



COVID-19: Returning to Work

JW Webinar | May 1, 2020



Gary Fowler, Moderator

- Disclaimers
- Housekeeping
- CLE and CPE

Our Panel



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Brad Nitschke

- Essential and Reopened Services
- State vs. Local Orders
- State Guidelines for All Employers

Essential and Reopened Services



- First question: are we allowed to reopen?
 - **Before May 1:**
 - **Statewide Executive Order (“shelter in place light”)**: CISA 2.0 + in-person religious services.
 - **Local shelter-in-place orders**: CISA 2.0, subject to local operating rules.
 - **Eff. May 1**: Executive Order GA-18 (Texas Gov. Greg Abbott)
 - **Statewide (“Phase 1”)**:
 - CISA ~~2.0~~ 3.0
 - In-person religious services
 - **Local orders**: maybe...

- CISA: Dept. of Homeland Security Cybersecurity and Infrastructure Security Agency
- **New to CISA 3.0:**
 - **Additional healthcare support**
 - Home care and long-term care workers
 - Workers who manage health plans, billing, health information, and cybersecurity AND who cannot work remotely
 - Vendors, suppliers, and manufacturers
 - “workers required for effective clinical, command, infrastructure, support service, administrative, security, and intelligence operations across the direct patient care and full healthcare and public health spectrum.”
 - **Additional manufacturing/distribution**
 - Products using agricultural commodities
 - Energy and related (e.g., pipeline workers, supply manufacturers, workers supporting installations)
 - Vehicle manufacture, distribution, sales, repair, and maintenance
 - Aerospace supply chain
 - **Commercial and residential construction**
 - **Commercial building operations** – “...critical to safety, security, and the continuance of essential activities, such as on-site property managers, building engineers, security staff, ... janitorial personnel, and service technicians....”
 - **Lawyers!**

Reopened Services



- In-person retail (reduced capacity)
- Dine-in restaurants (reduced capacity)
- Movie theaters (reduced capacity)
- Shopping malls (reduced capacity)
- Museums/libraries (reduced capacity + no hands-on)
- Golf courses
- “Services provided by an individual working alone in an office” (vs. “sole proprietorships”?)
- Local government
- Reduced capacity:
 - 25% of occupancy baseline
 - BUT increase to 50% for county certifying 5 or fewer cases to DSHS

Current Status?



- **Are we allowed to reopen?**

- CISA 3.0
- Reopened Services
- In-person religious services

- **Status of local orders?**

- GA-18 vs. local orders – “shall supersede any conflicting order issued by local officials ... but only to the extent...”
 - “**Restricts** essential services or reopened services” [i.e., narrows CISA 3.0 or Reopened Services]
 - “**Allows** gatherings prohibited by this executive order” [minimize social gatherings and minimize in-person contact with people who are not in the same household]
 - “**Expands** the list of essential services or reopened services” [i.e., expands CISA 3.0 or Reopened Services”]
- Local mask requirements, Minimum Basic Operations rules, workplace safety rule, COVID-19 Safety Monitor rules?
 - ➔ Rule of thumb (for now): regulate vs. restrict

Statewide Health Guidelines



- “In providing or obtaining essential services or reopened services, people and businesses **should follow** the minimum standard health protocols recommended by DSHS....”
 - Available at: dshs.texas.gov/coronavirus

The image shows a screenshot of the 'MINIMUM STANDARD HEALTH PROTOCOL' checklist for all employees. The document is titled 'MINIMUM STANDARD HEALTH PROTOCOL' and 'CHECKLIST FOR ALL EMPLOYEES'. It includes a section for 'Health protocols' with checkboxes for 'Train all employees', 'Screen employees', 'Do not allow work until', and 'Do not allow employees with the new or worsening signs or symptoms listed above to return to work until'. The 'Do not allow work until' section lists symptoms: Cough, Shortness of breath, Chills, Fever, Repetitive sneezing, Muscle aches, and Headaches. The 'Do not allow employees with the new or worsening signs or symptoms listed above to return to work until' section lists criteria for return to work: at least 3 days (72 hours) have passed since recovery, improvement in respiratory symptoms, and at least 7 days have passed since symptoms first appeared. It also includes criteria for employees who have symptoms that could be COVID-19 and does not get evaluated by a medical professional or tested for COVID-19, and for employees who have symptoms that could be COVID-19 and wants to return to work before completing the above self-isolation period.

