

GET BACK TO WORK!
**THE IMPORTANCE OF RETURN-TO-
WORK PROTOCOLS UNDER COVID-19**
MODC June 23, 2020

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NEW JERSEY'S PUBLIC HEALTH EMERGENCY

- **Public health emergency extended to July 7th but Stay-At-Home directive lifted**
 - **Non-retail may continue to operate, but must permit remote working when possible**
 - **Minimum number needed for critical operations**
 - **Retail may be open for customers – occupancy limited to 50% capacity**
 - **Barrier shields when 6 ft. distancing cannot be maintained**
 - **Bars and restaurants open for drive-through, take out and outdoor dining**
 - **Indoor dining permitted on 7/2/20 at 25% capacity**
 - **Personal care businesses, child care centers, recreational campgrounds and swimming pools may open as of 6/22/20**
 - **Casinos may open on 7/2/20 at 25% capacity**
 - **Outdoor gatherings of 250 (500 on 7/6/20?); indoor gatherings of 100**
 - **Protests and religious gatherings exempt from limits**
 - **Social distancing, barriers and face coverings should be implemented as appropriate and may be mandatory**

EMPLOYERS MUST PREPARE NOW FOR REOPENING

- Under the “new normal” the workplace will be significantly and perhaps permanently changed
- Return to the workplace will likely occur in phases and depend on the nature of the business and jurisdiction where it is located
- Employers must prepare a plan for re-introducing employees into the workplace that takes into account:
 - changes to the physical plant
 - identification of those employees who should be recalled first
 - what social distancing protocols should be implemented
 - health screening and monitoring of employees
 - accommodations of ill employees
 - protocols for handling employees who become ill at work
 - other HR issues
- No “one-size-fits-all” approach and employers must tailor each plan to evolving federal, state and local requirements as well as the nature of the employer’s business

CLEANING AND DISINFECTING THE PHYSICAL PLANT

- OSHA mandates all employers to provide a workplace that is “free from recognized hazards that are causing or likely to cause death or serious harm.”
- OSHA determined that this applies to preventing occupational exposure to COVID-19 and issued Guidance on Preparing Workplaces for COVID-19 <https://www.osha.gov/Publications/OSHA3990.pdf>
- CDC Guidance for Cleaning and Disinfecting <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>
 - Develop, implement and maintain/revise a written cleaning and disinfecting plan
 - Normal routine cleaning with soap and water will decrease virus on surfaces
 - Frequent disinfecting of frequently touched tools, equipment, surfaces and objects with EPA-approved disinfectants; if not available, use alternative disinfectants (e.g., 1/3 c. bleach to 1 gal. water or 70% alcohol solutions)

PHYSICAL MODIFICATIONS TO THE WORKPLACE

- **Physical changes should be made to places where employees congregate**
 - making points of entry/hallways/stairways one way if practicable to avoid face-to-face contact
 - replace door handles, bathroom fixtures, light fixtures, etc. with touchless technology
 - install high-efficiency air filters or other devices to increase circulation
 - erect plexiglass or other barriers in reception areas, desk fronts and other areas where face-to-face contact is unavoidable
 - remove seating from conference rooms, lunchrooms, reception areas, etc., to ensure 6 ft. distancing; if not possible, consider closing these areas

PHYSICAL MODIFICATIONS (cont'd)

- rearrange workspaces to ensure maximum social distancing (e.g., relocating work areas, arranging back-to-back to eliminate front-facing)
- where employees congregate to use work equipment (e.g., copiers, time clocks) place distance markers on the floor to ensure distancing and require sanitization after each use
- create “sanitizing stations” throughout the workplace equipped with hand sanitizer, disinfectant spray and wipes, disposable gloves and masks
- post appropriate signage to advise of occupancy limits, social distancing requirements and disinfecting protocols

