under applicable third-party vendor contracts.	5.2
	Create appropriate notices for vendors and contractors as appropriate under applicable federal, state, and local data privacy laws and regulations.	
	Consider developing updates to existing privacy policies to include information collected from vendors.	
	Consider training for vendors on data privacy issues, including those relating to temperature screening procedures.	
Remote Working	Task	Toolkit Section
	Consider whether remote working will be available for entire workforce, or limited set of workers, including those who are immune compromised, older or pregnant.	6.0
	Consider whether the business will grant requests for remote working as an accommodation.	
	Update and revise time-keeping policies to address remote working, off-the-clock working, and other remote working time keeping issues.	
	Update existing, or create new business reimbursement expense policy to align with federal, state and local law.	
	Update existing, or create new policies relating to cybersecurity and data privacy for remote workforce.	
	Update existing, or create new onboarding documents for remote workforce.	
Wage & Hour	Task	Toolkit Section
	Review and update incentive programs to account for COVID-19 changes.	7.0
	Review and update sales commission plans to adjust for COVID-19 changes.	

	Update policies to address waiting time associated with physical distancing and screening measures.	
	Update policies to emphasize prohibition against off-the-clock work.	
	Review and consider staggered scheduling to promote physical distancing.	
	Update policies to account for new breaks available under state and local laws and regulations.	



1.0 Workplace Health & Safety

Maintaining a safe and healthy workforce is one of the most important, and difficult challenges facing employers in the COVID-19 environment. Below we breakdown five critical areas as it relates to workplace health and safety in the COVID-19 era: (1) advance planning; (2) cleaning and ventilation; (3) physical distancing; (4) hygiene and reducing transmission; and (5) employee screening.

1.1 Advance Planning

1.1.1 Are there health and safety standards and guidelines we should follow when planning to reopen our workspace?

Yes. Employers should generally be guided at the federal level by the General Duty Clause of the Occupational Safety and Health Act (OSHA), which requires covered employers to provide each employee a place of employment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Employers should also follow general CDC guidance, as well as state and local guidance which may vary per jurisdiction and industry. Jurisdictions vary, for example, on specific items such as use of non-medical face coverings, return-to-work standards, and safety requirements, as well as standards applicable to specific industries such as manufacturing, grocery, food retail, meat and poultry processing, and schools and child care. Because the guidance in this space is rapidly evolving, it’s critical that employers be cautious about relying on printed documents and consult with counsel and/or refer back to the original sources for ongoing additional information or updates.

1.1.2 What health and safety planning documents should we create when planning to reopen?

It depends. OSHA recommends organizations develop an Infectious Disease Preparedness and Response Plan, if one does not already exist. State and local jurisdictions may require additional documents and plans, such as in California where businesses reopening must prepare a detailed risk assessment and implement a site-specific protection plan. Ultimately, re-entry plans should cover policies and practices for cleaning and disinfection of the facility; worker hygiene; physical distancing, including any workplace reconfiguration needed; screening of employees and any visitors to the facility; employee wellness; employee training; how to proceed if an employee becomes sick during the workday, and how to respond if an employee has a confirmed COVID-19 case; and recording and reporting COVID-19 cases, if necessary. Because this is a lot of information to digest and navigate, it’s recommended that each organization stand-up a return-to-work taskforce, charged with overseeing and implementing all new and developing workplace safety changes.

1.1.3 Do we need to post anything at the workplace about our workplace safety changes?

Possibly. Some jurisdictions may require the employer to post certain documents in the workplace concerning workplace safety changes. For example, in Pennsylvania, businesses must designate a “Pandemic Safety Officer” and post a notice about COVID-19, which points employees to that officer for more information and informs them of workplace safety steps the employer is taking. The answer to this question is ultimately subject to a jurisdiction-by-jurisdiction analysis, and it’s therefore important to consult with counsel and your local requirements before making a final determination as to posting requirements.



1.2 Cleaning & Ventilation

1.2.1 Do we need to perform any specific cleaning before employees return to the workplace?

Possibly. If the workplace has not been occupied for seven days or more, there is generally no special cleaning needed because of COVID-19. However, other measures may be necessary to address potential issues when a building has been closed for a long period of time. If the workplace has not been occupied for less than seven days, follow CDC and local health guidance and recommendations for developing and implementing a cleaning plan.

1.2.2 What cleaning must be conducted once employees are back at work?

It depends. Generally, employers should plan for regular cleaning and more frequent cleaning for high-touch and high-risk areas. When cleaning is conducted, organizations should ensure use of proper materials, and follow federal, state, and local guidance related to cleaning, including providing necessary PPE and training the cleaning crew. Organizations should measure their policies and procedures against relevant jurisdiction-specific guidance for specific types of facilities, such as steps outlined by authorities for the meatpacking industry.

1.2.3 What cleaning must be conducted if there is a suspected or confirmed case of COVID-19?

It depends. The CDC has issued a recommended protocol for cleaning and disinfecting when people suspected or confirmed to have COVID-19 have been at a facility. Generally, the advice is to identify and close off areas where the person has been in the facility; if possible, open outside doors and windows to that area; block all access to that area for 24 hours, or as long as practical; and then commence cleaning and disinfection. Pay attention to shared areas, such as break rooms, and to items that might have been touched by the sick person, including shared electronic equipment. Local jurisdictions may have more specific cleaning protocols that must be followed.

1.2.4 Can changes to the ventilation system help reduce transmission risk?

Possibly. The EPA has stated that, generally, “increasing ventilation and filtration is usually appropriate” to help reduce risks from the virus that causes COVID-19, but the complexity and diversity of buildings and their systems require a professional assessment, referring to guidance issued by the American Society of Heating and Air-Conditioning Engineers (ASHAE). ASHE has stated: “Transmission of SARS-CoV-2 through the air is sufficiently likely that airborne exposure to the virus should be controlled. Changes to building operations, including the operation of heating, ventilating, and air-conditioning systems, can reduce airborne exposures.” If employees use personal fans, employers should also take steps to minimize air blowing from one employee to another.

1.3 Physical Distancing

1.3.1 Are there best practices for establishing appropriate social distancing in the workplace?

Yes. Employers should think through different types of strategies to increase the space between employees, depending on the workplace, such as changing structures, policies, and practices. Changing structures may include reconfiguring workstations to create at least six feet of separation between employees, installing dividers between workstations, changing the spacing of tables in the lunch room or setting up outdoor lunch areas, removing chairs in conference rooms, and making corridors one-way by installing directional signage. Changing policies and practices may include limiting the size of in-person meetings, creating staggered work schedules to reduce the number of employees in the workplace at any one time, and allowing (or requiring) some employees to work remotely.

