

Returning to Work: A Summary of Recent Guidance for Employers

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Client Advisory

As employers begin to re-open workplaces closed by the Coronavirus (COVID-19) pandemic and ensuing stay-at-home orders and social distancing mandates, virtually all employers are faced with concerns about how to safely bring their work force back to the office while limiting the risks of both illness and liability if employees or others do get sick. The Centers for Disease Control and Prevention (CDC) recently released updated guidance for employers detailing actions employers should take and procedures they should implement prior to re-opening their workplaces. The updated CDC guidance encourages all employers to develop a COVID-19 workplace health and safety plan to protect employees and visitors to their workplaces. While the CDC guidance is not mandatory, some states and municipalities are imposing their own rules and regulations. For example, New York State employers are required to develop a written Safety Plan outlining how they will prevent the spread of COVID-19 in their workplace and to keep a copy of that plan on file and available to the New York State Department of Health or local health or safety authorities in the event of an inspection.

Employers can promote a safer workplace and minimize the risk of liability if employees or others get sick by following the CDC guidelines and local regulations. The CDC guidance, like many state or local regulations, focuses on four major topics: evaluation of the physical workspace, assessment of risk, implementation of workplace controls, and education of employees and supervisors.

Evaluation of the Physical Workspace

Prior to re-opening offices, the CDC recommends that employers (or building management) evaluate whether their office building is ready for occupancy. This includes ensuring that air ventilation systems, such as heating and air conditioning, work properly and circulate as much outside air as possible. Employers should also evaluate any other mechanical and life safety systems in their office to verify that no hazardous conditions associated with vacant buildings, such as mold, rodents or pests, or issues with stagnant water systems have developed while the office was closed.

Assessment of Risk

Employers should conduct "a thorough hazard assessment" of their workplace to identify where and how employees and visitors may be exposed to COVID-19 in the office. The assessment should identify potential workplace hazards that could increase risks for COVID-19 transmission as well as work and common areas — such as conference rooms, break rooms, cafeterias, reception areas, and entrances and exits (including elevators) — where employees could come in close contact (within six feet) with others. All employees and contractors who work in the office should be included in communication plans to minimize the risk of transmission of COVID-19 in these areas.

Implementation of Workplace Controls

The CDC recommends using a hierarchy of controls, including engineering and administrative controls, to reduce transmission of COVID-19 among employees. The goal of engineering controls is to maintain social distancing. These controls include modifying or adjusting seating

arrangements and workstations to maintain six feet of separation between employees and installing transparent barriers or other physical shields to separate employees and visitors where physical distance is not possible. In communal seating areas such as conference rooms or reception areas, chairs should be removed, re-arranged or blocked from use in order to maintain social distancing. Another option is to use tape, signs or other visual cues, placed six feet apart, to indicate where people should stand when physical barriers are not possible.

With respect to administrative controls, the CDC advises employers to “actively encourage” employees who are experiencing any symptoms of COVID-19 or who have a sick family member with symptoms of COVID-19 at home to notify their supervisor and stay home. Employees who become sick during the workday should immediately be isolated from other employees, provided a face mask if they are not wearing one already, and sent home with instructions to follow CDC guidance on self-isolation and follow-up with a healthcare professional. Employers should perform enhanced cleaning and disinfection after anyone suspected or confirmed to have COVID-19 has been in the office. Employers should also consider implementing the following administrative controls to change the way employees work:

1. Conduct daily in-person or virtual health checks (e.g., COVID-19 symptoms or temperature checks) before employees enter the office;
2. Stagger work shifts, start times, and break times when possible to reduce the density of employees in common areas;
3. Post signs in parking areas and entrances asking visitors to inform reception or security when they reach the facility so they can enter the building at staggered times and to wear cloth face coverings, avoid entering the building if sick, and stay six feet away from others, if possible, including limiting use and occupancy of elevators;
4. Develop, follow, and maintain a plan to regularly clean high-touch surfaces to reduce the risk of exposure to the virus that causes COVID-19 on surfaces;
5. Remind employees to wash their hands often (with soap and water, for at least 20 seconds), to use hand sanitizer when soap and water is not available, and to avoid touching their face;
6. Require that all employees who are able wear a cloth face cover to cover their nose and mouth in all areas of the workplace.