- ☐ Do not allow employees with the new or worsening signs or symptoms listed above to return to work until:
 - In the case of an employee who was diagnosed with COVID-19, the individual may return to work when all three of the following criteria are met: at least 3 days (72 hours) have passed *since recovery* (resolution of fever without the use of fever-reducing medications); and the individual has improvement in respiratory symptoms (e.g., cough, shortness of breath); and at least 7 days have passed *since symptoms first appeared*; or
 - In the case of an employee who has symptoms that could be COVID-19 and does not get evaluated by a medical professional or tested for COVID-19, the individual is assumed to have COVID-19, and the individual may not return to work until the individual has completed the same three-step criteria listed above; or
 - If the employee has symptoms that could be COVID-19 and wants to return to work before completing the above self-isolation period, the individual must obtain a medical professional's note clearing the individual for return based on an alternative diagnosis.
- ☐ Do not allow an employee with known close contact to a person who is lab-confirmed to have COVID-19 to return to work until the end of the 14 day self-quarantine period from the last date of exposure (with an exception granted for healthcare workers and critical infrastructure workers).



Scott McElhaney

- OSHA Guidance on Preparing Workplaces for COVID-19
- Additional CDC Recommendations
- OSHA Specific Guidance for Certain Industries

OSHA's 35-page “Guidance on Preparing Workplaces for COVID-19”

- Infectious Disease Preparedness and Response Plan
- Basic Infection Prevention Measures
- Developing Policies to Identify and Isolate Sick People
- Communications About Workplace Protection

OSHA's 35-page “Guidance on Preparing Workplaces for COVID-19”

- Implementation of Workplace Controls
 - Engineering Controls
 - Administrative Controls
 - Other Safe Work Practices
- Encouragement of safety training and reporting of concerns

Additional CDC Recommendations



The CDC's "Interim Guidance for Businesses"

- Mirror OSHA recommendations
- Additional advice

OSHA Industry Recommendations



Interim Guidance

- Healthcare
- Emergency response and public safety
- Postmortem care
- Meat and poultry processing
- Laboratories
- Airline operations
- Retail operations
- Border protection and transportation security
- Correctional facility operations
- Solid waste and wastewater management
- Environmental (i.e., janitorial) services
- In-home repair services
- Solid waste and wastewater management

OSHA Alerts

- Retail Workplaces
- Package Delivery Companies
- Manufacturing Businesses
- Construction Companies
- Meat and Poultry Processors



Sarah M. Montgomery

- Processes and Considerations When Returning Furloughed Employees to Work
- Avoiding Legal Pitfalls
- Best Practices for Wage and Hour Changes and Adjustments

Recalling Furloughed Employees



Return to Work Notice

- Provide a communication prior to the date of return that includes:
 - Date of return
 - Employee's rate of pay and work hours
 - Employee's PTO balance as of the date of return
 - Summary of anticipated onboarding process
 - Any changes to or impact on benefits

Statutory Leave Entitlements

- Federal and state FMLA eligibility may be impacted by furlough
- Consider whether state or local paid sick leave laws address accrual and/or use of benefits upon a recall to work

Other Considerations

- Consult collective bargaining agreements
- Review employment contracts to ensure compliance
- Consider policies that may impact employee status upon return to work (e.g., seniority)

Onboarding Process

- A complete onboarding process of furloughed employees is probably unnecessary
- Return access cards, credit cards, and electronic devices
- Ensure employees are aware of new or revised policies that took effect during furlough
- Consider having employees' general personnel forms updated (e.g., emergency contact forms, direct deposit authorization, etc.)