BEHAVIORAL MODIFICATIONS/PROTOCOLS

- **Implement and enforce practicable workplace protocols aimed at minimizing social contact**
 - continued remote working for those able to do so
 - implement staggered shifts or alternate workday schedules
 - encourage employees to bring their own lunch to work and eat at their desks/workstations; ban communal food and discourage lunches that require refrigeration
 - limit the use of office refrigerators and provide single use coffee creamers and bottled water; use single-use coffee/tea makers and require disinfecting after each use

BEHAVIORAL MODIFICATIONS/PROTOCOLS (cont'd)

- limit the numbers of persons in conference rooms, kitchen areas, lobbies and other congregating areas
- limit the number of persons permitted in elevators
- modify vendor delivery methods to limit contact with staff, such as leaving all deliveries in the lobby or curbside pick-up
- opt for virtual meetings whenever possible and discontinue any large meetings
- discontinue all non-essential travel

HYGIENE PROTOCOLS

- **Require and enforce hygiene protocols aimed at minimizing the spread of infection, which include:**
 - wearing of masks, especially in common areas and in-person meetings
 - wearing of gloves when touching surfaces used by many employees
 - specification of employees who must wear additional Personal Protective Equipment in the workplace
 - instructing users of shared equipment or workspaces (e.g., copiers, staplers, common workstations) to sanitize after each use
 - frequent handwashing
 - eliminating handshaking and requiring social distancing (6 feet or more) at all times
 - requiring sick employees to remain at home
 - design an action plan if an employee tests positive/presumptively positive for COVID-19, including actions for employees who may have been exposed

IDENTIFY EMPLOYEES WHO WILL RETURN

- **Assess immediate business needs and identify those employees needed to fit those needs**
 - identify employees/departments who are critical to meet immediate business needs
 - if individual employees are selected over similarly-situated employees, develop legitimate business-related selection criteria to eliminate claims of discriminatory selection
 - develop flexible plans for the phase-in of additional staff as business ramps up
 - once staffing needs are developed, identify employees who can continue to work remotely, either on a full-time or periodic basis to reduce workplace headcount
 - identify employees who can work on a staggered or alternated days schedule
 - determine whether layoffs are necessary
 - communicate with employees

DETERMINE IF SCREENING REQUIREMENTS WILL BE IMPLEMENTED

- The EEOC has determined that during the pandemic, employers have more leeway to take measures to ensure workplace safety
- **Screening questionnaire**
 - ask employees if they are experiencing symptoms, such as fever, chills, cough, shortness of breath, or sore throat
 - ask if anyone in employee's household has been diagnosed with COVID-19 or if employee had close contact with such individual
 - require employees to take their temperature at home and report the result when reporting for duty

DETERMINE IF SCREENING REQUIREMENTS WILL BE IMPLEMENTED

- **Taking body temperatures** - EEOC has determined that employers may measure employees' body temperatures, while keeping in mind that infected individuals may not have a fever
- **Administering COVID-19 tests.** During the pandemic, employers may administer COVID-19 testing because infected individuals pose a direct threat to the health of others, but employers must ensure tests are accurate and reliable. See <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2>
- **Visitor Screening.** Employers are free to implement screening for visitors to the workplace

DETERMINE IF SCREENING REQUIREMENTS WILL BE IMPLEMENTED

- Daily screening may be cost-prohibitive and too time-consuming
- If screening is implemented, business must ensure that persons doing the testing are properly trained on use and sanitization of testing devices
- Non-exempt employees will have to be paid for the time spent undergoing screening
- The physical location of testing and privacy concerns must also be addressed
- All medical information must be maintained in confidential files, consistent with ADA and HIPAA requirements
- Expanded ability to make medical inquiries is limited to the pandemic and will diminish when the threat has abated

EXCLUDING EMPLOYEES FROM THE WORKPLACE

➤ Excluding sick employees

- employees who report symptoms, are running a fever (100.4+) or test positive should be sent home and advised to contact their physician
- employees should not be permitted to return without medical clearance or only after isolation for 10 days since the onset of symptoms and 72 hours since the fever was resolved and respiratory symptoms began to improve

