



## Returning to the Workplace Amid COVID-19: Potential Issues and Practical Guidance

Frequently Asked Questions

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### **1. *May an employer mandate that employees return to work even if employees are able to work remotely?***

While an employer may require that employees return to the office once it is permitted in the specific jurisdiction, employers should carefully consider the potential risks to employee safety and the overall business function in requiring employees to return to work if employees are able to perform their job functions remotely. For example, employers should consider some of the following risks associated with returning employees to work:

- Do employees regularly use public transportation and thus face exposure from other commuters?
- Have employees disclosed they are at a higher risk for severe illness from COVID-19?
- Will employees have close interactions of 6 feet or less during meetings, in common areas, workstation configuration and common restrooms?
- Will employees have close interactions of 6 feet or less with other tenants in building common areas, elevators or stairwells?
- Is there a plan of action in place if one employee is exposed to COVID-19, and if that employee exposes others to COVID-19?
- Are there additional cleaning and disinfecting measures that have been implemented?



In addition, we recommend that employers engage interactively and flexibly with employees requesting COVID-19-related accommodations.

**2. *What if I am unable to configure the office space such that employees' workstations are spaced at least 6 feet apart?***

If it is not possible to arrange workstations in such a way that employees maintain at least a 6-foot distance from another employee, consider implementing staggered shifts so that employees with close workstations may be in the office at alternating times or days.

**3. *How should I handle social distancing if my workplace has an open floor plan?***

Consider implementing some of the following measures to encourage social distancing:

- Arrange workstations at least 6 feet apart from each other.
- Add signage in the workplace to encourage social distancing.
- Put tape or markers on floors or the wall to provide visual cues to remind employees to maintain a safe distance from one other.
- Create one-way halls or pathways.
- Discourage or prohibit large gatherings.
- Allow flexible work hours or staggered work shifts.

**4. *May we enact separate policies to address COVID-19-related concerns, such as social distancing?***

Yes, employers may implement policies to address guidelines related to social distancing in the workplace or remote working, for example.

**5. *What additional measures can an employer implement to make common areas, such as kitchens or conference rooms, safer?***

Since employer common areas, such as kitchens, conference rooms and copy rooms, are high traffic areas, it is recommended that employers implement measures to restrict the number of people that access these areas at a single time and increase the frequency of cleaning and disinfecting these areas. For example, implement shifts or post signs indicating the maximum number permitted in common areas at a single time. Encourage employees to continue to use video conference calls instead of in-person meetings to reduce close in-person



interactions as much as possible. Implement frequent cleaning and disinfecting using EPA-approved products on high touch areas, such as kitchen countertops, door handles, elevator buttons, copy machine buttons, coffee maker buttons and conference room tables. Also, consider eliminating common office supplies, such as staplers, or provide no-touch office supplies, if possible.

**6. *What should I do if employees are not complying with rules of social distancing in the office?***

An employee's failure to comply with social distancing rules and guidelines should be treated similarly to how an employer handles other disciplinary violations and should be implemented in accordance with the company's existing policies and procedures.

**7. *What personal protective equipment should employees wear (i.e. masks, gloves, etc.)?***

The appropriate personal protective equipment (PPE) (i.e. gloves, masks, respirators, gowns, etc.) for your employees will depend on the industry, the nature of work that your employees perform and the extent to which the nature of their job function exposes them to an increased risk of contracting COVID-19. To the extent that an employer is requiring that employees use PPE, provide training on the proper use and maintenance of such

PPE, to the extent such training is not mandated. Both the Centers for Disease Control and Protection (CDC) and the Occupational Safety and Health Administration (OSHA) provide guidance for specific industries and job functions as well as general guidance to employers who are preparing to return employees to work. See <https://www.cdc.gov/coronavirus/2019-ncov/community/worker-safety-support/index.html> and <https://www.osha.gov/SLTC/covid-19/>.

**8. *Do employees need to wear masks all of the time while in the office?***

The extent to which employees should wear masks or other PPE while in an office setting will vary depending on the type of office setting and the employee's job function. If an employee has an office in which they are isolated, protected by barriers and more than 6 feet from another employee, it is unlikely they would need to wear a mask while they are performing work in that enclosed and protected location. However, to the extent that an employee works in a setting that does not have walls or barriers, that is within 6 feet of another employee, or that places the employee in close contact with office visitors or customers, it is more likely that the employee will need to wear a mask or other PPE throughout the day.