Potential Legal Pitfalls

- Beware of discrimination and retaliation claims
 - Discrimination and retaliation laws apply in recall situations
 - Treat recall as a reverse layoff
 - If all employees are not recalled, document legitimate reasons for recalling some employees over others
 - Generally, do not replace furloughed employee with new employee (unless furloughed employee quits)
 - Review processes for disparate impact concerns

Recalling Furloughed Employees (cont.)



- Families First Coronavirus Response Act applicability
 - Consider potential triggering of Emergency Paid Sick Leave and Emergency Family and Medical Leave Expansion Act when asking employees to return to work
- Employees who refuse to return to work
 - Develop response plan for employees who refuse to return to work
 - Some reasons for refusing to return to work may be legally protected
 - Consider unpaid leave for those who are not otherwise entitled to leave or PTO, or remote working arrangements, rather than termination

Handling Wage and Hour Changes



Notice of wage and hour changes

- Provide following information in writing before changes take effect:
 - The effective date of the change
 - The new rate of pay and work hours
 - Any impact on employee benefits
- Ensure state requirements relating to notice content and timing are followed
- Avoid promises or guarantees in notices in case future changes or adjustments must be made

Other considerations

- Predictive scheduling laws in certain states/jurisdictions may require advance notice of schedule changes
- Ensure changes to salaried workers' pay does not impact overtime exemption



Judy B. Garner

The Americans With Disabilities Act

- Health and medical screenings
- Reasonable Accommodations
- Undue Hardship

ADA Considerations



- Health and Medical Screenings
 - Employee Health Questionnaires
 - Employee Temperature Screenings
 - COVID-19 Testing
- Reasonable Accommodations
 - Employees who are at a higher risk of severe illness
 - Temporary accommodations
 - Refusal to report to work
- Undue Hardship Guidance

- EEOC COVID-19 Pandemic Guidance - https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_a_da_rehabilitaion_act_coronavirus.cfm
- EEOC Webinar Regarding COVID-19 Pandemic - https://www.eeoc.gov/coronavirus/webinar_transcript.cfm
- CDC, General Business Frequently Asked Questions - <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>



Brooke Leondar

Families First Coronavirus Response Act

- Paid Sick Leave Provisions
- Qualifying Reasons
- Employee Certifications

Paid Sick Leave Provisions



- What employers are covered?
- Who is an eligible employee?
- How much leave does an eligible employee have?
- Notice requirements
- What are the qualifying reasons under EPSLA and EFMLEA?

FFCRA Employee Certifications



1. Subject to Federal, State, or Local quarantine or isolation order
 - Shelter-in-place and stay-at-home orders count
 - Provide name of government entity issuing order
2. Advised by health care provider to self-quarantine due to concerns related to COVID-19
 - No doctor's note required
 - Provide name of healthcare provider
3. Experiencing COVID-19 symptoms + seeking medical diagnosis

FFCRA Employee Certifications



4. Caring for individual subject to quarantine order or who has been advised by healthcare professional to self-quarantine
 - Personal relationship required
 - Provide name of individual, relationship to individual, and either issuing government entity or healthcare provider name

5. Caring for child under age of 18 who school or place of care is closed due to COVID-19.
 - Certify employee is only suitable caretaker
 - Provide child's name, age, name of closed school
 - If child over 14, employee must certify whether special circumstances apply or not

Resources



- JW Coronavirus FAQs -
<https://www.jw.com/news/insights-covid19-faq-employment-update/>
- DOL FFCRA Notice Poster -
<https://www.dol.gov/agencies/whd/posters>
- DOL FCCRA FAQs -
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Q&A

Please visit our
dedicated Coronavirus
resource page at

[JW.com/Coronavirus](https://www.jw.com/Coronavirus)

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