For New York employers, the required Safety Plan must also explain how the employer will ensure employees comply with physical distancing requirements; personal protective equipment requirements; hygiene and cleaning requirements; communication requirements; and screening and contact tracing requirements. The Safety Plan should also include any industry-specific guidance. The Department of Health’s “NY Forward Safety Plan Template” is available [here](#).

Education

The updated CDC guidance urges employers to educate employees and supervisors about steps they can take to protect themselves and others in the workplace using clear communication and training that is easy to understand. Topics for training include signs and symptoms of COVID-19 infection, staying home when ill, social distancing, personal protective equipment, hand hygiene practices, and identifying and minimizing potential routes of transmission at work, at home, and in the community. Employers should also consider whether additional training is needed on topics relevant to their particular industry or geographic location.

Returning to Work

Employers should also put plans in place now for situations they can reasonably expect to encounter when their workplaces re-open, such as employees who do not want to return to the office and what steps to take when an employee or visitor to the office develops symptoms of COVID-19. If an employee does not want to return to the office, an employer’s first step typically should be to determine why the employee is

hesitant to return. If the employee is hesitant because they are afraid of contracting COVID-19, but does not have any underlying health conditions that the employer is aware of and does not request an accommodation pursuant to the Americans with Disabilities Act (ADA), then the employer may consider allowing the employee to continue to telework (if the employee has been doing so) or to remain on unpaid leave, as long as the employer treats all similarly situated employees the same. Similarly, if an employee raises legitimate concerns about the safety of the workplace and the employer's compliance with best practices, then the employer should take those concerns seriously and reasonably try to address them before taking disciplinary action. A general fear of contracting COVID-19, however, is not in and of itself a disability, and an employer can take disciplinary action if such an employee is required to be in the workplace but refuses to show up. If, on the other hand, the employee does not want to return to the office because the employee has an underlying health condition identified by the CDC that puts them at a higher risk for severe illness from COVID-19, employers should support and encourage telework options and engage in the interactive process required by the ADA to determine whether there is a reasonable accommodation available to the employee.

The CDC has also issued guidance on actions employers should take when an employee is suspected or confirmed to have COVID-19. While the CDC is clear that, in most cases, it is not necessary to close the workplace in response to a single COVID-19 infection, employers should close off any areas used for prolonged periods of time by the sick person if less than seven days have passed since the sick person was in the office. Once the sick person is sent home, employers should wait 24 hours (or as long as possible if 24 hours is not feasible) before cleaning and disinfecting those closed off areas to minimize the potential of other employees being exposed to respiratory droplets. During the waiting period, the CDC recommends opening outside doors and windows to increase air circulation in areas used by the sick person. If seven days or more have passed since the sick person was in the office, then additional cleaning and disinfection is not necessary, but the employer should continue routinely cleaning and disinfecting all high-touch surfaces in the workplace.

Employers should also determine which employees may have been exposed to the sick person and inform those employees of their possible exposure to COVID-19 while maintaining the confidentiality of the sick person. Employers should instruct potentially exposed employees to stay home for 14 days, telework if possible, and self-monitor for symptoms. Employers should also keep in mind that the re-opening of the economy in many regions does not mean that all employees must return to the office. The CDC guidelines encourage employers to continue to allow teleworking where feasible. Finally, employers who are considering extending existing furloughs or laying off employees should carefully analyze whether those actions are covered by federal or local WARN Acts and ensure that their actions pass muster with applicable anti-discrimination and worker protection statutes and regulations.

Conclusion

The COVID-19 pandemic has had, and will continue to have, a significant impact on the workplace. Recent updates to CDC, state and local guidance emphasize the importance of employer preparedness and advance planning for re-opening closed workplaces and mitigating risks for both employers and their employees as employees return to their offices. Given the evolving guidance from the CDC and state and local governments, employers are encouraged to consult legal counsel to assist in assessing their preparedness and plans for re-opening their workplace.

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Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, boxer@clm.com), **Judith A. Lockhart** (212-238-8603, lockhart@clm.com), **Bryan J. Hall** (212-238-8894, hall@clm.com), **Alexander G. Malyshev** (212-238-8618, malyshev@clm.com), **Melissa J. Erwin** (212-238-8622, erwin@clm.com) and **Leonardo Trivigno** (212-238-8724, trivigno@clm.com). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.

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