



Return to Business in Texas: Practical Tips and Legal Risks as Texas Businesses Reopen

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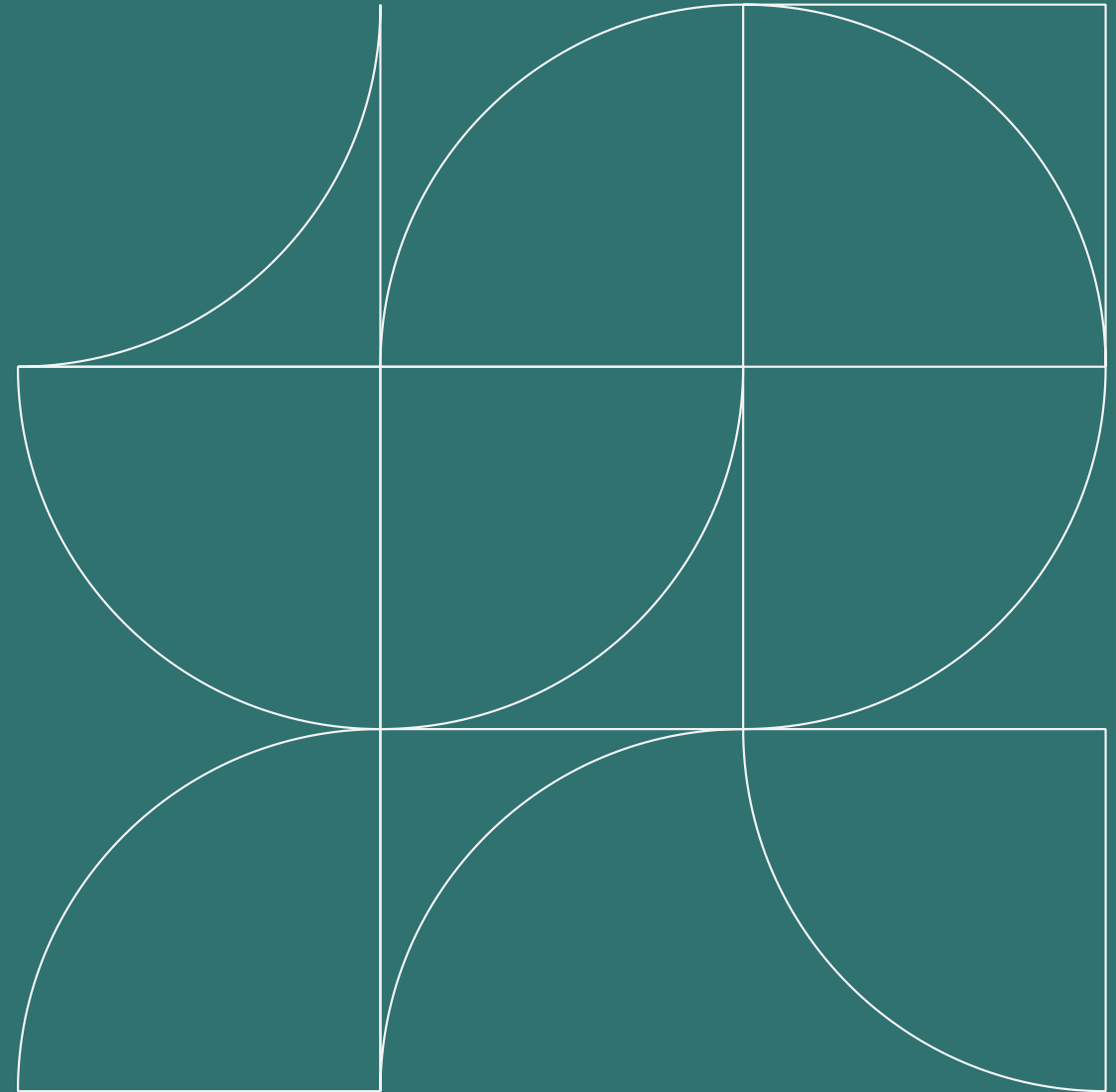
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Agenda

- 01** Texas Reopening/Return to Work
- 02** Health and Safety Protocols to Consider
- 03** Medical Exams and Handling Employees Who Refuse to Return
- 04** Public Accommodations During the Pandemic
- 05** What is Next in COVID-19 Wage & Hour Litigation
- 06** Compliance Tips & Traps Under the FFCRA

Texas Reopening/ Return to Work



Reopening Businesses in Texas

Phase 1: May 1, 2020

Governor Abbott's Plan to Reopen – Phase 1

- **Not many changes**, except for in-store retail/restaurants
- Texans “shall” continue to follow social-distancing/limit gatherings except where necessary to provide/obtain **essential services or “reopened services”**
- “Reopened services” include “services...by an individual working alone in an office” (sole proprietors/practitioners)
- Most retail can reopen at 25% capacity (also includes restaurants, movie theaters, malls, museums, libraries)
- Non-urgent surgeries permissible subject to capacity to handle surges and availability of PPE
- **Self-quarantine** for certain travelers into Texas extended
- Phase 2 reopening (barbershops bars and gyms) planned for May 18, 2020 (hair and nail salons open May 8, 2020)

Reopening Businesses in Texas

Local Stay-at-Home Orders Extended

readyharris.org/Portals/60/documents/050120-Second-Amended-Stay-Home-Work-Safe-Phased-Reopening-of-Services.pdf

Local Counties Extend Stay at Home Orders

- Numerous counties (Bexar, Dallas, Harris, Tarrant, etc.) have extended stay home stay safe orders
- On May 1, 2020, Harris County order was **extended through May 20, 2020**
 - Non-essential businesses and others not “reopened” by Governor Abbott’s order **must remain closed**
 - Work at home still permitted for all business
 - Continue to follow social-distancing guidelines
 - Over age 65 “strongly encouraged” to stay home
 - No visits to nursing homes/assisted living facilities
 - If positive test for COVID-19 in household, **all household residents must self-quarantine until cleared**
 - Masks or face coverings required (but no enforcement)