**9. As the employer, do I need to pay for masks if I require that employees wear them?**

If an employer requires that employees wear masks while at work, it is best practice and required in some jurisdictions to provide those masks to employees.

**10. If we are mandating that employees clean their workstations, does the employer need to provide cleaning supplies?**

It is best practice to provide employees with EPA-approved cleaning and disinfecting products in order to encourage employees to keep and maintain clean workstations and encourage them to clean their workstations frequently. See <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2> for EPA-approved disinfectants.

**11. May an employer require that employees notify them if they symptoms associated with COVID-19?**

Yes. You may ask that an employee notify you if they are experiencing any symptoms related to COVID-19, such as fever, chills, repeated shaking with chills, cough, shortness of breath, muscle ache, headache, sudden loss of smell or taste, or sore throat. This information should be maintained in a confidential medical file separate from the employee's personnel file.

**12. Is there a requirement to perform temperature screening prior to returning to work?**

Depending on the nature of your business and industry, screening employees may be required or an optional strategy that employers may implement. Temperature checks may be implemented in one of several ways to ensure employee safety, including: 1) reliance on social distancing and asking an employee to confirm that their temperature is less than 100.4 degrees Fahrenheit; 2) reliance on barrier/partition controls to protect a temperature screener from respiratory droplets; and 3) reliance on personal protective equipment. See <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html> for more information on performing temperature screens at work.



**13. May an employer require employees to undergo a temperature check prior to returning to work?**

Yes, you may require that employees undergo a temperature check at work. Some jurisdictions may have specific requirements regarding measuring temperature, so check local guidance.

Employees required to have a temperature check at work should be notified in advance that they will have their temperature checked and provided information on what to expect during the temperature check process. Certain states may require disclosure notices prior to testing based on the jurisdiction's privacy laws. Employers should conduct temperature screens in a safe and respectful manner and in accordance with guidance from public health authorities.

Generally, employees with a temperature of 100.4 degrees Fahrenheit or above should remain at home or be sent home from work. However, some states have slightly lower recommended standards (i.e. Delaware recommends that employees report if temperature is 99.5 degrees Fahrenheit or above). Keep in mind that some individuals with COVID-19 do not present with a fever.

As with all medical information, any information retained from a temperature check must be kept confidential and separate from the employee's personnel file.

**14. May we require employees to take their temperature at home before coming to work and provide us with the results?**

Yes, an employer may require that employees take their temperature at home before coming to work, and notify human resources if they have an elevated temperature prior to coming to work. An employer may simply ask the employee upon entering the workplace whether they have an elevated temperature or any other symptoms associated with COVID-19. Keep in mind that there may be an obligation in some jurisdiction to provide equipment to employees or reimburse employees for any expenses incurred in obtaining such equipment needed to take their temperature.

**15. May I require that employees take a COVID-19 test before returning to work?**

Yes, provided that the test is accurate and reliable. Currently, there are two types of COVID-19 tests: 1) DNA/RNA antigen test (nasal swab), and 2) antibody test. The nasal swab test indicates whether an individual has been infected with COVID-19, while the antibody test indicates whether an individual has developed antibodies to the virus. Also consider the incidence of false positives and false negatives associated with a



particular test and what the result of a particular test means with respect to whether an employee has the virus or could acquire it at a later date.

**16. Are we required to maintain employees' temperature if this is a condition of returning to work?**

No, there is no requirement that an employer retain or log an employee's body temperature. If an employer does retain an employee's body temperature readings, it must be maintained in a confidential medical file separate from the employee's personnel file.

**17. May an employer require that employees provide a medical certification prior to returning to work?**

Yes. However, be flexible and have a discussion with the employee to the extent the employee may be unable to obtain a doctor's note as a result the demands placed on health care providers. Alternatives to a doctor's note may include form, stamp or email certifications from the employee's local clinic that the employee has not tested positive for COVID-19 and does not currently have the virus.

