

COVID-19 NEWS OF INTEREST

# Operating During the COVID-19 Pandemic: Current Legal Landscape and Employer Considerations

May 22, 2020

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As states begin to allow non-essential businesses to reopen, employers must navigate a rapidly evolving patchwork of executive orders, laws, regulations and guidance in the midst of a global pandemic. This is not an easy task. The purpose of this Client Alert is to explain the current legal landscape and to discuss key considerations so that employers may resume operations in a way that protects employees and mitigates legal risk.

## **Current Legal Landscape**

### State and Local Executive Orders

The starting point for understanding an employer's obligations during the pandemic are the state and local executive orders applicable to each business. These orders describe the key ground rules, including when businesses can reopen, the rules they must follow when they do, and the penalties for non-compliance. These orders tend to be quite detailed and some have specific labor and employment requirements, including directives to accommodate vulnerable employees and those with childcare responsibilities.

While there are many consistencies among these orders, there are some key differences. Most orders provide guidance and recommendations on the best practices for operating and reopening businesses, while some go further to set out specific mandatory requirements. It is important to review the orders applicable to your business, and because these orders are also frequently updated, routinely check to ensure compliance with any updates. Willkie's 50-state survey of

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executive orders, which it regularly updates, can be found [here](#). Willkie's alert on trends relating to reopenings and common features of reopening orders can be found [here](#). Please also be mindful of any county or city orders that apply to your business.

### White House Guidelines for Opening Up America Again

The White House has issued "[Guidelines for Opening Up America Again](#)," which lays out a three-phased reopening approach based on gating criteria, with recommendations for employers at each phase, as well as general recommendations for all phases. Although these guidelines are not binding unless they are incorporated into an executive order, the Centers for Disease Control and Prevention ("[CDC](#)") recommends that employers follow them.

### The CDC

The CDC has issued workplace [guidance](#) and [FAQs](#) for non-healthcare settings, which contain detailed steps that employers should take to achieve three objectives: (i) prevent and reduce transmission among employees; (ii) maintain healthy business operations; and (iii) maintain a healthy work environment. The CDC has also issued a useful [decision tree](#), which sets forth criteria that employers must meet before reopening, including specific health and safety actions, a plan for ongoing monitoring of the workplace, and the ability to protect employees at higher risk for severe illness.

The CDC has also published certain industry-specific guidance including for [bars and restaurants](#), [manufacturing](#), and [meat and poultry processors](#).

### Occupational Safety & Health Administration ("OSHA") and Analogous State Agencies

OSHA's "[Guidance on Preparing the Workplace for COVID-19](#)," offers insights for employers on key health and safety issues, taking into account the degree of risk in a given workplace setting (e.g., "Low," "Medium" or "High"). OSHA has also issued recommendations and guidance for certain industries focused on implementation of appropriate engineering, administrative and safe work practice controls, as well as Personal Protective Equipment ("[PPE](#)") use and illness reporting. Significantly, OSHA's General Duty Clause requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Among the most relevant OSHA requirements implicated by COVID-19 are those concerning, [PPE](#), [sanitation](#), and [recording workplace illnesses](#). In addition to OSHA, state and local health regulations and guidance will likely bear on employer compliance strategies (although those regulations are often incorporated into the executive orders).

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### Anti-Discrimination Laws and Related Guidance

The Equal Employment Opportunity Commission (“EEOC”) issued a [press release](#) stating that it will continue to enforce the anti-discrimination laws during the pandemic, and it is critical that employers not discriminate on the basis of any protected characteristic and provide eligible employees with reasonable accommodations. The EEOC has also issued [guidance](#) stating that the Americans with Disabilities Act (“ADA”) does not prevent employers from adhering to CDC and other health guidelines. For example, according to the EEOC, employers may lawfully screen employees for symptoms of COVID-19 (including with temperature checks), and bar symptomatic employees from the office. However, any medical or health-related information that employers retain must be kept strictly confidential and separate from regular personnel files, as required by the ADA. Employers should also ensure to employ security protocols and tools that reflect the highly-sensitive nature of such information.

### Federal and Local Employee Leave Laws

Employers should be aware of leave entitlements available to employees during the pandemic. At the federal level, there is the Family Medical Leave Act and the recently passed Families First Coronavirus Response Act (“FFCRA”). Willkie’s Client Alerts on leave available under FFCRA can be found [here](#) and [here](#). In addition, many state and local governments have promulgated leave laws that employees may be able to use for COVID-related reasons.