Some Key Considerations for Reopening

Preparing a Return-to-Work Plan

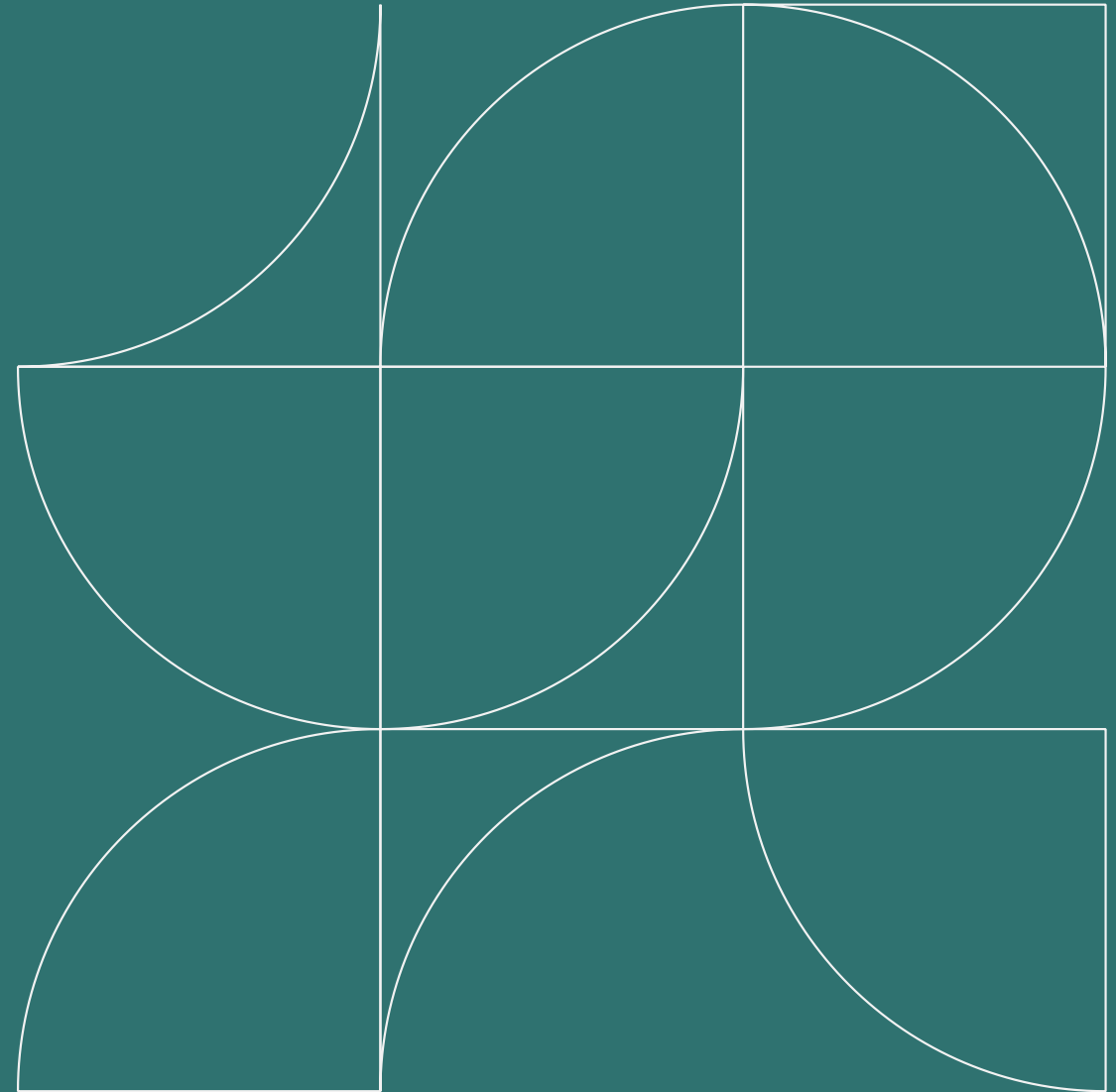


<https://www.seyfarth.com/news-insights/return-to-business-and-post-pandemic-planning-issue-checklist.html>

A Comprehensive Return to Work Plan

- Update employment policies and other practices
 - Leaves, PTO, schedules, wage hour, **safety protocols**, accommodations, business travel, new posting requirements, etc.
- Determine which employees will return (and how & when), which will continue to work remotely, and whether employees are safe to return
- Evaluate/consider new hiring practices in light of COVID-19
- Communication plans, orientation, and **training for employees and managers** re: new policies/protocols (also reaffirm existing policies)
- Bring work from home to an orderly close
 - Return documents, equipment, inventory/reinstate security/IT access
 - **EEs certify accuracy: wages, PTO banks, timekeeping, meal breaks**
 - Reimbursement of expenses incurred during shutdown
- Anticipate and plan for more requests for time off, reasonable accommodations, remote work, etc. due to COVID-19
- Determine if there is a need to bargain with any union(s) regarding return to work policies, protocols, and/or practices

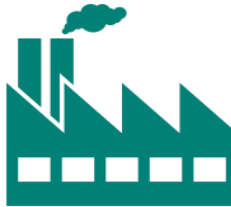
Health & Safety Protocols to Consider



Industry Considerations



Consumer Facing Companies



Industrial, Manufacturing, and Construction Companies

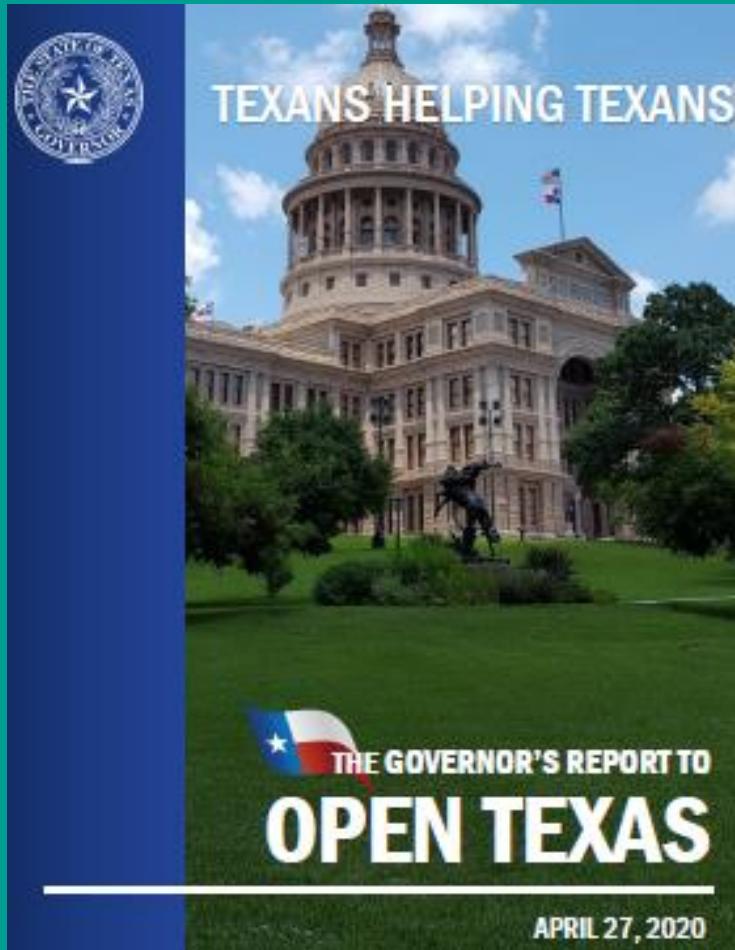


Office-Based Companies



High Consumer Density Companies

Governor Abbott's Safety Recommendations for Providing Essential/Reopened Services