1.3.2 Should we stagger work shifts or have other types of flexible scheduling?

Possibly. Decisions about staggered shifts will vary based on jurisdictional requirements and your organization's needs. In some jurisdictions, businesses are allowed to re-open but remote work is still required, if feasible. Where a significant portion of the workforce is working remotely, the number of employees in the workplace may be small enough that you do not need to stagger work shifts. On the other hand, if most or all employees will be working onsite, then you might want to stagger shifts. Doing so could not only promote physical distancing in the workplace, but also address other concerns, such as public transportation, by allowing some employees to commute at off-hours, avoiding bottlenecks at workplace entrances, and by reducing the rush of employees trying to use elevators at the same time.

1.3.3 How do we enforce physical distancing and other requirements within the workplace?

Consistently. Enforcement of violations surrounding new COVID-19 workplace policies and procedures should be done consistently, with the seriousness appropriate for addressing the ongoing crisis, and with the goal of fostering a safety-by-design culture in the workplace. Enforcement concerning new COVID-19 policies should also be consistent with past practices of your organization, including following any protocols for progressive discipline if appropriate and as consistent with your organization's legal obligations under contract or collective bargaining agreements.

1.4 Hygiene & Reducing Transmission

1.4.1 Are there policies and procedures we should implement to promote personal hygiene and reduce transmission of COVID-19 in the workplace?

Yes. Employers should plan a range of strategies to promote personal hygiene and to reduce transmission of COVID-19 in the workplace, including structural changes, policy changes, and training:

- **Structural changes.** Employers should consider implementing structural changes that can help limit transmission opportunities and promote personal hygiene throughout the workspace, such as installing touchless entry systems, controls for elevators, hand sanitizer supplies at entrances and exits, adequate facilities for hand washing, and touchless paper towel dispensers. It's important, during the planning stage, to examine how your employees actually use the space, and to plan accordingly. For example, a hand sanitizer station by the elevator doors will likely receive more use than one located in a hallway that people do not frequent.

- **Policy changes.** Employers should consider establishing policies and procedures that promote recommended hygiene, such as directives that employees should not use someone else’s workplace, work tools, or equipment, wash hands frequently, wear a mask if appropriate, and if necessary require employees to clean and disinfect any shared equipment before and after use.
- **Training changes.** Employers should consider providing training and support for new measures, such as sending a “welcome back” kit to employees that alerts them to new policies and encourages them to follow recommended guidance, such as frequent handwashing. Training is critical with these new workplace policies to ensure they are easily understood, available, and enforceable.

1.4.2 Can we require employees to wear face masks? If so, what kind?

It depends. Some jurisdictions require workers in particular industries to wear medical face masks, surgical masks, or masks with respirators. In others, face coverings—such as homemade cloth face coverings—may be recommended, but not required. And some others provide for exceptions to wearing face coverings, such as allowing an employee who has a private office to remove the face covering when working alone or if the covering restricts visibility during the performance of the worker’s duties. Ultimately, before mandating the use of face coverings, employers should plan a response if employees refuse to wear them (e.g., seeking accommodations, progressive discipline, termination, etc.). That plan must account for accommodation requests due to religious reasons or a disability, which should be addressed on a case-by-case basis pursuant to applicable laws and regulations in the organization’s particular jurisdiction.

1.4.3 How should we respond to an employee who refuses to wear a face mask?

Carefully. Questions about accommodating employee refusals to wear face coverings may implicate accommodation issues under the ADA and related state and local law. Your treatment of these requests should be consistent with your interactive process

for other requests for reasonable accommodations, and be consistent with applicable federal, state, and local law and guidance. If there is no ADA or related state concern, and the employee is openly refusing to comply with his or her employer’s safety requirements and protocols, employers should proceed with immediate discipline, consistent with applicable law and their existing contractual obligations / restrictions, where appropriate.

1.4.4 Can we require non-employees (i.e., customers, visitors, contractors, etc.) to wear face masks? What happens if they refuse?

It depends. Whether and to what extent you may require non-employees to wear face coverings when entering your workspace will depend on the outcome of a complicated patchwork of federal, state, and local laws and regulations as it relates to access to places of public accommodation. At the federal level, for example, Title III of the ADA generally prohibits places of public accommodation from discriminating against a person on the basis of disability, including imposing “eligibility criteria” such as a face covering requirement. However, the ADA provides an exception for individuals that pose a “direct threat” to the health and safety of others. A similar exception applies under the ADA as it relates to discrimination in employment, and the EEOC has opined that the COVID-19 health crisis presents a “direct threat” for the purposes of employment discrimination (at least as of March 2020, and that may change). That said, similar guidance has not yet been issued as it relates to Title III of the ADA. Thus, it’s a grey area of the law for now. Further complicating matters, several local jurisdictions mandate the wearing of face coverings for certain types of businesses. Thus, analyzing whether non-employees may be required to wear face masks requires a careful analysis of applicable laws and risks associated with the policy and practice.

1.5 Screening

1.5.1 May I screen job applicants for symptoms of COVID-19?

Possibly. At the federal level, although the EEOC has stated that employers are generally free under the ADA to screen job applicants for symptoms of COVID-19 after making a conditional job offer, they may only do so if the same process is used for all entering employees in the same job category. Local jurisdictions may have additional rules and restrictions as it relates to employment discrimination questions. If the employer is a covered business under the California Consumer Privacy Act (CCPA), the employer will have additional obligations to provide written notice to the job applicant before any screening is completed. It's therefore important to consult with counsel and review applicable state and local guidance and restrictions before undertaking any such screenings.

1.5.2 Is it permissible to conduct medical screenings of employees before they return to work?

Possibly. Although conducting medical screenings of employees is generally not permissible absent certain circumstances, the direct threat that COVID-19 poses to the workplace and the public more generally may justify employers when implementing medical screening of returning employees, so long as that screening is consistent with advice from the CDC and public health authorities, in alignment with the ADA and related state laws, and consistent with state and federal legal protections for medical confidentiality and privacy. In fact, some jurisdictions are requiring screenings before reopening is permitted. Screening may include taking temperatures and asking questions about symptoms (or requiring self-reporting) of all those entering the workplace. Such screening, however, must be narrowly tailored to align with all applicable legal restrictions and obligations, including those relating to the confidentiality and privacy of workers and visitors to the workplace.

1.5.3 Are there operational challenges that should be considered before developing and implementing a screening program?

Yes. Before implementing any screening program, employers should develop a protocol that addresses, at a minimum, the following:

- **Selecting who will be screened, and by whom.** It's important to establish a discrimination-free method of screening employees. It's also important to identify who will be performing the screening (if not automated) so employees are clear on expectations and rules relating to the procedure.
- **Acceptable questions.** Employers may ask whether employees have symptoms consistent with COVID-19 (such as fever, cough, and shortness of breath). Employers may also ask exposure questions, such as whether the employee has been in close contact, or currently lives with, someone who has COVID-19 symptoms or a confirmed COVID-19 diagnosis. Employers should be careful not to ask questions unrelated to COVID-19 that may require the employee to disclose more information than necessary, or appropriate under applicable law.
- **Protections during the screening.** When conducting temperature screening, employers should consider performing the screening before the workday begins for the employee or otherwise as necessary. Employers should ensure there is enough space for physical distancing for those waiting to be screened, with mass gatherings and lines avoided. Anyone that conducts temperature screening should have adequate PPE for the job. And proper cleaning and disinfectant supplies should be furnished for cleaning surfaces and equipment prior to and after screening.
- **Privacy protections.** Health screening results must be treated as a confidential medical records in compliance with the ADA. There may be additional restrictions relating to confidential medical records at the state and local level. See more information in "[Privacy](#)."