### **Considerations and Recommendations**

Based on this legal framework, employers should consider the following when developing a return-to-work plan and while continuing to operate during this crisis:

- **Build a Record of Compliance.** To mitigate litigation risk, it is critical that employers comply with all applicable executive orders and health guidelines, and that they build a record of doing so through the implementation of and adherence to COVID-19-related policies. Employers should communicate such policies to employees in writing, update the policies as necessary, and provide training on them where appropriate. These policies do not necessarily need to be formally incorporated into your employee handbook; standalone memos, including in emails, are fine so long as employees understand that the communication reflects a policy that must be followed. We also recommend posting signs with key aspects of the policies in the workplace (and certain posters may be required by law). However, avoid adopting policies that will not be followed or enforced.
- **Consult the Landlord/Building Manager.** Consult your landlord or building manager while developing your reopening and operating plan to ensure that you understand what steps they are taking with respect to building visitors and what requirements they may impose on tenants. Topics you may want to ensure your landlord is considering in developing their building-wide plan include: dedicated paths of ingress and egress; HVAC safety and filtration; directional

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signage; mandatory PPE use (face coverings) in common areas; enhanced cleaning protocols; potential health screenings; and protocols for stairs and elevators.

- Consider an Employee Survey. The CDC recommends that employers “seek [employee] input” in developing COVID-19 policies. One way to do so is through an anonymous and/or confidential survey that requests employees’ views on a variety of issues including interest in returning to the workplace and general or specific health and safety concerns. This information will help employers focus on issues most relevant to their workforce, and considering employee preferences in the reopening process could boost morale and mitigate litigation risk.
- Reopen Gradually and Flexibly. Consider reopening in phases where business needs permit. If employees are able to effectively telework, have them continue to do so. (Encouraging telework where possible is present in almost all executive orders and the White House guidelines.) Additionally, be flexible wherever possible, even if not legally required; the more voluntary the return to work process, the better. In that regard, companies should decide how to handle situations where an employee does not feel safe returning to work or has COVID-related childcare obligations. While employers may be legally obligated to provide leave or other accommodations in such circumstances, businesses should adopt a consistent approach to these situations where no such obligation exists. To the extent employers are inclined to be more generous than the law requires, consider developing a policy to ensure consistent treatment across the business.
- Accommodate Vulnerable Employees. Develop a plan for accommodating self-identified vulnerable employees (such as those who are above 65 years of age or who are immunocompromised) in consultation with the CDC’s [interim guidance for employees at high risk](#) (see page 49). The EEOC has offered [examples](#) of potential accommodations for vulnerable employees and it encourages employees and employers to be “creative and flexible.” However, employers may not prevent an employee from returning to work solely because the individual is at higher risk for severe illness. Rather, according to recent EEOC [guidance](#), an employer can only bar a vulnerable employee from returning to work if, after undertaking an individualized analysis, the employer concludes that the employee poses a “direct threat” to his or her health that cannot be eliminated or reduced by reasonable accommodation. According to the EEOC, “the ADA direct threat requirement is a high standard.”
- Implement Robust Workplace Health & Safety Policies. Consistent with applicable executive orders and health guidelines, employers should (i) screen employees for symptoms of COVID-19, including those [identified by the CDC](#); (ii) not allow employees or visitors with symptoms in the workplace; (iii) develop a plan for addressing an employee who tests positive, including sanitation and communication protocols; (iv) consider policies on contact tracing and antibody testing; (v) promote social distancing through specific policies and physical changes to the workplace; (vi) provide and require employees and visitors to wear face coverings (or other PPE where applicable) and regularly wash their hands; (vii) mandate routine cleaning and disinfecting; and (viii) improve your workplace’s ventilation system.

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- Document and Investigate Safety Concerns. Employers should implement a policy regarding reporting and investigating workplace safety concerns, and train personnel as necessary on the policy. The policy should strictly prohibit retaliation against any employee who makes a good faith complaint.
- Mitigate Risk of Discrimination Claims. In order to mitigate the risk of discrimination claims, employers should base reopening decisions, such as deciding which employees to recall and when, on objective, reasonable criteria; ad hoc, decentralized decision-making should be avoided. In addition, employers should treat similarly situated employees similarly and confirm that decisions impacting groups of employees do not disparately impact any protected classes. Finally, employers should document their decision-making processes.
- Keep Medical Information Confidential and Secure. Only retain employee medical or health information if necessary. For example, there is likely no reason to save temperature or other employee screening information unless you deny someone entry to work based on it. Ensure that any medical information that is saved is kept highly confidential (including the identities of any employees who have contracted COVID-19) and separate from other personnel information, and employ security protocols and tools commensurate with the highly-sensitive nature of that information.
- Talk to Your Employees. Regularly communicate with your employees. Make sure they understand the new policies, encourage questions, solicit feedback, and update them on the company's response to the crisis as appropriate. Employees no doubt have many work-related questions and anxieties right now, and candid communication may help assuage those concerns and help employers promptly address issues before they turn into liabilities.

This Client Alert is not intended to be an exhaustive guide but, rather, identifies key issues to be considered in navigating these extraordinary times. We are available to discuss these and other issues with you, as we understand that the needs of each business are unique and there is no one-size-fits-all solution to this crisis. Please also keep in mind that government guidelines are continuously changing as more businesses are allowed to reopen and as medical professionals learn more about COVID-19. Therefore, it is critical to remain informed about the most current laws and guidance governing your business.

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Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters, and CFTC and bank regulation. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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