**18. May an employer require that employees take an antibody test before returning to work?**

Yes, however, it is still unclear at this point whether a positive antibody test makes an individual immune to COVID-19. The antibody test is a blood test that checks whether there are antibodies, which indicate that you had a previous infection with the virus. Depending on when the individual was infected and the timing of the test, the test may not detect antibodies in someone with a current COVID-19 infection. A positive test shows that the individual has antibodies, which are proteins used to help fight off infections. It is unclear whether those antibodies provide protection or immunity against being infected again. If you test negative for COVID-19 antibodies, you probably did not have a previous infection that has gotten better. However, you could be currently infected. See <https://www.cdc.gov/coronavirus/2019-ncov/testing/serology-overview.html>.

**19. Should I send an employee home if they have any symptoms of COVID-19, even if it is only a cough?**

Yes. Individuals with COVID-19 display a wide range of symptoms, including cough, shortness of breath or difficulty breathing; fever, chills, muscle aches, sore throat and new loss of taste or smell; and some less common symptoms such as, nausea, vomiting or diarrhea. Employees who have symptoms when they arrive at work or become sick during the day should be separated from other employees, customers and visitors, and



sent home. The CDC provides a self-checker resources to guide individuals in terms of what level of care is appropriate. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

#### ***20. How do I handle employees who come to work sick?***

An employee who displays symptoms of COVID-19 should be separated from other employees, customers or visitors, and instructed to go home. If the individual cannot leave the office immediately, they should be isolated from others and continue to wear a surgical mask, unless they have a medical condition that prevents them from wearing one. See <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html> for resources to provide to the employee who is ill.

#### ***21. What employee privacy concerns should I be aware of when an employee notifies me that they have symptoms of COVID-19?***

Any medical information, such as symptoms, body temperature, testing results, etc., provided by the employee or related to the employee must be maintained in a confidential medical file separate from the employee's personnel file. In addition, it is critical that employers make every effort to limit the number of people who get to know the identity of the employee. To the extent an employee notifies the employer that they have tested positive for COVID-19, their identity must not be disclosed to other employees, even as the employer performs contact tracing to investigate and identify others who may have been exposed to COVID-19. Determine who in the organization needs to know the identity of the employee and instruct those individuals that they must maintain the confidentiality of that information.

#### ***22. If an employee returns to work and subsequently tests positive for COVID-19, would it be considered recordable or reportable under OSHA?***

It depends. OSHA recordkeeping requirements mandate that covered employers record certain work-related injuries and illnesses on their OSHA 300 log. An employer must record instances of workers contracting COVID-19 if the worker contracts the virus while on the job if: 1) the case is a confirmed COVID-19 case, 2) the case is work-related as defined by 29 CFR 1904.5 and 3) the case involves one more of the general recording criteria set forth in 29 CFR 1904.7. Recent guidance published by OSHA provided that it will not enforce its recordkeeping requirement that would require employers in areas where there is ongoing community transmission to make work-relatedness determinations for COVID-19 cases, except where a) there is objective evidence that a COVID-19 case may be work-related and b) the evidence was reasonably



available to the employers. This waiver of enforcement does not apply to the health care industry, emergency response organizations and correctional institutions in areas where there is ongoing community transmission.

**23. What obligations does an employer have to report that an employee tested positive for COVID-19?**

An employer is not obligated to report a positive or suspected positive COVID-19 test to the CDC. The health care provider who receives confirmation of a positive test result is a mandatory reporter who will handle that responsibility.

**24. If an employee who was in the workplace subsequently tests positive for COVID-19, what communication should be provided to employees?**

Speak with the employee suspected or confirmed to have COVID-19 to determine who that individual was in close contact with (6 feet or less) for a prolonged period of time (referred to as “potentially exposed employees”) and whether the employee was regularly wearing a mask when close to potentially exposed employees. Without identifying the potentially infected employee, notify the potentially exposed employees and inform them that may have been exposed to a person with a suspected or confirmed case of COVID-19. The potentially exposed employees should stay home and practice social distancing for at least 14 days. The potentially exposed employees should also self-monitor their symptoms by checking their temperature twice per day, monitoring for a fever of 100.4 degrees Fahrenheit or above, cough, shortness of breath, chills, muscle aches, headache, sudden loss of smell or taste, or sore throat. Potentially exposed employees should also avoid contact with others, especially those who may be at a heightened risk, and follow CDC guidance if they develop symptoms.