1.5.4 Is there screening that should be done before employees return to work? What about screening on a daily basis when employees are at work?

Yes. If employees have been working remotely, or not at all, employers should consider starting with a pre-screening questionnaire that asks about current symptoms, exposure to anyone with a COVID-19 diagnosis or COVID-19 symptoms, and whether the employee has had a positive COVID-19 test. The answers to this questionnaire must be securely kept. And, if appropriate, notices may need to be provided to align with applicable privacy laws. After employees return to the workplace, employers may seek information on a daily basis about employees. For example, some employers may require employees to complete a self-assessment checklist that covers current symptoms and recent exposures to anyone

with COVID-19 (or symptoms of the disease). Others may require the administration of a screening questionnaire on a daily basis, with the understanding that any medical information must remain confidential. Temperature screening may be an option, if employers choose to do so, or may be required in some instances. For example, an employer could face a shift from an optional to a mandatory temperature screening policy once an employee has a confirmed case. In the end, any such screening questions should be aligned with applicable federal, state, and local laws and guidance. It's therefore important to consult with counsel before developing and implementing any screening programs so as to mitigate risk and avoid unnecessary liability.

2.0 Workplace Communications & Reporting

Implementing appropriate practices and measures to reopen workplaces is only one key part of the overall reopening effort. Another crucial component includes communicating with your workforce, governmental organizations, and other third parties about those practices and measures. Having a robust, consistent, and prepared communication plan will provide necessary reassurance to your workforce, demonstrate legal compliance to relevant governmental organizations, and inform customers and clients about your heightened safety and compliance efforts.

2.1 Employee Communications

2.1.1 Are there best practices for communicating with employees regarding returning to work?

Yes. Understandably, many employees may feel anxious and hesitant about returning to the physical workplace. This apprehension will result in employees craving information about the workplace. To reassure and educate employees, employers should communicate to employees the steps and precautions taken to protect employees from COVID-19. And in some jurisdictions, this type of communication may be required. At a minimum these communications should address:

- **Safety Plan.** The company's OSHA required Infectious Disease Preparedness and Response Plan (Preparedness and Response Plan), or site-specific safety plan (as required by applicable state or local law and/or regulation). This plan should be specific to the employer's unique circumstances and consider safety precautions the employer has implemented to simultaneously allow for a safe return-to-work, but also business continuity and efficiency. The plan may include promoting frequent and thorough hand washing, encouraging employees to stay home if they are sick, encouraging respiratory

etiquette, flexibility with remote working policies, and descriptions of housekeeping and disinfecting procedures.

- **Risk assessments.** The results of any hazard assessments conducted in accordance with OSHA rules or local requirements (e.g., California).
- **Physical distancing.** Social distancing measures the company is implementing and requiring adherence to in the workplace.
- **Updated policies.** Updated policies that will impact COVID-19 related issues, including temperature or COVID-19 testing, remote working, leaves of absence, travel policies, and customer or client interactions.

2.1.2 How much, and how often should I communicate with my employees about COVID-19 issues?

It depends. Providing consistent and frequent communications will likely allow employees to feel safe and more comfortable with returning to work during the COVID-19 pandemic. It is recommended that an employer provide transparent communication to employees about the steps it has taken to protect employees from COVID-19, which should continue even as employees return to work. When developing policies and procedures for returning to work, employers should use consistent and correct messaging from a trusted source. Communication regarding current policies and procedures to protect employees from COVID-19 should be placed throughout the workplace, wherever possible, and distributed in multiple forms, e.g., email, posters, hard copy memos. Employers may also need to communicate with non-English speakers in their preferred languages. Like with many key communications to employees, an employer should consider having an acknowledgment system in place to verify that employees have received, read, and understood the information provided.

That said, an employer's communication plan should not be a one-way street. Just as much as an employer should arm its employees with transparent and robust information about returning to work, employees should also be given a clear channel through which they can voice their concerns and report key information to the

employer. This communication channel should include creating communication systems employees can use to self-report if they are sick and that employers can use to notify employees of exposures and closures. This may come in the form of an e-mail communication chain, an intranet page, an application, or other type of communication portal. Employers may also consider the implementation of a hotline, e-mail address, application, or another method of allowing employees to anonymously voice concerns about safety, return to work, or other COVID-19-related concerns.

2.1.3 Is it enough for employers to simply provide employees with the information described above and proceed with reopening?

No. Given the myriad issues involved in reopening, employers should engage in regular follow-up with employees about the changes made to pre-pandemic policies, procedures, and practices. One effective way to ensure these changes are properly implemented and understood is to provide robust and regular workforce training, which should address, at a minimum:

- New employee benefits under the Families First Coronavirus Relief Act (FFCRA) and related state and local law, where applicable.
- New safety, sanitation, and social-distancing procedures, and updates on federal, state, and local guidance.
- Responding to complaints and concerns related to COVID-19.
- Recording time, staggered work schedules, and updates to compensation systems.
- Refreshers on FMLA and ADA issues in the COVID-19 context, including recognizing requests for leave or accommodations.
- Refreshers on anti-discrimination, harassment, and retaliation policies.
- Employee privacy and cybersecurity standards.
- Remote working policies.
- New medical screening protocols and procedures.

2.2 Compliance Personnel

2.2.1 Should we appoint someone within the organization to handle compliance issues for COVID-19 related issues?

Yes. Compliance personnel are on the front line of protecting your organization from legal risks generated by negligence or failure to follow governmental guidance and recommendations regarding the return-to-work process. Before considering whether your organization should reopen and implement proper return-to-work procedures, you should ask yourself: “What are the rules, can we comply with them, and how will we comply with them?” If your organization does not have an active compliance program, identify an individual or group of individuals to serve as the compliance officer or compliance group for all COVID-19-related issues. These individuals will need a seat at the table for all decisions regarding return-to-work procedures to ensure compliance with all applicable federal, state, and local laws.

2.3 Third Party Communications

2.3.1 Should we plan to communicate with third parties, including media and government officials, regarding return-to-work procedures and steps taken to ensure employee safety?

Yes. Employers should plan to communicate with third-parties, including media and governmental entities, regarding the preparedness procedures undertaken to reopen the workplace, where appropriate. Particularly with respect to governmental agencies, an employer should have a prepared communications plan in place that addresses (1) authority and justification for the employer’s continued operations within the context of any stay-at-home, shelter-in-place order, and/or reopening order; (2) steps the employer has taken to comply with OSHA, CDC, and local social-distancing guidance; and (3) other measures the employer has taken to ensure employee safety, as required and appropriate under federal, state, and local laws and/or guidance.

