



Are You Ready to Reopen? Legal and Practical Issues to Consider

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Overview Questions

Assuming stay-at-home and shelter-in-place orders permit reopening, with or without restrictions, consider the following:

- Does the physical layout of my business practically allow me to reopen in compliance with applicable laws?
- Do I feel confident that I can adequately protect the health of my employees?
- Do I feel confident that I can adequately protect the health of my customers?
- Would customers be satisfied with the level of service?
- Would the level of business generated support additional payroll costs?

Case Study of Possible Restrictions

As a case study, consider the restrictions placed on restaurants permitted to resume providing dine-in service effective April 27, 2020 in Georgia. Governor Kemp has authorized various businesses to reopen but with specific restrictions based on the type of business. Restaurants have 39 restrictions.

State of Georgia Executive Order – Restaurants & Dining Services

1. Screen and evaluate workers who exhibit signs of illness, such as a fever over 100.4 degrees Fahrenheit, cough, or shortness of breath;
2. Require workers who exhibit signs of illness to not report to work or to seek medical attention. Per existing U.S. Food and Drug Administration Food Code requirements, employees who are sick should remain home. If an employee becomes ill or presents signs of illness at work, the operator should identify the employee's condition during a pre-work screening and send the employee home. Restaurants shall create, maintain, and follow established policies regarding when employees who have become ill are permitted to return to work. An employee with known or suspected COVID-19 must follow Centers for Disease Control and Prevention guidelines to self-isolate for at least seven (7) days after symptom onset and end isolation only after symptoms have improved and the employee has been fever-free and/or symptom-free for three (3) consecutive days without medication before returning to work;

Business Restrictions

3. Implement teleworking for all possible workers;
4. Implement staggered shifts for all possible workers;
5. Hold all meetings and conferences virtually, whenever possible;
6. Train all employees on the importance and expectation of increased frequency of handwashing, the use of hand sanitizers with at least 60% alcohol, and provide clear instruction to avoid touching hands to face;
7. Require all employees to wear face coverings at all times. Such coverings shall be cleaned or replaced daily;
8. Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment;

Business Restrictions

9. Where possible, stagger workstations to avoid employees standing adjacent to one another or next to each other. Where six (6) feet of separation is not possible, consider spacing options that include other mitigation efforts with increased frequency of cleaning and sanitizing surfaces;
10. Establish limit numbers to reduce contact in employee breakrooms;
11. Prohibit handshaking and other unnecessary person-to-person contact in the workplace;
12. Enforce Social Distancing of non-cohabitating persons while present on such entity's leased or owned property;
13. Increase physical space between workers and patrons;

Business Restrictions

14. Limit contact between wait staff and patrons;
15. Discard all food items that are out of date;
16. Discontinue use of salad bars and buffets;
17. If providing a "grab and go" service, stock coolers to no more than minimum levels;
18. Ensure the Food Safety Manager certification of the person in charge is up-to-date and provide food handler training to refresh employees;
19. Thoroughly detail, clean, and sanitize the entire facility prior to resuming dine-in services and continue to do so regularly, focusing such cleaning and sanitation on high contact areas that would be touched by employees and patrons;

Business Restrictions

20. Between diners, clean and sanitize table condiments, digital ordering devices, check presenters, self-service areas, tabletops and commonly touched areas, and discarding single-use items;
21. Use rolled silverware and eliminate table presets;
22. Remove items from self-service drink, condiment, utensil, and tableware stations and have workers provide such items to patrons directly wherever practicable;
23. The use of disposable paper menus is strongly encouraged, which should be discarded after each patron use. Otherwise, businesses subject to this Section shall clean and sanitize reusable menus between each use by a patron. Non-touch menus are also acceptable for use.

