# Return to Business: Getting Back to Work Safely with Testing, Monitoring, and Safety Best Practices

*As the country slowly pivots to reopening, questions abound around how employers can safely restart operations while dealing with a cautious workforce and uncertain economy. What legal and practical employment and safety hurdles can employers anticipate when restarting business operations and bringing employees back to the workplace?*

**This is a summary only; please contact a Seyfarth attorney for any legal advice or guidance needed.**

## Legal Considerations

As employers plan to safely reopen workplaces, they will need to consider state and local executive orders, as well as OSHA, CDC and EEOC guidance. There may also be industry-specific guidance documents that apply. While state and local plans to reopen business contain similarities such as wearing masks and proper use of social distancing, there are critical differences with regard to the details so it is important for employers to know which executive orders affect their facilities based on jurisdiction. City or county orders might be more restrictive than a state order. Also, as the medical community learns more about the virus and how to combat it, these orders and guidance may change so employers will need to stay up-to-date. If the orders are unclear, the CDC recommendations can be used as a guideline.

## Infectious Disease Preparedness and Response Plan

Prior to reopening the workplace, businesses will need to develop an Infection Disease Preparedness and Response Plan. Employers should conduct a COVID-19 risk assessment to determine the level of risk associated with the worksite and job tasks. The Preparedness and Response plan should:

- Detail basic infection prevention measures.

- Establish robust housekeeping and cleaning schedules.

- Establish policies for employee work flow throughout the facility.

- Develop processes for identifying and addressing sick employees.

All employees should be trained on any new policies and procedures prior to restarting operations and the training should be updated and refreshed as needed.

Employers should also consider procedures for how third parties can safely visit the worksite and develop contingency plans for potential future outbreaks. It is essential, especially for worksites that have been sitting idle, that all equipment be visually inspected to ensure it is safe to restart and that all employees are up-to-date on trainings or certifications.

## Pre-Shift Screening and Temperature Taking

Screening of employees before they return to work is important for several reasons. Generally, employers want to provide a safe and healthy workplace and screening will reassure both your employees and any visitors to your workplace such as customers or vendors, that you are following the recommended guidelines provided by the CDC and your state and local authorities. Screening also will help you avoid legal and reputational risks that could develop from employees testing positive.

Employers must determine which method of screening works best for their business. Options include:

- Written or electronic questionnaires that each employee completes that asks if the employee has experienced any COVID-19 symptoms or been exposed to someone who has symptoms or who has tested positive. These questions can also be asked verbally by the employer.

- Posting questions near a time clock with a statement that employees who sign in for work affirm that answers to all COVID-19 symptom and exposure questions is no.

- Taking the employee's temperature.

For screenings that involve employee interaction such as verbally asking questions of employees or taking an employee's temperature, it is important to protect the employee who is performing the screening by ensuring the proper protective gear is utilized. Employers also need to protect the privacy of any employee who does not pass the screening and needs to be sent home. Additional consideration needs to be given about record keeping with regard to the screening. If the employer is going retain the screening results, it is important to fulfil the ADA requirements about confidentiality and separate record keeping.

## Testing as a Condition of Return to Work

The EEOC has approved mandatory testing as a condition to return to work with caveats that employers must ensure that the tests are accurate and reliable and that FDA and CDC guidance is reviewed regularly to know what tests are recommended. Employers can choose to run either a diagnostic test or an antibody test; each come with their own pros and cons. However, the results of both types of tests will need to be analyzed by FDA-certified labs. Testing of employees also imposes certain obligations on employers such as establishing and following medical privacy duties and protocols, reporting positive results only to required authorities such as local health officials, and balancing employee privacy against the need-to-know of any co-workers who have potentially been exposed.

## Responding to Positive COVID-19 Tests in the Workplace

If an employee tests positive for COVID-19 the employer should confirm the diagnosis and the timing of the onset of symptoms, either with the employee or with someone with first-hand knowledge of the diagnosis such as a family member. The employer should then try to determine the activity of the employee for 48 hours prior to symptom onset in order to identify any employees that he/she may have come into contact with and to also determine where in the workspace the employee has been in order to properly clean and disinfect the area. The CDC has issued guidance for cleaning and disinfecting

...

businesses which is included within the PowerPoint presentation or can be found at
www.coronavirus.gov. Employers should report the positive test to local health officials if required.

In terms of having an employee return to work who has tested positive for COVID-19, there are two options. The first is symptom-based and requires that the employee has had no fever for 72 hours, their respiratory system symptoms have improved, and it has been at least 10 days since symptoms appeared. The second option is test-based and also requires that the employee have no fever, their respiratory system symptoms have improved, and that they have had two negative tests in a row that are more than 24 hours apart.

## Material is Summarized From a Presentation By:

James Curtis, Partner
Karla Grossenbacher, Partner
Condon McGlothlen, Partner