It may also be appropriate for an employer to communicate to other employees in the office, including the potentially exposed employees, that an employee has tested positive and inform employees of the steps that will be taken by the employer to protect and promote employee safety, such as additional cleaning and disinfecting.

**25. If an employee who was in the workplace subsequently tests positive for COVID-19, what cleaning measures should be implemented?**

Generally, it is not necessary to close the office. However, close off any areas that had been visited by the sick person.



If it has been 7 days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routine cleaning and disinfecting of high-touch surface areas.

If it has been less than 7 days since the sick employee used the facility, wait 24 hours after the sick employee has left the area (or as long as practical) before cleaning and disinfecting. This minimizes the potential for others to be exposed to respiratory droplets. Open outside windows and doors to increase circulation in the area.

Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash. For disinfection, cleaning staff should use products identified by the EPA for use against the virus that causes COVID-19.

Operations may resume as soon as the cleaning and disinfecting are complete.

***26. What if a customer or client who was visiting the workplace subsequently notifies the employer that they tested positive for COVID-19?***

Speak with the customer or client suspected or confirmed to have COVID-19 to determine who may be potentially exposed employees and whether the customer or client was regularly wearing a mask when close to the potentially exposed employees. Without identifying the potentially infected customer or client, notify the potentially exposed employees and inform them that they may have been exposed to a person with a suspected or confirmed case of COVID-19. The potentially exposed employees should stay home and practice social distancing for at least 14 days. The potentially exposed employees should also self-monitor their symptoms by checking their temperature twice per day, monitoring for a fever of 100.4 degrees Fahrenheit or above, cough, shortness of breath, chills, muscle aches, headache, sudden loss of smell or taste, or sore throat. Potentially exposed employees should also avoid contact with others, especially those who may be at a heightened risk, and follow CDC guidance if they develop symptoms.

It may also be appropriate for an employer to communicate to other employees in the office, including the potentially exposed employees, that an individual who was in the office tested positive and inform employees of the steps that will be taken by the employer to protect and promote employee safety, such as additional cleaning and disinfecting.



**27. What guidance do I provide employees who primarily take public transportation to work?**

To the extent an employee takes public transportation to commute to work, the employee should be aware that public transportation presents heightened risks for potential infection due to the inability to social distance. If an employee would normally take public transportation and is unable to drive or walk to work, consider whether they should be encouraged to continue to work from home. If an employee must take public transportation to work, the employee should follow the most recent CDC and local guidance regarding face coverings, PPE or other protective measures while using public transportation. The employer should also permit schedule flexibility to allow the employee to use public transit during off-peak hours. If an employee expresses discomfort using public transportation to commute to work, managers must be sensitive. It is unlawful to retaliate against individuals who may not be comfortable returning to work.

**28. What if an employee expresses that they do not feel safe or comfortable returning to work?**

Managers and HR should work with employees who express such a concern on a case-by-case basis. Ask the employee why they are concerned about returning to work (i.e. general fear, commuting concerns, vulnerable family member, the employee's own health condition, etc.). Engage in discussions with employees to determine what accommodations, such as continued teleworking, modified work hours, providing PPE or leaves of absence, may be available. Communicate the steps the office is taking to protect employees, such as increased cleaning and disinfecting or reconfiguration of workspaces. Remind managers that it is unlawful to retaliate against individuals who may not be comfortable returning to work.

**29. May an employer discipline an employee or terminate their employment if an employee refuses to return to work after government orders have lifted restrictions on individuals' mobility and an employer returns its employees to work?**

No. It is unlawful to retaliate against an employee who may not be comfortable returning to work because of the employee's own health condition, the health condition of an individual with whom the employee lives or is routinely exposed, or because the employee is a member of a vulnerable class of individuals. Discuss with the individual employee why they are concerned about returning to work. See guidance in Question #28. If the employee's refusal to return to work is only based on a generalized fear and the employer has implemented safety measures pursuant to CDC and OSHA guidance, the employer may consider what alternative steps may be appropriate on a case-by-case basis. However, it is recommended that employers be flexible in navigating these individual return to work concerns.