Business Restrictions

24. Clean and sanitize restrooms regularly, check restrooms based on the frequency of use, and ensure adequate supply of soap and paper towels at all times;
25. Implement procedures to increase cleaning and sanitizing frequency of surfaces in the back-of-house. Avoid all food contact surfaces when using disinfectants;
26. Check restrooms regularly and clean and sanitize based on frequency of use;
27. Update floor plans for common dining areas, redesigning seating arrangements to ensure at least six (6) feet of separation from seating to seating. Utilize physical barriers on booth seating when available;

Business Restrictions

- 28. Limit party size at tables to no more than six;
- 29. Where practical, consider a reservations-only business model or call-ahead seating;
- 30. Remind third-party delivery drivers and any suppliers of your internal distancing requirements;
- 31. Post signage on entrances that no one with a fever or symptoms of COVID-19 is permitted in the facility;
- 32. Where practicable, physical barriers such as partitions or Plexiglas at registers should be used;

Business Restrictions

- 33. Use technological solutions where possible to reduce person-to-person interaction: mobile ordering, mobile access to menus to plan in advance, text on arrival for seating, and contactless payment options;
- 34. Provide hand sanitizer for use by patrons, including contactless hand sanitizing stations when available;
- 35. Do not allow patrons to congregate in waiting areas or bar areas. Design a process to ensure patron separation while waiting to be seated that can include floor markings, outdoor distancing, or waiting in cars;

Business Restrictions

- 36. If possible, use an exit from the facility separate from the entrance;
- 37. Mark ingress/egress to and from restrooms to establish paths that mitigate proximity for patrons and staff;
- 38. Where practicable, take-out and curbside pick-up services should be prioritized over dine-in services; and
- 39. All restaurant or dining room playgrounds shall be closed.

Resistance To Returning - Unemployment

- Employers are facing a conundrum in recalling furloughed employees. Those employees who have been furloughed or had their hours reduced may be receiving state unemployment benefits as well as the \$600/wk federal supplement under the CARES Act and receiving more than they would if they returned to work full-time at their previous compensation.
- For example, in Georgia, the maximum weekly state benefit is \$365/week. With the additional \$600 CARES weekly benefit through July 31, 2020, that employee will be receiving \$965/week in unemployment benefits (annualized \$50,180/year).
- In Massachusetts, state max is \$823/week. With \$600 CARES, that's \$1,423/week (\$74,000 annualized).

Resistance to Returning-Unemployment

Employers have a right to recall workers. Generally, if a worker refuses to return to work after reasonable notice, the worker can be separated **and likely disqualified from receiving further unemployment benefits.**

Resistance to Returning - Unemployment

- BUT: What if you need that employee and don't want to take the "stick" approach of saying we need you back and if you don't want to come back, fine, but you won't be able to collect unemployment.
- "Carrot" approach - some employers are attempting to address the unemployment claims issue by temporarily increasing the pay of recalled workers. Some are providing increased pay through July 31, 2020 when the federal supplement of \$600/wk is scheduled to end.

Resistance to Returning – General Concern

- A general anxiety about feeling unsafe going back to work **is not an acceptable reason** to refuse to return to work. As discussed further below, if an employer is not following CDC and OSHA guidelines and taking measures to ensure a safe workplace, an employee may be protected by OSHA and similar state laws from returning to work.
- Employees who have been working remotely or furloughed may be concerned about returning for protected, related medical concerns. An employer is not required to permit these employees to continue working from home. However, if an employee requests an accommodation to work from home or take leave due to a disability or medical condition, you should engage in the interactive process under the Americans With Disabilities Act (“ADA”) to determine if such an accommodation can be made.

Resistance to Returning – Vulnerable Population

CDC's and President's "Opening Up America Again" guidelines identify a "vulnerable population" of employees for which there is a higher risk of serious illness:

- 1. Older employees (65 and older)
- 2. Individuals with serious underlying health conditions, including:
 - a. high blood pressure
 - b. chronic lung disease or moderate to severe asthma
 - c. serious heart condition
 - d. diabetes
 - e. severe obesity (body mass index [BMI] of 40 or higher)
 - f. compromised immune system (e.g., chemotherapy for cancer)
 - g. chronic kidney disease
 - h. chronic liver disease

Returning to Work – Vulnerable Population

- Consider developing a voluntary, self-certification process/questionnaire. Ask the employee to identify if he/she is in a vulnerable population and, if so, whether he/she is seeking an accommodation. Only if the employee is seeking some accommodation would the employee then complete the questionnaire and return it to HR.
- The Company may consider permitting more vulnerable employees to continue sheltering in place for a period of time. They could work remotely whenever possible and feasible with business operations.
- As stated above, the Company should consider permitting more vulnerable employees to return to work **if they choose** to avoid claims of age or disability discrimination (assuming permitted by any applicable shelter-in-place orders).