- Follow the protocols and recommendations from the Texas DSHS, the CDC, and OSHA
- Texans are “**encouraged to wear appropriate face coverings**” (cannot enforce with civil/criminal penalties)
- Consider also:
 - Other state/local executive orders re: safety/restrictions
 - **Industry-specific guidance** from OSHA/CDC
- Many good reasons to comply:
 - **Keep your workers, their families, and our communities safe**
 - Encourage workers and customers to return
 - OSHA (employers must provide workplace free from recognized hazards likely to cause death or serious physical harm)
 - Potential **defense to negligence claims**

CDC/OSHA Interim Guidance



www.osha.gov/Publications/OSHA3994.pdf

osha.gov/Publications/OSHA3990.pdf

cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html

Some Minimum Health/Safety Protocols to Consider for Returning to Work

- **Social distancing**
 - Physical modifications to workplace
 - Limiting in-person interactions and physical contact
 - Updates/changes to employee schedules
 - Encourage remote work (when feasible), particularly high-risk workers
- **Screening protocols** for employees, customers, visitors, etc.
- Providing appropriate PPE (masks, gloves, face shields, etc.)
- Cleaning and sanitation (facilities, workstations, etc.)
- Communication plan and **training re: new safety protocols**
- Plan to identify, isolate, remove, track cases/exposure at work

***NOTE:** This is not an exhaustive list; requirements will differ depending on industry/job classification (potential exposure risk). May need to accommodate disability or religious issues

OSHA's “Ten Steps to Reduce Risk of Exposure”



[osha.gov/Publications/OSHA3994.pdf](https://www.osha.gov/Publications/OSHA3994.pdf)

- 1 Encourage workers to stay home if sick.
- 2 Encourage respiratory etiquette, including covering coughs and sneezes.
- 3 Provide a place to wash hands or alcohol-based hand rubs containing at least 60% alcohol.
- 4 Limit worksite access to only essential workers, if possible.
- 5 Establish flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), if feasible.
- 6 Discourage workers from using other workers' phones, desks, or other work tools and equipment.
- 7 Regularly clean and disinfect surfaces, equipment, and other elements of the work environment.
- 8 Use Environmental Protection Agency (EPA)-approved cleaning chemicals with label claims against the coronavirus.
- 9 Follow the manufacturer's instructions for use of all cleaning and disinfection products.
- 10 Encourage workers to report any safety and health concerns.

For more information, visit www.osha.gov/coronavirus or call 1-800-321-OSHA (6742).

Texas Department of Health State Services Checklists

gov.texas.gov/uploads/files/organization/opentexas/OpenTexas-Report.pdf

MINIMUM STANDARD HEALTH PROTOCOLS



CHECKLIST FOR ALL EMPLOYERS

Page 1 of 2

In accordance with Governor Abbott's executive order GA-18, the following are the minimum recommended health protocols for all businesses choosing to operate in Texas. Employers may adopt additional protocols consistent with their specific needs and circumstances to help protect the health and safety of all employees and customers.

The virus that causes COVID-19 can be spread to others by infected persons who have few or no symptoms. Even if an infected person is only mildly ill, the people they spread it to may become seriously ill or even die, especially if that person is 65 or older with pre-existing health conditions that place them at higher risk. Because of the hidden nature of this threat, everyone should rigorously follow the practices specified in these protocols, all of which facilitate a safe and measured reopening of Texas. The virus that causes COVID-19 is still circulating in our communities. We should continue to observe practices that protect everyone, including those who are most vulnerable.

Please note, public health guidance cannot anticipate every unique situation. Employers should stay informed and take actions based on common sense and wise judgment that will protect health and support economic revitalization. Employers should also be mindful of federal and state employment laws and workplace safety standards.

Health protocols for your employees:

- Train all employees on appropriate cleaning and disinfection, hand hygiene, and respiratory etiquette.
- Screen employees before coming into the business:
 - Send home any employee who has any of the following new or worsening signs or symptoms of possible COVID-19:
 - Cough
 - Shortness of breath or difficulty breathing
 - Chills
 - Repeated shaking with chills
 - Muscle pain
 - Headache
 - Sore throat
 - Loss of taste or smell
 - Diarrhea
 - Feeling feverish or a measured temperature greater than or equal to 100.0 degrees Fahrenheit
 - Known close contact with a person who is lab

Houston Greater Partnership

Work Safe 2.0 Principles

<https://www.houston.org/news/work-safe-20-principles-guide-reopen-houston-safely>

Work Safe 2.0: Principles to Guide Reopen Houston Safely

Published Apr 29, 2020 by A.J. Mistretta

As the Houston region moves to reopen our economy, it is important that we do so safely, sustainably and successfully. To aid companies planning to reopen or expand their operations, the Greater Houston Partnership is sharing principles to help businesses develop plans to protect the health of their employees and customers by reducing the risk of transmission of the COVID-19 virus.

Businesses have a vested interest in getting this reopening right. All businesses should want to keep their employees and customers safe — and feeling safe — as they return to “normal” operations. Get **industry-specific guidance**, learn more about the Partnership's **Houston Work Safe Program** and pledge to employ these principles at your company today.

This list of principles has been modified from the Partnership's original Work Safe principles to reflect evolving federal and state guidance, and this list either meets, exceeds or expands on that guidance.

Work Safe 2.0 Principles

- 1. Allow all but essential on-site employees to work from home.**
While companies may maintain on-site workers to complete specific business tasks, employers should continue to allow all but those necessary employees to work remotely.
- 2. Create a safe work environment for all on-site employees.**
 - Create physical separation. Health officials advise that all individuals should remain at least six feet apart to avoid possible transmission. Employers should establish protocols that allow all on-site employees to maintain a distance of at



Continue Reading

MEMBERSHIP ECONOMY

COVID-19 Resources



COVID-19 BUSINESS RESOURCES

Get updates, toolkits and timely information about the virus and its economic impact.

[Learn More](#)



VIRTUAL PROGRAMMING

Register to connect with experts and members to discuss timely topics.

Houston Greater Partnership

Industry-Specific Safety Guides/Protocols

<https://www.houston.org/worksafe#toolsguidance>



[Houston Work Safe Program](#)

Houston Work Safe Program

As the Houston region moves to reopen our economy, it is important that we do so safely, sustainably and successfully. This must be a gradual and deliberate process; one that balances the health of our community with the need to reopen industry as we move toward a new normal. The

business community has a vested interest in getting this right. We know Houston has the can-do spirit, positive attitude, and hearty resilience to be an example to cities around the world of what a successful, smart, and sustainable recovery looks like.