2.3.2 Should we develop a plan for addressing on-site visitors and customers?

Yes. Employers should implement policies and procedures for visitors and customers requiring on-site visits to the workplace. Employers should communicate and train employees on these new procedures for visitors and, to the extent possible, ensure visitors and customers are also aware of the policies and procedures—ideally before they arrive at the workplace. These procedures may include requiring: (1) PPE for on-site visitors; (2) contact information logs for visitors; (3) written approval for any on-site meetings with third-parties or work-related travel; (4) masks; and (5) screening.



3.0 EEO, Accommodations & Leave

3.1 EEO

3.1.1 Are there new anti-discrimination and/or anti-harassment rules I should be aware of?

Possibly. New medical and sick pay leave programs associated with COVID-19 provided at the federal, state, and local levels may have new anti-discrimination and retaliation provisions attached. Certain data privacy laws, such as the CCPA, prohibit discrimination in the exercise of a data subject’s rights (i.e., requesting that their thermal information be deleted). And existing anti-discrimination, anti-harassment, and anti-retaliation laws under federal, state, and local laws apply with equal force in the COVID-19 environment, which generally prohibit discrimination, harassment, and/or retaliation on the grounds of race, color, national origin, medical condition, and other protected characteristics.

It’s also important to keep in mind that certain types of invidious discrimination and harassment have increased during COVID-19, including against Asian Americans and against those who may otherwise have pre-existing medical conditions (such as older workers and those who are pregnant). It’s critical, now more than ever, to train your workforce and supervisors on your organization’s anti-discrimination, harassment and retaliation policies (perhaps even more regularly than required by law in your respective jurisdiction).

3.2 Accommodations

3.2.1 Can I require employees who have been away from the workplace during the COVID-19 crisis to provide a doctor’s note certifying fitness to return to work?

Possibly. At the federal level, the EEOC has stated that such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified

under the ADA standards for disability-related inquiries. Local jurisdictions may have more restrictive standards, and should be consulted before making any return-to-work fitness requirement standards mandatory.

3.2.2. Can I terminate an employee who refuses to return to work because he or she is afraid of contracting COVID-19?

Possibly. Depending on the jurisdiction at issue, most employment is considered “at will” unless otherwise specified by contract. And although many employers have policies that generally allow for the termination of employees who fail to report to work, such action may be risky in the COVID-19 environment. Federal laws may protect such employees, depending on the nature of their concerns. Some employees may refuse to report to work because they are generally concerned about contracting COVID-19, while others may have concerns about their susceptibility to COVID-19 due to underlying medical conditions. OSHA and related state law also may protect certain employees with general concerns about workplace exposure to COVID-19 if specific conditions are met. Further complicating matters, employees who have specific concerns about returning to work because they have a medical condition that could be exacerbated by COVID-19 or puts them at high-risk of contracting COVID-19 could be entitled to leave under federal, state, or local law. There may also be accommodation issues raised by the employee, generally requiring the employer to engage in the interactive process. Ultimately, employers may be able to assuage such concerns by communicating with their employees regarding measures taken to ensure their safety. In the end, it’s important to consider your specific jurisdictional requirements, company policies, and consult with counsel before undertaking any terminations based on refusal to return to work.

3.2.3. May I ask an employee to disclose if he or she has a compromised immune system or chronic health condition that the CDC says could make him or her more susceptible to complications of COVID-19?

Probably not. At the federal level, the EEOC has said asking an employee to disclose a compromised immune system or a chronic health condition is considered to be a disability-related inquiry because the response is likely to disclose the existence of a disability. The EEOC has stated that the ADA does not permit such an inquiry in the absence of objective evidence that having a compromised immune system would cause a direct threat to the workplace. There may be additional state and local restrictions on these types of inquiries, so it is important to examine your applicable jurisdiction carefully before embarking on any such inquiries.

3.2.4 May I encourage my employees to work remotely as an accommodation, or as an infection-control strategy?

Probably. Remote working is generally considered an effective infection-control strategy as well as a reasonable accommodation for those employees who may have COVID-19 symptoms or whose disabilities put them at high risk for complications of COVID-19. Whether and to what extent remote working will be considered a reasonable accommodation is a fact-specific inquiry, and will depend largely on the size and jurisdiction of your organization. It’s important to engage in the interactive process with the employee to determine what is, and what is not reasonable in any given circumstance.

3.2.5 When an employee returns from travel, do I have to wait until the employee develops COVID-19 symptoms to ask questions about exposure during the trip?

Probably not. At the federal level, the EEOC has said these types of questions would not be disability-related. And if the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal. Local jurisdictions may have more restrictive conditions. Ultimately, employers should follow the advice of the CDC and state and local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.

3.2.6. Are temperature checks permissible under the ADA and related state law?

Generally, but with restrictions. At the federal level, the ADA protects job applicants and employees from disability discrimination, and regulates employers' disability-related inquiries and medical examinations, including those who do not have ADA disabilities. The ADA also prohibits covered employers from excluding individuals with disabilities from the workplace for health and safety reasons unless they pose a "direct threat" (i.e., a significant risk of substantial harm even with reasonable accommodation). The EEOC has stated that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issues attendant represent a public health emergency as of March 2020, employers may require temperature checks. In other words, temperature checks are considered valid under the ADA only to the extent COVID-19 remains a direct threat to the workplace. If the CDC and local public health officials change that determination in the coming months, temperature taking may lose the EEOC's imprimatur. Temperature checks must also be conducted in alignment with federal, state, and local

guidance and requirements, including in conformance with OSHA safety standards and applicable privacy standards. Many local jurisdictions require temperature taking to be undertaken. Therefore, before undertaking any temperature taking program, it's important to consult with counsel and be cognizant of the myriad legal and regulatory challenges that may apply to your organization.

3.2.7 Can I take steps if an employee comes to work and shows symptoms of COVID-19?

Yes. You should instruct the employee to leave the premises and get tested for COVID-19 immediately. Because the employee is showing symptoms of COVID-19 and seeking a medical diagnosis, they may also be entitled to certain sick leave protections under federal and state law, depending on the size of the employer and the applicable jurisdiction. It's important to note that employees' eligibility for such leave may not depend on an affirmative COVID-19 diagnosis.

3.2.8 Can I take steps if an employee refuses to comply with our safety protocols once they return to work?

Yes. But it depends why they are refusing. If they have a medical issue that impacts their ability to comply (i.e., asthmatics wearing a mask), then the employee and employer should engage in the interactive process under the ADA and applicable state and local law. If the employee is protesting current safety practices, employers should carefully navigate the whistleblowing/complaint procedure to ensure the employee is heard, and considered. If the employee is refusing for no justified reason, the organization should consider triggering the discipline mechanism appropriate to the nature of the employment and circumstances.