➤ Excluding employees who have been exposed to COVID-19

- Employers can require employees who reside with/caring for an infected individual to remain home for 14 days symptom free
- Employers can require employees who had “close contact” (6 ft/10 min) with an infected individual, including a co-worker, be sent home

➤ Employees who refuse screening/testing may be excluded

➤ Excluding high-risk employees

- Employers may not exclude high-risk asymptomatic individuals unless i) the disability poses a “direct threat” to his/her health, ii) that cannot be eliminated or reduced by reasonable accommodation
- CDC’s listing of individuals deemed to be at high risk is available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html><https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>)

REASONABLE ACCOMMODATION OBLIGATIONS

- Accommodations that may be required for high-risk employees to remove the “direct threat” of exposure include:
 - working from home
 - changes to the work environment, such as plexiglass, one-way aisles, reconfiguration of work areas or other steps to minimize contact with others
 - temporary job restructuring to remove marginal job duties that increase contact with others
 - temporary transfer to another position or modified work schedules or shift assignments with less risk of exposure
 - exemption from requirements to wear protective gear, or providing alternate gear (e.g., non-latex gloves, modified face masks, disposable gowns), if feasible

HR ISSUES FOR RETURNING EMPLOYEES

- **COVID-Related Employee Leave Rights.** Employees recalled to duty may invoke various leave rights to delay a return to duty or subsequent to their return to duty

HR ISSUES FOR RETURNING EMPLOYEES

- **The Families First Coronavirus Response Act (FFCRA) applies to employers with 500 or less employees and provides emergency leave rights through December 31, 2020:**
 - **FFCRA Emergency Paid Sick Leave.** All employees are eligible for 80 hours of pay if
 1. they are subject to a quarantine order or caring for an individual subject to an order,
 2. they have been advised to self-quarantine by a health care provider or caring for an individual advised to quarantine,
 3. they have COVID-19 symptoms and are seeking medical attention; or
 4. they are caring for a child because of closure of the child's school or place of childcare because of the pandemic.
 - If the absence is due to the employee's condition, full pay, subject to a max. of \$511 per day; if to care for another, 2/3rds pay, subject to a max. of \$200 per day

HR ISSUES

- **FFCRA Emergency Family and Medical Leave Expansion**
Employees caring for a child because of the closure of the child's school or place of childcare are eligible for
 - up to 12 weeks of leave (2 weeks unpaid, 10 weeks at 2/3rds pay)
 - subject to a max. of \$200 per day
 - any time taken will be counted towards all FMLA leave benefits
- **NJ Earned Sick Leave.** Employee exhausting FFCRA leave may use accrued NJ earned sick leave benefits for COVID related absences
- **NJ Temporary Disability, Workers Compensation and Family Leave Insurance Benefits.** Employees who experience COVID related absences may be eligible for these State income protection benefits during the absence

HR ISSUES

- **Employees who refuse to return out of fear of contracting COVID-19 are generally not protected and may be subject to termination except:**
 - employees who submit medical documentation of disabling anxiety or other mental health disorders
 - under OSHA, employees can refuse to work if they have a *specific, fact-based fear* of infection in the workplace, not merely a generalized fear, that cannot be addressed through the employer's health and safety measures
 - under the NLRA, employees who join together to complain about unsafe workplace conditions are engaged in protected activity if the refusal to work is based upon a good-faith belief that working conditions are unsafe.

HR ISSUES

- **Discrimination Against Employees Suffering from COVID-19**
 - Gov. Murphy signed a Bill prohibiting termination or other adverse employment action against employees/applicants who test positive for COVID-19 or are presumed to have the virus.
 - Employers should also remind all employees that harassment of these individuals is likewise prohibited and take appropriate remedial action if this occurs.

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