General Guidance [▼](#)

High-Touch Sectors [▼](#)

Industrial Sector [▼](#)

Office/Knowledge Sectors [▼](#)

Healthcare Sector [▼](#)

Logistics/Transportation Sector [▼](#)

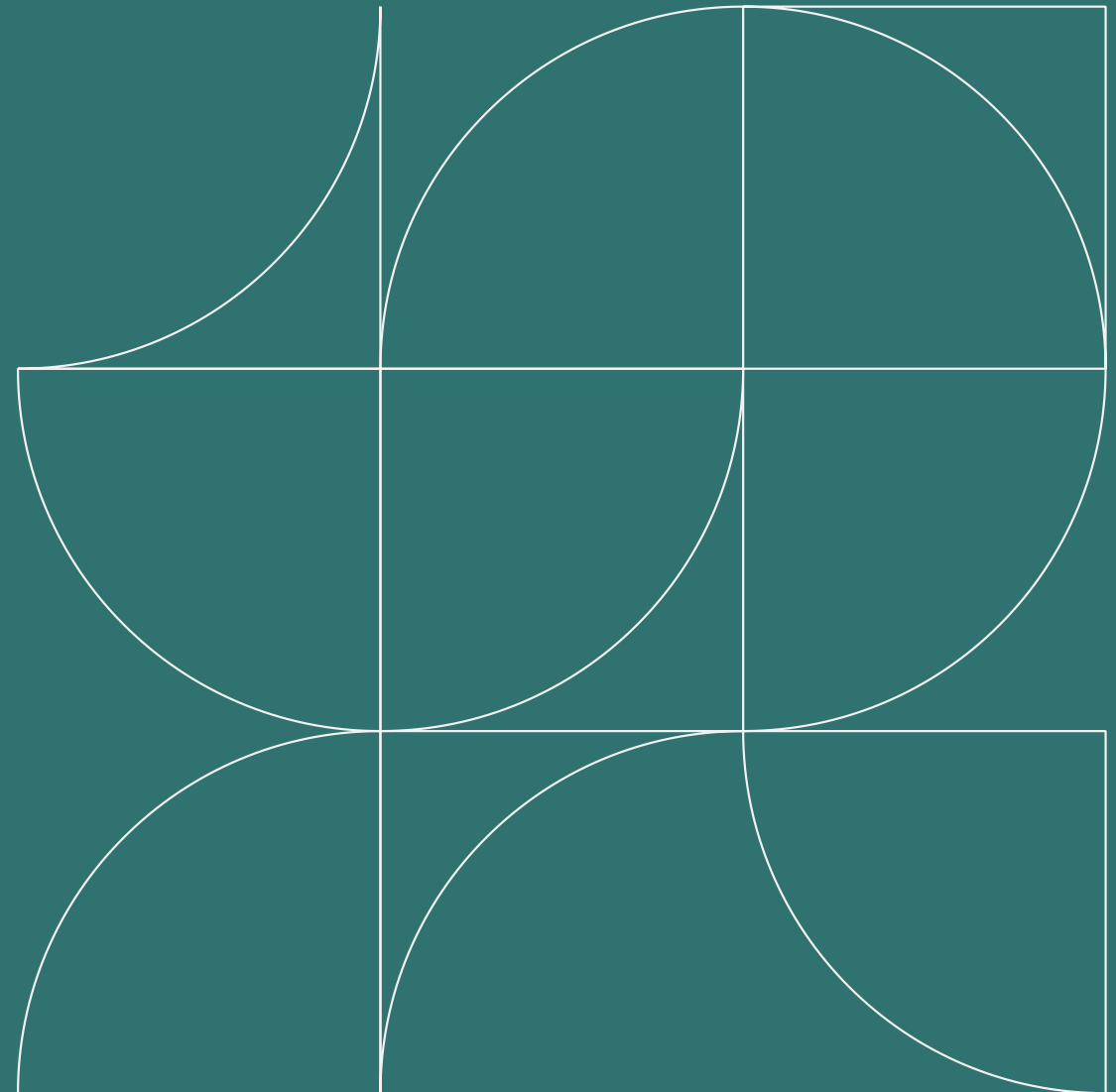
Small Business Sector [▼](#)

Education Sector [▼](#)

Social Services Sector [▼](#)

A total of **156** Houston area businesses have committed to becoming Work Safe Companies so far. Please sign the pledge to add your company to the list.

Medical Exams and Handling Employees Who Refuse to Return



CHECKLIST FOR ALL EMPLOYERS

Page 1 of 2

In accordance with Governor Abbott's executive order GA-18, the following are the minimum recommended health protocols for all businesses choosing to operate in Texas. Employers may adopt additional protocols consistent with their specific needs and circumstances to help protect the health and safety of all employees and customers.

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Please note, public health guidance cannot anticipate every unique situation. Employers should stay informed and take actions based on common sense and wise judgment that will protect health and support economic revitalization. Employers should also be mindful of federal and state employment laws and workplace safety standards.

Health protocols for your employees:

- Train all employees on appropriate cleaning and disinfection, hand hygiene, and respiratory etiquette.
- Screen employees before coming into the business:
 - Send home any employee who has any of the following new or worsening signs or symptoms of possible COVID-19:

| | |
|---|--|
| <ul style="list-style-type: none"> - Cough - Shortness of breath or difficulty breathing - Chills - Repeated shaking with chills - Muscle pain - Headache | <ul style="list-style-type: none"> - Sore throat - Loss of taste or smell - Diarrhea - Feeling feverish or a measured temperature greater than or equal to 100.0 degrees Fahrenheit - Known close contact with a person who is lab confirmed to have COVID-19 |
|---|--|
 - 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

ALL EMPLOYERS: Page 2 of 2

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).
- Have employees wash or sanitize their hands upon entering the business.
- Have employees maintain at least 6 feet separation from other individuals. If such distancing is not feasible, other measures such as face covering, hand hygiene, cough etiquette, cleanliness, and sanitation should be rigorously practiced.
- If an employer provides a meal for employees, employers are recommended to have the meal individually packed for each employee.
- Consistent with the actions taken by many employers across the state, consider having all employees wear cloth face coverings (over the nose and mouth). If available, employees should consider wearing non-medical grade face masks.

Health protocols for your facilities:

- Regularly and frequently clean and disinfect any regularly touched surfaces, such as doorknobs, tables, chairs, and restrooms.
- Disinfect any items that come into contact with customers.
- Make hand sanitizer, disinfecting wipes, soap and water, or similar disinfectant readily available to employees and customers.
- Place readily visible signage at the business to remind everyone of best hygiene practices.