3.2.9 If a job may only be performed at the workplace (i.e., remote working is unavailable), are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who is at higher risk from COVID-19 due to a preexisting condition?

Possibly. There may be reasonable accommodations that could offer protection to an individual whose disability puts the individual at greater risk from COVID-19, and who requests such accommodations to be made within the workplace to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer. Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles, using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure. Remaining flexible is the name of the game when it comes to accommodations. Previously "unreasonable" solutions, such as remote working and modified schedules, may now be considered reasonable and appropriate.

3.3 Leave

3.3.1 Are my employees entitled to a special type of COVID-19 leave?

Possibly. Depending on the size of your organization and the jurisdictions in which you operate, you may have specific leave obligations related to COVID-19. At the federal level, the FFCRA requires employers with fewer than 500 employees (subject to certain small

business exceptions) to provide eligible employees with expanded and paid leave under FMLA and paid sick leave. States and local jurisdictions, including California and New York, have adopted their own COVID-19 paid sick leave programs for certain employers. Ultimately, it's a fact-specific inquiry, and it's important to consult counsel and local jurisdictional requirements before determining the full scope of leave required by an organization.

3.3.2 Does the FFCRA specify the amount of leave required to be provided to eligible employees?

Yes. The FFCRA provides for the following:

- **Expanded FMLA Leave.** Expanded FMLA leave requires employers to grant leave to employees who are unable to work or telework due to a need to care for a child whose school is closed (or whose daycare is unavailable) due to COVID-19. The first 10 days of this leave are unpaid (unless the employee opts to substitute paid time off available under the employer's policy). The remaining 10 weeks of leave are paid at 2/3 of the full-time employee's regular rate of pay. Employees are eligible for this type of leave if they have worked for the employer for at least 30 days.
- **Emergency Paid Sick Leave.** Covered employers are required to provide 80 hours of paid sick leave to eligible employees who are unable to work or telework because: (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to an order as described in (1) or has been advised as described in (2); (5) the employee is caring for a son or daughter if their school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of

Labor. If a full-time employee is absent for reasons (1) through (3), they are entitled to 80 hours of pay at their regular rate. If that employee is absent for reasons (4) through (6), they are entitled to 80 hours of pay at 2/3 their regular rate. All employees are eligible for this form of leave, regardless of their length of service with the employer.

Ultimately, employees can be eligible for both types of leave to care for a child whose school or place of care is closed due to COVID-19 concerns, but only for a total of 12 weeks of leave. Before providing FFCRA covered leave, it's important to consult counsel and determine if, and to what extent your organization is subject to the law's requirements.

3.3.3 May I request information from my employees who request leave under the FFCRA?

Yes. Employees requesting expanded FMLA leave or paid sick leave under the FFCRA must provide their employer (orally or in writing) with their name, the dates for which they request leave, the reason for leave, and a statement that they are unable to work or telework because of that reason. If an employee seeks leave because they are subject to a quarantine or isolation order or caring for an individual subject to such an order, the employee must provide the name of the government entity that issued the order. If the employee requests leave to self-quarantine based on advice from a healthcare provider, or to care for someone who is self-quarantining based on such advice, the employee should provide the name of the healthcare provider who gave the advice. If the employee seeks leave for childcare issues, the employee should provide the name of their child, the school or daycare that is closed or otherwise unavailable, and a statement that no other suitable person is available to care for the child. Guidance from the Department of Labor indicates that employers may seek some clarification as to the circumstances requiring leave, but they should tread carefully. And additional documentation standards may apply at the

state and local level. If an employee exhausts their paid sick leave and is eligible for traditional FMLA leave for a serious health condition, all existing certification requirements under the FMLA remain in place. The ultimate answer to this question is jurisdiction specific, so it's important to consult with counsel before implementing any additional leave programs, including any certification requirements.

3.3.4 Can employees take expanded FMLA leave or emergency paid sick leave intermittently?

Possibly. If an employee is teleworking, but cannot telework their normal schedule of hours due to a qualifying reason for expanded FMLA leave or emergency paid sick leave, then the employer may allow them to take paid sick leave intermittently while teleworking. If an employee is working at their usual worksite, then they cannot take paid sick leave intermittently for any of the following reasons: (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) the employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or (5) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. Employers may permit employees who are working at their usual worksite to take intermittent leave to care for a son or daughter if their school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.

4.0 Layoffs, Furloughs & Hiring

The COVID-19 public health emergency has forced a number of employers to furlough, lay off or otherwise reduce their workforce. Below we highlight several key questions relating to this ongoing process, and new challenges that may emerge as employers begin to bring back their workforce.

4.1. Our employees have been on an unpaid furlough, but they remained an employee and are on our payroll. Do we have to “re-hire” them if we bring them back?

Generally, no. If the furloughed employee remained an employee, subject to your organization’s existing policies and standards, and remained on the payroll, you can generally return the employee to their prior position at the same pay rate and benefit eligibility. That said, if you are implementing new and revised policies and procedures relating to workplace safety, timekeeping, temperature reading, etc., you will want to ensure any returning employee, including those who were furloughed, are provided with copies of the updated policies and procedures and acknowledge the same. If the employee is brought into a different position, at a different rate or benefit eligibility, you may need to consider treating that individual as a new-hire, depending on the applicable jurisdiction. Moreover, some jurisdictions may consider a furloughed employee to have been terminated depending on the circumstances and length of the furlough. Ultimately, because the answer to this question requires a jurisdiction-by-jurisdiction analysis, it’s important to consult with counsel and local requirements before making a final decision on re-hiring requirements.

4.2 Do we need to give furloughed or terminated employees a “right of recall” when it comes to rehiring?

Possibly. In some jurisdictions, such as Los Angeles, certain employers must offer laid-off or furloughed workers the first chance to get their jobs back as

companies resume operations. Additional jurisdictions may follow suit. Thus, before bringing back furloughed or terminated employees, it’s important to consult with counsel and check local jurisdictional requirements.

4.3 If we terminated an employee, we will need to re-hire them. How should we do it?

Carefully and consistently. Employers seeking to return terminated employees will need to “re-hire” the individual and observe the employer’s normal course of hiring for new employees. This may include additional background checks, drug testing, a new I-9 form, and new onboarding documentation, including the acknowledgment of policies, arbitration agreements, and other processes reserved for new hires, if appropriate. And, of course, if you are implementing new and revised policies and procedures relating to workplace safety, timekeeping, temperature reading, etc., you will want to ensure any returning employee, including those who were terminated, are provided with copies of the updated policies and procedures and acknowledge the same. The requirements for new hire documentation is highly dependent on the applicable jurisdiction. It’s therefore important to consult with counsel and local requirements before making a final decision on re-hiring requirements.