Returning to Work – Vulnerable Population

- Mandating that more vulnerable employees return to work, and the timing, will depend on any applicable shelter-in-place orders, improving health conditions related to the coronavirus, guidance from the CDC, OSHA and other government agencies, increased ability to take measures to provide a safe workplace, and the employees' individual circumstances. For example, under Georgia's shelter-in-place order, the "vulnerable employee" *must* continue to shelter-in-place through May 13, 2020.
- Pregnancy not identified as a condition placing someone in a vulnerable population.
- May require some supporting documentation from a healthcare provider if the employee is seeking accommodation for health condition.

Safety Measures for Employees

There are a number of things employers can do to mitigate risks, including requiring their employees to complete return-to-work questionnaires, taking workers' temperatures, the use of masks in the workplace and COVID-19 testing.

Safety Measures for Employees

The EEOC has issued guidance that permits employers to ask employees if they are experiencing symptoms of the coronavirus such as fever, chills, cough, shortness of breath, or sore throat. Employers can develop a questionnaire for employees to complete or be asked before entering the workplace. Depending on the nature of the business, the questions could be asked when the employee is recalled or hired or at the beginning of each shift. Employers must maintain information about an employee's illness as a confidential medical record in compliance with the Americans with Disabilities Act (ADA) and store such records potentially in compliance with OSHA requirements.

Safety Measures for Employees

The EEOC also has stated that employers may take the temperature of employees during this pandemic. There are a number of issues to consider in taking employees' temperatures. What type of device is used and its quality? Who will be the temperature taker? Ideally, it would be a medical professional. If not, there should be a limited number of employees (health and safety, HR, management, etc.) designated and trained to take temperatures so that the results are accurate and there is consistency in the process. What type of protective equipment should the temperature taker wear (mask, gloves, etc.)? If the temperature taker is an employee, should you have the employee sign an acknowledgment or waiver?

Safety Measures for Employees

If employees are lined up to be tested, they should keep a social distance of 6 feet apart. If they are required to wait in line, will they be paid for that time? It may depend on the length of time waiting and the state where the worker is located. For example, in California, the time spent both waiting for and participating in the temperature checks must be paid (non-exempt employees only). Again, medical information should be kept confidential, and employers should comply with any state privacy law requirements, including mandatory notice requirements.

Safety Measures for Employees

Another safety measure employers could choose to take, if not otherwise legally required to do so, is to require employees to wear masks. Generally, if employers require that masks be worn, the employer should provide the masks to employees. If the masks can be cleaned by employees by hand or in regular laundry, then employers would not be required to compensate employees for cleaning the masks. However, the employer may have that obligation under general state or local laws obligating employers to provide or pay for equipment like face coverings. For example, New York specifically requires employers to provide employees in essential, customer-facing positions with face coverings at the employer's expense. Similarly, New Jersey requires restaurants and other food service businesses to provide their employees with face coverings and gloves at the business's expense.

Safety Measures for Employees

On April 23, 2020, the EEOC yet again amended its guidance to specifically address whether an employer may require COVID-19 testing as a condition of returning to work. Answering generally in the affirmative, it explained that the ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, the EEOC opined that employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.

Safety Measures for Employees

Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. The EEOC cautioned that, consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and should check for updates.

Safety Measures for Employees

Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

OSHA Considerations

General Duty Clause

Each employer shall furnish to each of his employees 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 to his employees.

OSHA requires employers to assess occupational hazards to which their workers may be exposed.