Reopening Businesses in Texas

New Texas Workforce Commission Guidance for Unemployment Claims

<https://www.laborandemploymentlawcounsel.com/2020/05/sidelined-workers-in-texas-can-refuse-to-return-to-work-and-still-retain-unemployment-benefits-but-new-twc-rules-do-not-provide-job-protection/>

Unemployment Benefits Will Still Be Granted to Individuals Who Refuse Suitable Work

- “Qualifying” Reasons:
 - At High Risk: People 65 years or older
 - Household member at high risk
 - Diagnosed with COVID and is not recovered
 - Family member w/ COVID, not recovered, 14-day
 - Currently in 14-day quarantine due to exposure
 - Child’s school or daycare closed and no alternatives are available
- New guidance **does not require** reinstatement/job protected leave
- Caution: Some “qualifying” reasons may overlap with other legal protections (FFCRA, FMLA, ADA, etc.) that **may require job protection/reinstatement**
 - Do not rush to terminate if workers refuse to return
 - Communication is key

Determining if Individual Employees are Safe to Return and Work

Temperature Checks

- Permitted only given the pandemic
- **Note:** Not all persons with COVID-19 have fevers
- Privacy and social distancing needs to be implemented, and PPE used
- Time spent before the start of regular work hours is considered compensable time
- Follow CDC guidelines

Determining if Individual Employees are Safe to Return and Work

Blood Oxygen Level Testing

- Evidence low oxygen level is an early indicator of COVID-19
- **But:** The FDA has not approved the use of oximetry as a method of testing for COVID-19
- There are many reasons for why blood oxygen levels may be low
- EEOC has not specifically stated employers may use this test, unlike temperature tests

Determining if Individual Employees are Safe to Return and Work

COVID Testing

- Permitted to require employees entering the workplace take a COVID test because an individual with the virus will pose a direct threat to the health of others
- Tests must be accurate and reliable in accordance with FDA guidance, CDC and public health guidance
- In considering accuracy and reliability, must consider the incidence of false positives or false negatives

Determining if Individual Employees are Safe to Return and Work

COVID Antibody Testing

- EEOC has not spoken directly on antibody tests
 - Believed permitted under same rules and terms for COVID testing
- If done, recommend FDA approved test, but limited number of such tests
 - Tests can have a high false positive/negative rate
- Unknown whether people with antibodies are immune or for how long
- Pros and cons of such tests

What Are Face Coverings?



- **Face Coverings, also known as disposable or cloth masks, are not considered workplace PPE**
- **Company-issued or home face coverings are permitted to be worn**
- A face covering is a well-fitting mask that may help block transmission of large-particle respiratory droplets if properly worn
- These coverings have elastic bands or ties that can be looped behind your ears or tied behind your head to hold it in place
- A metal strip may be present at the top of the covering and can be pinched to fit the mask around your nose
- Face coverings are **NOT** a substitute for social distancing
- Additionally, the protection provided by this equipment is effective only when used in combination with frequent hand-cleaning with alcohol-based hand rub, or soap and water
- Face coverings are **NOT** to be shared between individuals

How To Wear Face Coverings

1. Before putting on a face covering, clean hands with alcohol-based hand rub or soap and water
2. Hold the covering by the ear loops and place a loop around each ear
3. Cover mouth and nose with the covering and make sure there are no gaps between your face and the covering; if a metal band is present, pinch to form around the nose
4. Adjust the covering to cover the mouth and chin
5. Avoid touching the covering while using it; if you do, clean your hands with alcohol-based hand rub or soap and water



Care and Disposal of Disposable Face Coverings



- **Disposable masks are intended for single day use only**
- **To remove the face covering:**
 - Remove it from behind
 - Do not touch the front of mask
 - Discard immediately in a designated trash bin at the end of day
 - Clean hands with alcohol-based hand rub, or soap and water
- **If face cover is temporarily removed:**
 - Carefully fold so outer surface is held inward and against itself
 - Folded mask can be stored in a clean paper bag, labeled with your name
- **If your covering is damaged or soiled, or if breathing through the mask becomes difficult:**
 - Remove the face mask, discard it and replace it with a new one

Care and Maintenance of Cloth Face Coverings



- A cloth face covering should be **washed or otherwise cleaned** daily
- A cloth face covering can be safely **sterilized/ cleaned by washing in a washing machine with detergent**
- Individuals should be careful **not to touch their eyes, nose, and mouth** when removing their cloth face covering and wash hands immediately after removing
- **If a cloth face cover is removed**, carefully fold so that the outer surface is held inward and against itself.
- The folded mask can be stored in a **clean paper bag**, labeled with your name