4.4 What documentation do we need for a returning employee’s file?

It depends. If the employee is returning as a “new hire,” you will want to paper the personnel file with the required new hire / onboarding paperwork your organization normally utilizes for new hires, and as required by your applicable jurisdiction. If the employee is returning from a furlough, you should review the personnel file to determine what documentation may require an update or supplementing, including arbitration agreements, I-9 form, policies, or other required documentation. The requirements for personnel files are highly dependent on the applicable jurisdiction. It’s therefore important to consult with counsel and local requirements before making a final decision on what documentation to include in a personnel file.

4.5 Are returning employees entitled to reinstatement of benefits, including accrued but unused leave?

Possibly. It depends on the type of leave at issue. Leave provided by organizational policy, and not mandated by law, is generally not required to be reinstated unless otherwise stated in policy or by an employment agreement. In some jurisdictions, if an employee leaves employment and is rehired within a certain period of time (e.g., one year), previously accrued and unused paid sick days must be reinstated as a matter of law, and the employee must be allowed to use them and begin accruing additional paid sick days. Paid sick leave laws vary by state, county, and sometimes city. The answer to this question is therefore ultimately subject to an organizational specific and jurisdiction-by-jurisdiction analysis.

4.6 Should we ask returning employees to sign an arbitration agreement or seek a class waiver?

Possibly. Whether and to what extent an arbitration agreement and/or class waiver makes sense for your organization is highly dependent on the nature of your

industry, the jurisdiction in which you operate, and how the agreement is presented and structured. Overall, arbitration agreements and class waivers, if valid where you operate, may be an advisable approach in an uncertain legal environment where the full scope of potential liability associated with COVID-19 related changes in the workplace remains a known unknown. The answer to this question is ultimately subject to a jurisdiction-by-jurisdiction analysis, and it's important to consult with counsel and your local requirements before making a final determination on arbitration agreements, class waivers, and how to structure and communicate those provisions with your workforce.

4.7 Can we require returning employees to undergo new background checks and drug tests?

Yes, for some. Employers are generally free (and sometimes required) to require new hires to undergo background checks and pre-employment drug testing. For those employees returning from a termination, employers should follow their normal pre-hire procedures for background checks and drug testing, and follow their state and local guidance. For those employees returning from a furlough, employers should generally avoid requiring



employees to undergo any new background check or drug test unless otherwise justified under your organization's policies and procedures, or applicable law. Employees returning from a furlough are still active employees, subject to existing policies and procedures. In the end, your organization should consult your specific policies, applicable law, and generally consult with counsel before embarking on a new set of background checks and drug testing.

4.8 Is there anything preventing our organization from furloughing and/or terminating employees in the future?

Possibly. Although organizations are generally free to furlough and terminate all or part of its workforce in the future, there may be some restrictions depending on the applicable jurisdiction. In Los Angeles, for example, certain businesses that undergo changes of ownership or control must retain the workers for at least a 90 day transition period. In Chicago, a municipal ordinance bars employers from firing workers who take time off related to COVID-19 reasons, such as obeying a stay-at home order. And there may be penalties associated with terminating part of the workforce if the organization received aid under the CARES Act or similar relief measures. The risks associated with future

furloughs and terminations are also heightened, as organizations need to carefully plan those decisions to avoid allegations of discrimination, ensure alignment with state and federal laws relating to mass layoffs or closures, such as the federal WARN act and local mini-WARN acts, ensure continuation of applicable benefits (e.g., ACA and COBRA), and comply with applicable state and local laws as it relates to furloughs, terminations, and the payout of accrued and unused leave. You will also need to consult with your own organization's policies on terminations and furloughs (e.g., severance eligibility), take into consideration whether the employee subject to the adverse action has been discussing perceived unsafe workplace conditions with other employees, as that could raise a potential concern of concerted and protected activity under the NLRA, and consider other termination or furlough issues that may arise under a collective bargaining agreement, if applicable.



5.0 Privacy

Most organizations are collecting more from their employees, job applicants, and vendors, including medical information such as temperature and symptoms. These new collection practices raise difficult new questions as it relates to the privacy of those involved. What information can be collected? How should it be stored? What are the risks associated with each category of collection? Below we discuss these issues as they relate to: (1) job applicants, (2) employees, and (3) customers / contractors.

5.1 Job Applicants & Employee Privacy

5.1.1 Are job applicants and employees entitled to a right to privacy over the information we collect about them?

It depends. Generally, employees and job applicants do not enjoy a widespread right to privacy in the US (as compared to other global jurisdictions). That said, there are several statutory regimes that provide employees and job applicants relief. At the federal level, privacy rights for employees and job applicants relating to COVID-19 would largely come into play through HIPAA, the ADA, and through the regulation of unfair business practices by the FTC. At the state level, the privacy rights of job applicants and employees may be triggered through a number of consumer privacy statutes, records acts, biometric privacy laws, unfair business practice statutes, and other consumer-facing statutes. Thus, before collecting additional information from job applicants and employees, it's important to consult counsel and map your organization's existing legal and regulatory obligations as it relates to job applicant and employee data collection, storage, and use.

5.1.2 Do I need to create a separate privacy policy for job applicants and employees like the one I have on my website for customers?

No, but it may be advisable. Although there is no express legal obligation to create a privacy policy



for job applicants and employees under federal or state law, it may be advisable and an efficient way to communicate privacy expectations and standards to your job applicants and employees. Examples of information that could be included in a job applicant and/or employee privacy policy, for example, may include: (1) categories of information to be collected during the job application process, and purpose for its use; (2) expectations for job applicants as it relates to COVID-19 testing; (3) expectations for use of company technology and websites; (4) expectations for use of telephone and network systems; and (5) any rights regarding disclosure or deletion of their information. If your organization is a covered business under the CCPA, you may also be required to provide job applicants and employees notice “at or before the point of collection” describing the categories of personal information to be collected from the job applicants and employees and the purposes for its use. This notice could, in practice, link to an existing privacy policy that sets forth this information. Thus, before determining whether a privacy policy makes sense for your organization, it’s important to examine your organization’s legal and regulatory posture, and what challenges any changes would present.

5.1.3 If I am taking my employees’ temperatures, are there privacy laws I must consider?

Yes. Depending upon the jurisdiction in which you operate, there may be both federal and state privacy laws to consider. At the federal level, collecting or recording body temperatures is considered a medical examination under the ADA, and such information must be kept as a confidential medical record pursuant to the ADA’s requirements. If you are taking the temperature in your capacity as a covered entity or business associate under HIPAA, you may have additional obligations under the HIPAA Privacy and Security Rules. At the state level, if the body temperature is taken with any type of technology that operates off of employee biometrics, the employer may be subject to state biometric privacy laws, such as the Illinois Biometric Information Privacy Act (BIPA). And if the employer is a covered business under the CCPA, the employer may be required to provide conspicuous notice at or before the point of collection of the employee’s “thermal” information or

information related to a “medical condition,” and ensure said data is stored in a reasonable manner, as measured against industry cybersecurity standards. As is the case with most issues outlined in this toolkit, the answer to this question is highly dependent on the applicable industry, organization size, purpose of collection, and applicable jurisdiction.