**30. What if an employee notifies me that they are concerned about returning to work because they live with an individual who is more vulnerable?**

Employees who live with or care for individuals who may be more vulnerable to complications related to COVID-19 should be encouraged to continue to work from home, if feasible, and continue to take precautions. “Vulnerable” individuals are those who are elderly and individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy. If any employees are uncomfortable with returning to work because they live with or care for vulnerable individuals, encourage managers to be sensitive and remind them that it is unlawful to retaliate against individuals who may not be comfortable returning to work because they live with or care for vulnerable individuals.

**31. What if we have a number of employees over 65, and it will impact our department if they do not return to work?**

According to the CDC, people who are 65 years and older may be at a higher risk for severe illness from COVID-19. As a result, the CDC recommends steps such individuals should take to reduce their risk of getting sick, including staying at home, if possible. See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

Supportive policies and practices to protect such employees include:

- Support and encourage options to telework, if available.
- Consider offering vulnerable workers duties that minimize their contact with customers and other employees, if the worker agrees to this.
- Offer flexible options such as telework to all employees, which will minimize risk of exposure.
- Ensure that any other businesses and employers sharing the same workplace also follow such guidance.



**32. If more vulnerable employees want to return to work, may we ask that they continue to work remotely?**

While an employer may bar employees with COVID-19 symptoms from the workplace and may generally require employees to work remotely, the employer may not bar an employee from the workplace *solely* because the employee has a disability that the CDC identifies as potentially placing them at higher risk for severe illness if they get COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation. For more information, see <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

**33. May an employer restrict an employee's personal travel?**

No, an employer cannot restrict personal travel of an employee. However, an employer may ask questions related to where the individual traveled since the CDC and state and local public health officials recommend self-isolation for individuals who travel to specific locations. Some states have instituted specific travel restrictions with respect to domestic travel. In addition, the CDC has issued guidance with respect to self-isolating based on where and by what means (i.e. cruise ship) an individual has traveled. Check travel guidance provided by the CDC to determine whether the employee's travel impacts their ability to immediately return to work.

**34. Is the employer required to reimburse employees for technology associated with working remotely?**

It depends on the jurisdiction. A number of states have enacted statutes that require employers to reimburse employees for necessary business expenses.

**35. If the employer continued the employees' benefits during the furlough period without collecting premium payments from the furloughed employees, would the employer need to include the employer paid amount in the employee's gross income?**

Employer paid premiums for group health benefits, including premiums paid for active, furloughed and former employees, are not included in gross income. If the employee was covering a non-tax dependent, such as a domestic partner, the employer would need to continue imputing income for the value of the coverage related to the non-tax dependent.



***36. If an employer implemented a salary reduction and the employer continued to pay the employee's life and disability insurance premiums so the employee's full benefit remained intact, must an employer include the employer paid amounts in the employee's gross income?***

For disability insurance, the answer is consistent with Question #35 above. For life insurance, if the employer's contributions toward group term life insurance have increased, the amount imputed to the employee under IRS Code Section 79 may be impacted. Please speak with your tax adviser to discuss the specific circumstance.

***37. Does the Families First Coronavirus Response Act (FFCRA) apply to employers with less than 500 employees or less than 500 full time equivalents?***

The FFCRA applies to employers with fewer than 500 full time and part-time employees within the US at the time the employee's leave is to be taken. This includes employees on leave, temporary employees who are jointly employed with another employer and day laborers supplied by a temporary agency. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#2>.

***38. Does return-to-work guidance apply to all employers or are there exemptions for small employers?***

The information and guidance provided here is intended to be generally applicable to most employers who are considering and preparing to return employees to work. However, the applicability of guidance for each employer and its workforce will vary depending on size of workforce, location, state and local laws, industry, nature of work performed by employees (e.g. laboratory, manufacturing, office, retail, etc.), exposure risk to COVID-19, and a variety of other factors. Accordingly, employers with questions specific to their business are encouraged to seek advice of counsel.