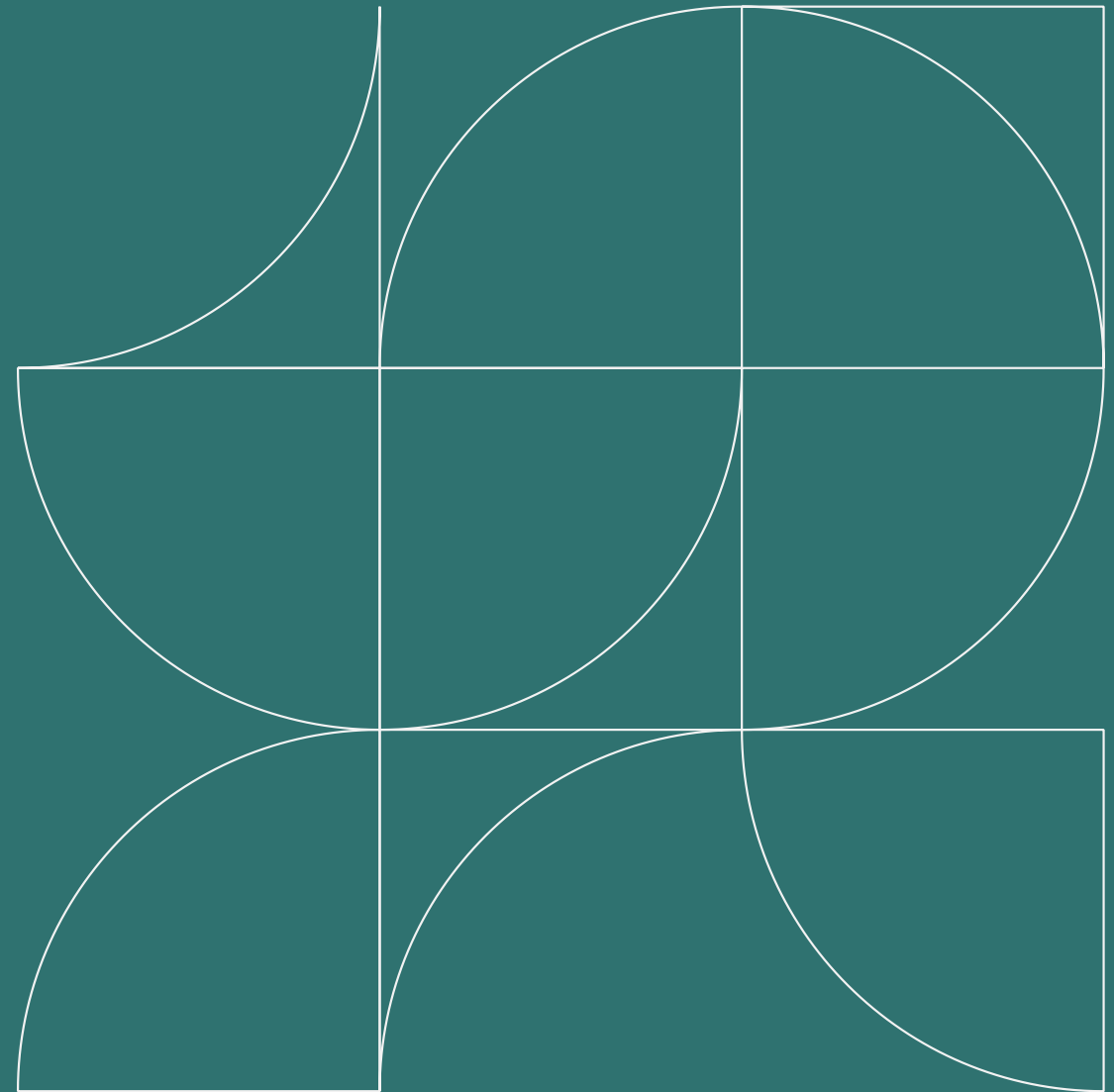
Requests to Work Remotely

Has the Remote Work Philosophy Changed?

Productivity Established?

- Reasonable disability accommodations (including revisiting pre-COVID-19 accommodation request denials)
- Fear of COVID-19 (note: potential ADA and whistleblower issues)
- Membership in a vulnerable population
- Allegation(s) of violations of health and safety orders and/or laws or need to quarantine due to potential exposure
- Child/senior care challenges
- Transportation challenges
- Household family members being in a vulnerable population (pre-vaccine) (e.g. underlying medical conditions/ immuno-compromised or senior citizens)
- Personal reasons

Public Accommodations During the Pandemic



Overview: ADA Title III Requirements

- ADA requires public accommodations to ensure equal access for individuals with disabilities
- ADA requires “reasonable modification” of policies, practices and procedures and the provision of “auxiliary aids and services” to ensure effective communication with individuals with disabilities
- ADA departs from other antidiscrimination statutes by requiring affirmative steps to ensure access by persons with disabilities
- Private Right of Action:
 - Injunctive and declaratory relief
 - Attorneys’ fees and costs
- DOJ Enforcement:
 - Damages
 - Civil penalties
- Also, Section 508 of the Rehabilitation Act imposes related requirements for recipients of federal funds

Limitations on Scope of Affirmative Steps

- Undue Burden
- Fundamental Alterations
- **NOTE:** Similar to the employment context, how we evaluate undue burden and fundamental alterations is affected by how businesses acted during Phase 1 (stay home/stay safe)
- Cannot charge persons with disabilities needing accommodations more for affirmative steps

Action: Expanded Web Presence or Reliance

- Many public accommodations modified or expanded websites to recapture revenue lost by stay home/ stay safe orders
- Confusing DOJ regulation of accessible websites
- Court involvement
- **Bottom Line:** In most jurisdictions, liability for lack of an accessible website

What is an “Accessible” Website

- Web Content Accessibility Guidelines (WCAG) 2.0 AA
- Not a regulatory standard for public accommodations websites under Title III of the ADA
- Used in all DOJ settlements
- Legal standard for recipients of federal funds under Section 508 of the Rehabilitation Act
- WCAG 2.1 now available
- Screen reader readable for visual content
- Closed captioning for video content on sites

Roadmap to Website Accessibility

- Unlike many Title III regulations, it is difficult to “eyeball” compliance and not easily subject to checklists
- Engage accessibility expert to audit website/mobile app, one that can be used by people with various types of disabilities
- Prioritize most frequently used portions of the website first
- Make accessibility improvements to website (sometimes requires reworking of entire site)
- Final goal is WCAG 2.0 AA conformance
- Train team on how to maintain accessibility as amendments and additions to the site are made
- Re-audit after big changes, or annually

Action: Special Hours for At-Risk Groups

- Some retailers (especially grocery stores) permitted only at risk groups to shop for a period before opening to the general public
- Definition of disability has not changed under the law, but perhaps conceptions of who has a disability may evolve (e.g., people with cancer have compromised immune systems, elderly people are not able to fight of COVID-19 as well)
- Do not necessarily have to keep same hours as used during Phase I until herd immunity is accomplished across the population, but what policy modifications are reasonable may have shifted

Action: Introduction of Curbside Pickup

- Some businesses permitted customers to place orders and pick them up curbside at the brick and mortar facility
- As retailers open, some customers may want to continue to have such services, and those customers may or may not identify themselves as having a disability
- Particularly during a period in which retailers are not permitted to have the store at maximum capacity of customers, it may not be an undue burden to still offer curbside service
- If a business offered curbside pickup, it will have more difficulty showing that it meets the “fundamental alteration” standard
- May not charge more for reasonable accommodations to customers with disabilities

Examples of Other Actions with Potential Accessibility Issues

- Barriers between customers and staff
- Changes in payment processing
- Virtual services:
 - Medical appointments
 - Tutoring
 - Therapy
- Ongoing use of limited menus
- Others?