5.1.4 If we collect and store information about our employees’ temperature or other medical conditions, does that trigger HIPAA?

It depends. The HIPAA Privacy and Security Rules apply to covered entities and their business associates, as defined under HIPAA and related regulations. If the organization is neither, HIPAA would not be triggered. However, the information collected may be considered a confidential medical record under other laws, such as the ADA and related state guidance. It is therefore important to consult counsel and review each jurisdiction’s requirements before undertaking a screening / temperature taking regime.

5.1.5 Will the collection of information regarding employees’ temperatures or other COVID-19 symptoms or diagnosis trigger any special obligations under biometric information privacy laws?

It depends. If the employer collects biometric information or identifiers along with the temperatures (i.e., face or fingerprint scan), it could trigger additional privacy considerations. If the temperature is taken on its own, however, it likely would not trigger state biometric protections, such as under BIPA or the recently amended New York SHIELD Act. That said, there may be exceptions. Therefore, before embarking on any type of screening program, it’s important to map out the applicable jurisdictional privacy laws and implications and consult with counsel.

5.1.6 Do I have to provide job applicants and employees notice before I collect information regarding their temperatures or other information related to COVID-19 symptoms or diagnosis?

Possibly. If your organization is a covered business under the CCPA, you must provide conspicuous and clear notice to the job applicant or employee “at or before the point of collection” of all categories of personal information you will be collecting, and the business or commercial purpose for its use. The CCPA defines personal information to include information related to a medical condition and thermal information (i.e., temperatures). The format and style of this notice will be subject to the requirements set forth in the regulations promulgated by the California Attorney General’s (AG) office, and may include the notice to be translated into languages normally communicated to job applicants and employees, and be in an accessible format if presented electronically. Practically, if you are taking the temperature or screening job applicants and employees, you may need to implement an electronic notice before individuals appear at the site, notices on the job applications themselves, or notices in physical form.

5.2 Third-Party Privacy

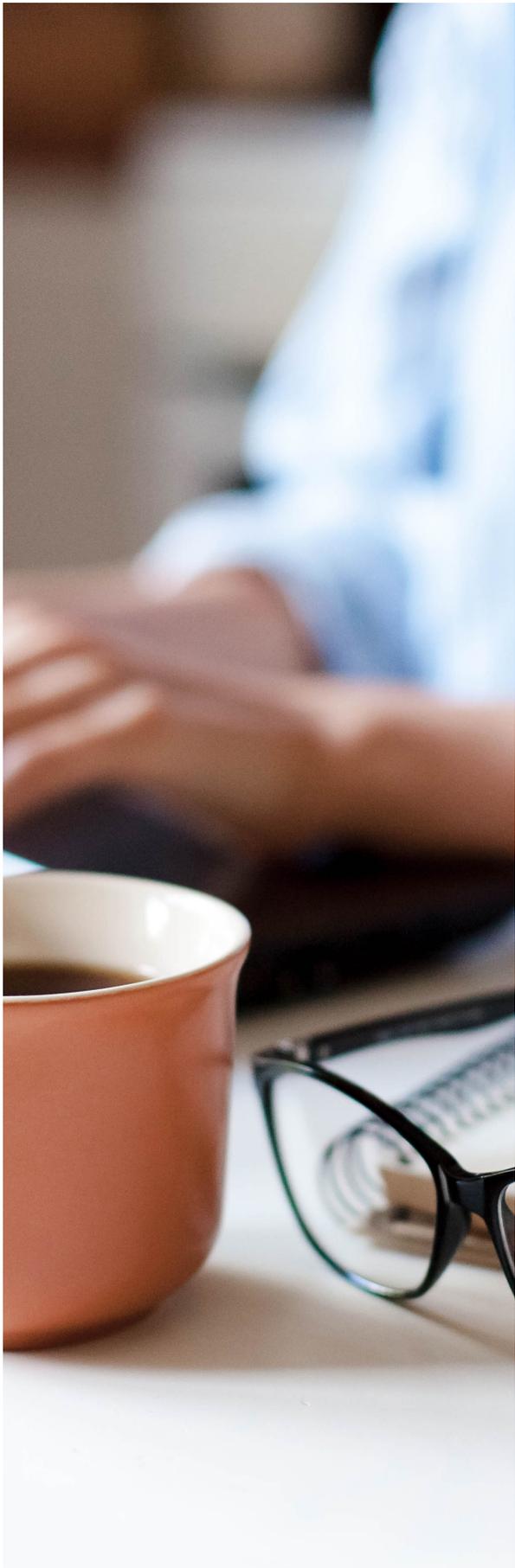
5.2.1 We have an existing online privacy policy that governs how our customers use our website, applications, and other platforms. If we take our customer’s temperatures, or require them to follow certain hygiene protocols before entering the workspace, do we need to update our privacy policy?

Possibly. A number of jurisdictions expressly require online privacy policies to be developed and posted that accurately describe information collected through

online platforms, such as websites and applications. Unless your organization is collecting new forms of COVID-19 information through those platforms, the electronic privacy policies in those jurisdictions likely would not require updating. That said, if your organization is a covered business under the CCPA, you may need to adjust your privacy policy as it relates to offline collection of personal information, including medical information and thermal readings. Ultimately, the answer to this question requires a jurisdiction-by-jurisdiction analysis, and you should consult counsel and your specific jurisdiction’s requirements regarding online privacy policies and the collection of customer data before making any changes.

5.2.2 Are there other privacy considerations we should consider as it relates to customers and third-party vendors?

Yes. If you are collecting and processing the medical information, including thermal readings, of your customers, that data collection may be subject to data privacy related laws and regulations, including the CCPA. Third-party vendors may have additional data processing restrictions and/or protections set forth in the applicable contracts and agreements. It’s therefore important to consult counsel and map out legal and regulatory obligations before additional data is collected on third parties.



6.0 Remote Working

Although widespread remote working is the new normal for most organizations, the legal issues facing employers with a remote workforce are not new. It is now more crucial than ever that employers prepare and distribute remote work policies and be mindful of practices that may raise the organization's risk profile.

6.1 How do I ensure that non-exempt workers are accurately capturing their time while remote working?

Carefully. Employers should ensure non-exempt remote workers accurately record their time worked in the absence of usual clock-in and clock-out procedures, which can include electronic timesheets, documenting hours via personal or group spreadsheet, or asking employees to email managers when they clock in and out. Employers should remind non-exempt remote employees that the same timekeeping policies apply in a remote setting as they would in a physical workspace. These communications should align with the communications recommendations set forth in this toolkit, and should remind employees of your off-the-clock work policy. Ultimately, employers should carefully monitor reported time entries to ensure employees are complying (and not simply entering 9am to 5pm every day).