The clause requires employers to have workplaces free of known hazards that can be feasibly mitigated.

OSHA Considerations

Limited Right to Refuse Work

If an employee believes working conditions are unsafe or unhealthy, the employee may file a complaint with OSHA concerning a hazardous condition at any time. If possible, the employee should bring the conditions to the employer's attention. If the condition clearly represents a risk of death or serious physical harm, there is not sufficient time for OSHA to inspect, and where possible, the employee has brought the condition to the attention of the employer, the worker may have a legal right to refuse to work in a situation in which he or she would be exposed to the hazard.

OSHA Considerations

Protection from Retaliation

It is illegal for an employer to fire, demote, transfer or otherwise retaliate against workers for exercising their rights under OSHA.

OSHA Considerations

Enforcement During the Coronavirus Epidemic

OSHA has directed its compliance officers to evaluate an employer's good faith efforts to comply with safety and health standards during the coronavirus epidemic.

OSHA will take employers' attempts to comply in good faith into strong consideration when determining whether it cites a violation.

As of Thursday April 23rd, OSHA had received about 2,400 complaints about coronavirus workplace hazards and closed out about 1,400.

OSHA - Industry Specific Guidance

OSHA has issued some industry-specific guidances to minimize risks of coronavirus in the workplace.

For instance, on April 26th, OSHA and the CDC released joint coronavirus-related interim guidance for meatpacking and meat processing workers and employers. The interim guidance includes information regarding:

- Cleaning of shared meatpacking and processing tools;
- Screening of employees for the coronavirus before they enter work facilities;

OSHA - Industry Specific Guidance

- Managing workers who are showing symptoms of the coronavirus;
- Implementing appropriate engineering, administrative, and work practice controls;
- Using appropriate personal protective equipment; and
- Practicing social distancing at the workplace.

Recalling Employees – Discrimination

- Because of business needs, many employers will face the challenge of having to rehire some but not all of their work force. Anytime an employer has to make decisions among its workforce as to who will be rehired and when, it can potentially create legal challenges.
- Develop internal criteria for determining who will be recalled from the recall list. The following are steps to consider in the recall process:
 - a. Identify the Company's business needs which necessitate or warrant the recall. For example, is there a particular area or division where business has picked up and therefore there is a need for additional workers? If so, which positions are impacted?
 - b. Identify the skill set and training required for the individuals who will fill the available positions.

Recalling Employees - Discrimination

- c. Identify the persons on the recall list who meet the skill set and training.
- d. Of the persons who meet the skill set, make final selections based on such business reasons. This criteria may include the same considerations that you used when making the original selections for furlough, such as relative performance, relative capabilities, length of service. The more objective the criteria, the more defensible (e.g., last in first out), but that may not be the best criteria for business.
- e. Assess whether employees will be similar to your pre-layoff workforce in terms of diversity. You should make this determination for all protected groups (e.g., sex, age, race). Consider whether to employ outside counsel to conduct disparate impact or disparate treatment analysis.

Recalling Employees - Discrimination

- f. Prepare a memorandum, which is marked “PRIVILEGED AND CONFIDENTIAL” to in-house legal counsel (or outside counsel) documenting your business reasons and seeking counsel’s input. As you assemble the above information, prepare a privileged and confidential memorandum specifically directed to legal counsel, outlining the information compiled for items a-e above.
- g. Avoid sending internal emails and creating unnecessary documentation unless legal counsel is copied on these documents so that the attorney-client privilege is maintained. Remember that any documents you create internally may become discoverable in the event of future litigation unless prepare specifically for your legal counsel. Documents include electronic documents, such as emails, spreadsheets, etc.

Laying Off Employees- Permanent

- If you are laying off two or more employees permanently, consider:
 - Appropriate release with schedules in compliance with ADEA and OWBPA, identifying by age and position those selected for termination and those within same class or job unit retaining their position.
 - Engaging in disparate impact and disparate treatment analysis as above (e.g., age, race, sex).

Thank you!

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