

# Return to Work and COVID-19

NCHER Presentation  
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# Visit Our COVID-19 Disease Resource Center



Ballard Spahr COVID-19 Resource Center

# Leadership & Planning

# Leadership & Planning

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- Establish a team or task force to oversee planning, execution and monitoring
- Conduct COVID-19 risk/hazard assessment
- Create the Reopening Plan
- Communicate the plan and the right to modify the plan
- Undertake regular monitoring and updates
- Document the process

# Reopening Plan

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- Health and safety mitigation measures
- COVID-19 response process
- Staffing (e.g., security, janitorial, screening)
- Workplace screening and testing
- Leave and other employee concerns
- Transition from partial remote to in-person operations
- Recall and rehiring processes
- Communication and education plan
- Consider retrenchment, if needed

# Policies & Protocols

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- Social distancing
- Hand washing
- Cleaning & sanitation
- PPE (face coverings, gloves)
- Scheduling, breaks, shifts, interaction
- Workspace and movement (entry, exit, elevators, common space)
- Screening and testing
- COVID-19 “Open Door” policy
- ADA and accommodation requests
- Leave and attendance policies

# Monitoring and Compliance

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- Regular and ongoing review of guidance – public orders, CDC, OSHA, etc.
  - Adjust reopening plan based on changes
- Be prepared to address issues as they arise
  - Consider “coordinators” in departments and facilities to oversee compliance
  - Establish “open door” policy to report, investigate, remediate issues and complaints
- Media/PR issues

# Liability Mitigation

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- Third Party Agreements
  - Staffing agencies
  - Lease agreements (common space)
  - Cleaning and janitorial
  - Screening and testing vendor
- Insurance
  - Workers' compensation coverage (employee infections)
  - General liability coverage (infection of customers, vendors, third parties)



# Health & Safety & Operations

# OSHA Duty & Standard of Care

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- General duty to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
- No specific, mandatory COVID standards
- Protection for employees who refuse to engage in dangerous work when subjectively and objectively dangerous, employer refuses to eliminate danger and there is no time to correct through enforcement channels

# Engineering & Administrative Controls

- Cleaning/disinfection protocols
- Work area partitions, workspace configuration, Plexiglas
- Social distancing protocols
- Reconfiguring work spaces
- Limiting in-person interaction (cohorting)
- Scheduling changes (staggered shifts, teams)
- Continued remote work
- Additional time clocks to limit congregation of workers
- Single file movement (could include directional arrows like in store aisles)
- Additional breaks and changed schedules
- Reviewing and revising sick time and leave policies
- PPE: face coverings (already required in some states), gloves

# Personal Protective Equipment

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- Considerations include:
  - Who provides?
  - What kinds?
  - Who will be required to wear it?
  - Under what circumstances?
  - What do to with people who refuse?
- Following OSHA standards
- Handling requests for religious or medical exemptions

# Testing and Screening Protocols

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- In some jurisdictions, COVID-19 screening or testing may be required
- Where not required, considerations include:
  - What to test?
  - Who to test?
  - How to test?
- Maintaining records; confidentiality
  - HIPAA
  - ADA
  - Consent
- Accommodations

# Wage and Hour and Related Issues

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- FLSA
  - Exempt vs. non-exempt
  - Integral and indispensable vs. preliminary and postliminary activities
  - *De minimis* rules
- State and local wage and hour laws
- Independent contractor and joint employment concerns

# Exposure Response

- COVID-19 emergency response plan that follows CDC guidance and applicable public orders
- If an individual is confirmed to have COVID-19, inform employees (and others?) who had close exposure
  - Maintain confidentiality as required by the ADA - do not disclose names of individuals who have or suspected to have COVID-19
  - Close exposure = within 6 feet for more than 15 minutes
- Disinfecting and isolation and screening measures

# Exposure Response

- Individuals exhibiting COVID-19 symptoms should immediately be separated from others and isolated
- Individuals with symptoms or positive tests should not be permitted to return to work until they have met the CDC's latest criteria to discontinue home isolation
  - At least 10 days have passed since symptoms first appeared & 3 days since recovery under symptom-based strategy
  - Or no symptoms and 2 negative tests 24 hours apart
  - Different standards for essential employees



# Signs/Postings

- Posting reminders about the new policies in the workplace, such as reminders to wash hands and social distance, one direction hallways, break/lunch rooms
- OSHA industry specific posters
- DOL FFCRA/Employee Rights poster



# Workforce Issues

# Remote vs. In-Person Work

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- Should you continue to offer remote work?
- Phasing back workforce with continued balance between remote work and in-person work
- Voluntary vs. mandatory return to in-person work
- Remote work policies if continuing
- Managing requests for continued telework
- Remote work as reasonable accommodation

# Return to In Person Work

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- As employees return to in person work, be prepared to address:
  - Communication with employees about safety measures
  - Requests for accommodation
  - Potential changes to leave and attendance policies
  - Changes in business and travel policies
  - Changes in benefit plan design

# Wage & Hour Concerns

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- Exempt Employees—
  - Due to staffing shortages, exempt employees may have been performing nonexempt tasks
  - Does this sacrifice the exemption?
- Temporarily converted to non-exempt—
  - Because of decreased work demands, some employers may have converted exempt employees to nonexempt
- Capturing work time for non-exempt employees who continue to work remotely

# Employees Who Refuse to Return

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- Employees may not want to return:
  - Fear about contracting COVID-19 at work or during their commute
  - Underlying health conditions that make them particularly susceptible to falling ill if they contract the virus or high risk family member
  - Childcare issues
  - Supplemental unemployment benefits pay more than working
- Response depends on whether reason has legal protections

# High Risk Employees

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- Employers may seek to exclude high-risk employees or the employees may request not to return to avoid exposure
  - Direct threat analysis under ADA
  - Interactive process and reasonable accommodation
  - Pregnant employees
  - Older employees
- Indefinite leave is not a reasonable accommodation – what about indefinite remote work?

# Leave Issues

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- FFCRA leave
- FMLA
- State and local leave
- Employer policies



# Families First Coronavirus Response Act

- Two forms of new federal leave for COVID-19 events
  - Emergency Paid Sick Leave (EPSL): 80 hours
  - FMLA-Public Health Emergency (PHE) Leave: 12 workweeks of FMLA leave (including EPSL)
- Covered employers: private employers with less than 500 employees. Exemption for small business with fewer than 50 employees
- Both paid leaves subject to maximum dollar caps
- Available for different, but overlapping reasons, until December 31, 2020

# State & Local Leave Laws

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- FFCRA does not preempt or supersede other laws
- Some states and locales have enacted or amended leave laws to cover COVID-19 situations
  - These provisions vary from jurisdiction to jurisdiction
- Others already apply leave to certain public health emergencies impacting work or school

# Labor Issues

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- Responding to information requests
- Duty to bargain plans to reopen
- Negotiable subjects
- Force Majeure clauses
- Exigent circumstances exception

# Protected, Concerted Activity

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- Refusing to work based on safety concerns – objective standard
- Invoking health/safety provisions of the CBA
- Speaking to the media about PPE
- Walk-outs to protest an employer's handling of the pandemic
- Sick-outs
- Demanding hazard pay and safety gear
- Demanding paid leave for COVID-19

# Questions?

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