6.2 Do I need to reimburse my remote employees for expenses they incur while working remotely, such as internet costs?

Possibly. Some jurisdictions, such as California, require reasonable reimbursement of expenses incurred by your remote workforce during the course of performing job duties, such as use of a cell phone, internet or equipment used in furtherance of the employer's business (e.g., computers, etc.). If an employee purchased a printer to work from home, some jurisdictions may require full or partial reimbursement of that cost if using a printer is part of the employee's job duties. And some states even require employers to reimburse a percentage of employees' phone

bills and internet bills, even if those employees have unlimited phone or data plans and incur no additional expenses as a result of the work usage. Reimbursement of business expenses also may raise minimum wage issues. If an employee makes close to or around the minimum wage, and they are not properly reimbursed for employment-related expenses, they may be able to assert a minimum wage claim based on an improper kickback of wages. Ultimately, it's a jurisdiction-by-jurisdiction question, and may require you to consult with counsel before embarking on any new or revised reimbursement policy.



6.3 How do I effectively communicate cybersecurity risk to my remote workforce?

Consistently. COVID-19 is changing the way in which we interact and do business. That means more remote working, more video conferencing, and more phone calls. Your organization has likely resorted to new practices to keep up with this change (e.g., using VPN-based technologies to mitigate virtual working capacity issues) and/or has engaged new business partners to help with confidential business matters and to process confidential information, including personal data (e.g., engaging a new communications or collaborative working platform). It's important to consistently train your employees on cybersecurity best practices, and the organization's information security plans and protocols. This is not only a best practice, but may also be a legal / regulatory requirement depending on the type of business involved, and the applicable jurisdiction.

6.4 Are there best practices I can employ when onboarding new hires remotely?

Yes. For employers operating remotely, the Department of Homeland Security has issued guidance for inspection of I-9 or similar documents: (1) inspect these documents remotely by video, email or fax within 3 business days; (2) add "COVID-19" as the reason for the physical inspection delay on the form; and (3) conduct an in person verification of these documents within 3 business days of normal operations. Alternatively, employers may designate an individual to serve as an agent for the in-person review of the documentation. There may be additional state and local guidance. It's therefore important to review carefully any new policies on onboarding for remote workers.

7.0 Wage & Hour/ Scheduling

Though many employees are working remotely, there are many workplaces still in operation with employees reporting for work. In addition to federal, state and local guidance or ordinances, employers must pay careful attention to wage and hour issues that may arise as a result of the pandemic.

7.1 Are there any additional wage and hour considerations we should consider for employees who are physically reporting to work?

Yes. Given that the EEOC has now permitted employers to take temperatures or conduct COVID-19 testing of employees who are reporting to work, employers need to be cognizant of the rules relating to waiting time pay for employees who spend time waiting in line to have their temperatures taken. If the organization requires employees to self-check before they come into work, they will also need to consider whether that is compensable time under applicable law. Additionally, employers should be aware of paying employees to complete additional tasks on-the-clock, such as time waiting for the time clock to be cleaned and sanitized after use by an employee. And, employees who report to work and who are found to have a high temperature or tested positive for COVID-19 may be entitled to reporting time pay. There are myriad jurisdictional issues that may arise in this scenario, so it is important to consult with counsel and review existing wage and hour policies to ensure compliance in this “new normal.”

7.2 Are employees entitled to extra breaks while working during COVID-19? If so, are they paid?

Possibly. Many state and local orders permit employees to wash their hands every 30 minutes, or as needed, to increase proper sanitation measures. In most jurisdictions, this is considered compensable time. Depending on the number of employees during each scheduled shift and timing compliance, meal and



rest breaks may also need to be scheduled to ensure proper social distancing in break rooms or extra time may be necessary so that each employee receives a full and timely break. Ultimately, this presents a jurisdiction-by-jurisdiction inquiry to come to the appropriate solution for any given employer.

7.3 Are there shift arrangements we should consider to promote the health and safety of our workforce?

Yes. In order to align with the physical safety requirements and guidance at the federal, state, and local level, employers should consider reducing the number of employees during each shift, staggering shifts, or otherwise making changes in employees' duties. Employers should remain flexible and adaptive to the circumstances, and think critically about the organization's needs on a regular basis. Employers should be prepared to adjust workplace policies in accordance with public health recommendations, and stay abreast of state and local changes that could be occurring weekly, if not daily.

7.4 Do we need to adjust our bonus and commission plans?

Possibly. Employers should be careful to consider adjusting attendance-based incentive compensation plans to account for COVID-19 absences, assess whether state law permits unilateral modifications to

incentive compensation plans, and assess whether bonus plans based on company performance should be adjusted. It's also important to review sales commission plans, and required state and local requirements for commission plans, before making amendments.

7.5 What other wage and hour issues should we be thinking about?

There are several. Additional issues your organization should think through in any return-to-work strategy include:

- If implementing pay cuts, consider applicable law regarding prior notice.
- If you have implemented hazard pay, or discretionary bonuses to incentivize work during the pandemic, be sure to include this in calculating regular rate of pay for overtime and other benefits determinations.
- Assess whether employees who "volunteered" for additional work (i.e., sewing face masks or researching availability for PPE) should be compensated.
- Assess availability and appropriateness of work-sharing programs to minimize future loss and risk.

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Dentons COVID-19 Resources

Dentons has been helping clients address the challenges COVID-19 has presented since the outbreak started. We will continue to do all we can to support our clients and communities at this time. Our **COVID-19 hub** is updated regularly and includes links to a variety of practice and sector insights. We chose to make these resources available to you on a complimentary basis because sharing with those in need is simply the right thing to do. Our offerings include:

- A **US 50-State tracker**, a database of state and local government directives (including links) on reopening plans, business shutdowns, school closures and other limits on close contact; tax relief measures; emergency funding sources, and modified government services, including court closings and suspended legislative sessions; electronic notarization; mortgage and rent payment relief; and telemedicine/telehealth, among many others
- A **Small Business Resource hub** to help identify a variety of financial support available to small businesses during the COVID-19 pandemic, as well as updates on pending legislation
- A **Global Labor & Employment tracker** to provide guidance on what COVID-19 means in countries around the world for employers, including as to employer protection responsibilities, compensation, COVID-19 diagnosed employee response, privacy, and terms adjustment in the event of operational difficulties
- A **Global Tax tracker** to help clients quickly navigate the latest COVID-19 tax arrangements, by country and topic, answering frequently asked questions that we have been asked
- A **Global Insolvency tracker** to provide information on procedural changes, directors' duties & third party enforcement rights comparisons
- A **Webinar hub** where you can find all the recordings of webinars that have been produced in relation to COVID-19 and information on upcoming webinars
- Sub hubs on **Competition & Antitrust**, **Data Privacy**, **Force Majeure** and **Agile Working**
- A **COVID-19 mailing list** to sign up to receive insights and invitations related to COVID-19

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