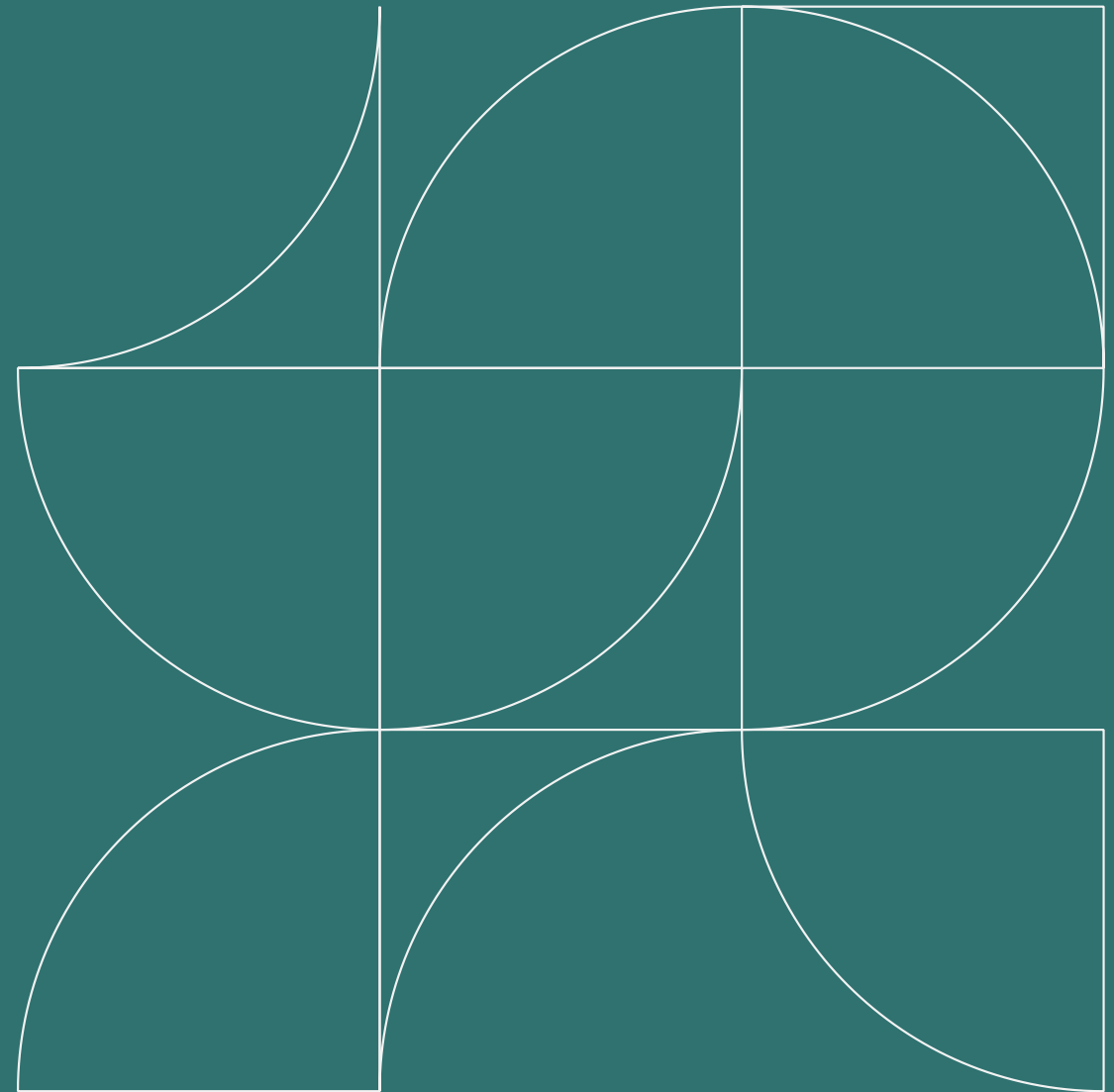
Policy Modifications and Rule Enforcement

- Some businesses are adopting policies for staff and customers with respect to PPE and social distancing
- Expect customers to ask managers to help enforce the rules you adopt, and if a business has adopted a policy, it is difficult to say that the policy or enforcement of it is unreasonable
- Some customers may ask to you modify or adopt rules to provide additional protections (no mask, no service)
- Expect requests to keep policy modifications as the governing authorities start to lift or relax rules
- **Reminder:** ADA requires reasonable modifications to policies necessary to serve customers with disabilities

Thinking Through the New Normal of Accessible

- Day 1 of Phase 2 will **not** be a permanent situation: What it means to be “open” will change, the public is hearing different messages, and individuals will make decisions about what they “should” do
- Think ahead of the standards you will apply to keeping both employees and customers safe, including customers with disabilities
- Train staff on accommodating customers with disabilities without asking intrusive questions
- Train staff on enforcement of rules of your business, including complaints about other customers not following those rules
- Communicate with the public about how you are making decisions, emphasizing that things may change
- Offer ways for customers to communicate concerns and engage with those concerns

What is Next in COVID-19 Wage & Hour Litigation



What is Next in COVID-19 Wage & Hour Litigation

Exempt Misclassification Claims

Because of COVID, we expect to see the following individual claims and class/collective actions:

- **Salary Level:**
 - Reduction of exempt employees' salary below the federal or state exemption level (federal \$35,568)
- **Salary Basis:**
 - Reduction of hourly requirements of an exempt employee and reduction of salary by a commensurate amount [i.e. 20% reduction in pay for 20% reduction in work]
 - Furloughs: exempt employee on furlough who:
 - Keeps working, e.g., answers emails and texts during furloughed period
 - Starts furlough in the middle of a work week but is not paid for the entire week
- **Duties Dilution:**
 - Changes in duties results in loss of exempt status; manager spends more than 50% of time doing non-exempt duties [sanitizing, working cash registers, etc.]

What is Next in COVID-19 Wage & Hour Litigation

We also expect to see individual claims and class/collective actions for:

- Off-the Clock or Hours-Worked claims
- Unrecorded time worked by remote workers
 - Travel time
 - Training time (e.g., for remote work)
 - Working through meal breaks
 - Continuous workday
 - Pre and post shift work
 - Cleaning
 - Sanitizing
 - Donning/Doffing
 - PPE

What is Next in COVID-19 Wage & Hour Litigation

State Specific Traps

Possible class/collective actions based on potential state law:

- Meal/Rest Break
 - Failure to grant the breaks, breaks interrupted, or more time required due to COVID-19
- Commission/Incentive Plan Claims
 - Failure to pay earned compensation
- Unilateral changes to commission plans giving rise to alleged contract breaches
- Claims for failure to reimburse employees for expenses for data, phones computers, etc.

What is Next in Discrimination

And Other Class Actions and EEOC Pattern and Practice Claims

As employees return to work, potential claims based on:

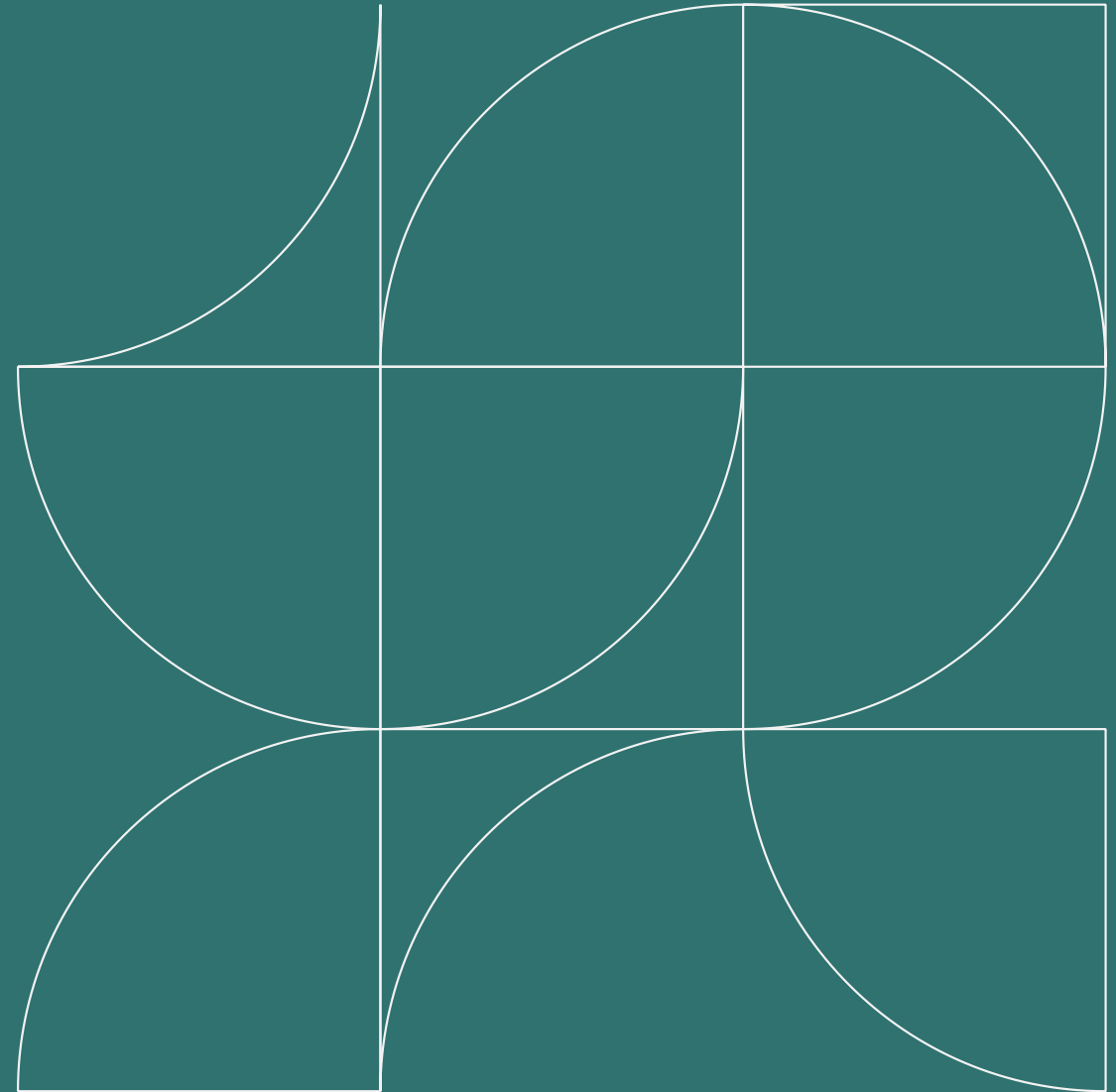
- In layoffs or rehiring:
 - Disparate Impact
 - Disparate Treatment
- Violations of:
 - HIPAA
 - GINA
 - ADA related to temperature checks
 - Symptom checks
 - COVID-19 tests
 - Antibody tests

Impact of COVID-19 on Jury Trials

Practically and
Emotionally

- **How soon are we going to start having trials and what will they look like?**
 - Sooner in Texas than in Massachusetts!
- **Jury Pool**
 - All will have been touched in some way by COVID-19
 - Views of employee rights may be affected by whether juror was an essential employee during the shut-down; working from home; furloughed; or laid off
 - Views on employers will vary
 - Was business interruption necessary? Overblown?
 - Did employer receive bailout which should have gone to plaintiff and other individuals? *We will reallocate now!*

Compliance Tips & Traps Under the FFCRA



FFCRA Compliance Tips & Traps

dol.gov/agencies/whd/pandemic/ffcra-questions

dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

dol.gov/agencies/whd/pandemic/ffcra-poster-questions

dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf

federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act

- Employees are eligible for EPSL immediate upon hire
- DOL poster: email & intranet okay/no posting if not covered by FFCRA
- Schools that have moved to on-line learning are still considered closed
- Childcare leave may **extend beyond end of school year** (i.e., daycare-aged children, summer camps, etc.)
- This is **NOT an additional 12 weeks of FMLA** (employees start with whatever FMLA they have remaining, and subtract EFMLA from there)
- FMLA used for employee's own serious health condition (even if because of COVID-19) is **not paid** (except for EPSL under FFCRA)

FFCRA Compliance Tips & Traps

dol.gov/agencies/whd/pandemic/ffcra-questions

dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf


dol.gov/agencies/whd/pandemic/ffcra-poster-questions

dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf

federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act

- Taking **EPSL/EFML on workers' comp. or STD/LTD**
 - Unless employee was able to return to light duty before taking the leave, the employee would not be eligible under FFCRA
- Consider **intermittent FFCRA leave**
 - If the employee is *teleworking*, then both EPSL and EFMLA can be taken intermittently with the **employer's approval**
 - If the employee is still working at the job site, intermittent leave can be taken only for school closure leave
- Employee cannot “unilaterally decide” to take leave as a precaution
- **No year end carryover** for EPSL
- **No payout of EPSL on termination** or separation, even if laid off

Seyfarth's COVID-19 Resources



Seyfarth **Post-Pandemic Recovery and Renewal**

Planning and Executing a Strategic and Successful Return to Work

We have assembled a cross-disciplinary Recovery and Renewal team who can advise you on the current state of business impact as a result of COVID-19, and what the future holds for business. Our team of 100+ lawyers is already deeply credentialed, having advised thousands of clients on the developments of the rapidly changing pandemic across the globe. We have a deep understanding of how the pandemic is affecting businesses and industries deemed essential and non-essential, and the related legal, business, and workforce issues specific to all. Likewise, we are already helping clients build phased return-to-work plans by modeling various scenarios for how business might resume—from continued social distancing to a full engagement of their workforces in full operations.

We are ready to leverage our knowledge to help you reengage in business—and grow.

We recognize that your business is unique and the legal landscape faces unprecedented complexity. Accordingly, we employ a three-step process to prepare a comprehensive, bespoke return-to-work toolkit for our clients.

1. Review

- Investigation and audit of pre-pandemic business status quo
- Step-by-step checklist addressing business elements and pandemic
- Establish goals and overall business strategy for near, mid, and long term

2. Analysis

- Business review in the new legal and business landscape using Seyfarth's in-depth **Return to Work Treatise**
- Strategic conversations regarding return-to-work timing, business considerations, and growth opportunities
- Identification of legal landmines with strategies for minimizing risk
- **Return to Work Selection Process Guide**

3. Implementation

- Execution of custom plan for return to work: phased/all/none; employee selection; employee screening protocol; workplace safety plan; communications cascade
- Access to Seyfarth's first-in-class **Policy, Communications & Tracker Repository**

| | | |
|----------------------------------|----------------------------|----------------------|
| • Positive test / confirmed Case | • Face covering | • Work from home |
| • Temperature screening | • Business travel | • FFCRA request |
| • Antibody testing | • Expense reimbursement | • Infectious disease |
| • Social distancing | • Visitor self-Declaration | |

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www.seyfarth.com/covid19

- **Seyfarth's COVID-19 Resource Center**

- www.seyfarth.com/covid19

- **Sign Up For Seyfarth's Latest COVID-19 Updates**

- <https://connect.seyfarth.com/33/48/landing-pages/rsvp-blank---covid-19.asp?sid=blankform>

- **Seyfarth Post-Pandemic Recovery and Renewal**

- <https://www.seyfarth.com/services/practices/advisory/post-pandemic-recovery-and-renewal.html>

- **Seyfarth COVID-19 Webinars on Demand**

- www.youtube.com/playlist?list=PLg0AI7yn7R3cVmPQJEUtYilEffzrSgJdv



Thank You!