

**Insights**

## **U.S. COVID-19: PREPARING A REOPENING PLAN - FIVE STEPS TO TAKE RIGHT NOW**

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As state governments and businesses look towards restarting the economy, the consensus is that as the U.S. gradually re-opens, the look and feel of businesses will change dramatically. Before the world can return to its full pre-COVID-19 normal, this interim period between the lifting of shelter in place orders and the broad distribution of vaccines or effective treatments is projected by experts to last at least one, and possibly as long as two years. This client communication will focus on public facing businesses which must significantly change their operations to reduce the risk of coronavirus transmission. Non-healthcare businesses which have frequent contact with the general public, such as retailers, are deemed by the Occupational Safety and Health Administration (OSHA) to be medium exposure risk. Before such businesses re-open, they should have a comprehensive reopening plan addressing the following:

### **1. Monitor Best Health Practices and Guidelines**

The Centers for Disease Control (CDC) sets national standards and guidelines for responding to COVID-19. The CDC uses its website to communicate with the public, which is updated frequently as their recommendations change based on circumstances. CDC recommendations are widely deemed to be standard practice for the United States, and cover a range of topics such as social distancing, treatment of surfaces and use of materials; they also contain specific guidance for both healthcare and non-healthcare related businesses. While the guidelines have changed over time as the situation has evolved, reliance on their recommendations offers a measure of protection as the CDC guidelines are the most widely adopted threshold standards in the United States. Before and during their reopening, businesses should:

- Appoint personnel to regularly monitor the CDC website for updates as well as the applicable state and local health agency recommendations and executive orders.
- Establish a protocol for regularly communicating changes to management and employees.
- Establish methods of modifying business operations as the standards evolve.

### **2. Comply with Employment Laws**

As employers plan their reopenings, each business must adapt employee duties to align with public health recommendations of the CDC, state and local public health authorities, and OSHA. Not only do employers need to be mindful of how social distancing and additional hygiene requirements will affect how work is performed, they must also be mindful of the potential pitfalls of failing to comply with a variety of employment laws, including the Americans with Disabilities Act (ADA) and other state and local discrimination laws. These laws can have a significant impact on the workplace, including:

- Limiting the types of information that employers may request from and/or share with employees, including personal medical information, family medical history, and participation in medical exams (such as temperature screenings, diagnostic exams, etc.).
- Creating leave entitlements and other accommodations for employees impacted by COVID-19; Establishing whether a case of COVID-19 must be recorded or reported under OSHA.
- Providing a procedure and protections for responding to employee complaints.

More in depth discussions of these topics are available at the following:

- A general overview of the potential measures and related issues that we suggest employers consider in preparing to return to work is available [here](#).
- A summary of factors that employers should consider when deciding whether to implement a temperature screening process is available [here](#), and guidance on developing and implementing such a process is available [here](#). With respect to testing, employers should refer to guidance from the CDC and consult with legal counsel before requiring any sort of testing in the workplace (either for diagnostic purposes or for potential future immunity purposes).
- Information about disclosing the identities of employees who have tested positive for COVID-19 in California (the state with the strictest privacy laws) is available [here](#).
- Information on recording or reporting employees' COVID-19 cases under OSHA is available [here](#)

### **3. Prepare for Safe Interactions with Clients and Customers**

Public facing businesses will need to incorporate CDC, state and local public health authorities, and OSHA recommendations and orders to maintain social distance between people moving within their premises, for customers and employees alike. To accomplish this, businesses should consider:

- Installing plexiglass shields and barriers where appropriate, between cashiers and customers, or, in the case of restaurants, between patrons to protect against droplet exposure.

- Controlling foot traffic in and out of their space, analyzing traffic patterns within their space, and enforcing strict limits on the number of customers allowed into stores.
- Adopting some form of online and social media selling strategies, along with free delivery and curbside pickup. As of the end of 2019, e-commerce sales had already exceeded 10% of total retail sales. While restaurants have already been utilizing curbside pickup and delivery, retailers of products as diverse as paint and barbecue grills have started to do the same.
- Utilizing online portals or other forms of electronic communication to minimize physical contact with customers.

In an effort to limit surface exposure, business owners should also consider:

- Eliminating high touch items such as shared coffee makers, vending machines, magazines in waiting rooms and sampling stations.
- Implementing CDC, state and local public health authorities, and OSHA recommendations on frequent surface cleaning and disinfecting.
- Asking employees to wear face masks and gloves, especially on the sales floor. OSHA standards may be relevant to the use of certain types of protective equipment used by employees.

In Asia, airports, amusement parks and retail stores employ walk-through temperature scanners, fever detection cameras and non-contact thermometers with guests as well as employees. With respect to clients and customers, this practice raises serious concerns under U.S. law, because in addition to the employment context, the ADA also prohibits disability discrimination in places of public accommodation. While the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the employment aspects of the ADA, has authorized temperature screening practices in the workplace, no equivalent guidance has been issued for places of public accommodation. As such, before implementing any sort of screening process for clients or customers, employers should consult with legal counsel.

#### **4. Establish Guidelines for Space Sharing and Control Issues**

There are many instances in which businesses either have or are perceived to have shared control and responsibility over space. This is especially true for businesses that operate as landlords, businesses that regularly work with third-party contractors/vendors, and franchisors/franchisees. Such businesses should consider the following:

- **Considerations for Landlords**
  - Develop a plan to comply with evolving CDC, OSHA (regarding employees), state and local guidelines regarding social distancing, cleaning, disinfecting, monitoring and other issues in

the common areas. Share your plans with your tenants to ensure they are following the new rules.

- Tenants, likewise, should communicate their needs and plans with landlords so that an efficient, safe and effective plan for coordinating returning to work is followed, in particular as it relates to common spaces, including garages and elevators.
- Landlords would be best served by communicating with tenants about the precautions they are taking to prevent the spread of COVID-19 and should provide warnings if they know that a person with COVID-19 has used common areas under their control. Additional information about premises liability is available [here](#).
- Add return to work best practices in owners association or building rules and manuals.
- Determine who is responsible for the additional costs associated with social distancing and sanitation practices. As between landlords, associations and tenants, documents such as the leases and association bylaws and covenants should be consulted to see how responsibilities and costs are borne.
  
- **Considerations for Invitees/Vendors/Third-Parties**
  - Assess the potential impact that vendors and third parties may have on COVID-19 transmission, including:
    - Again, follow the evolving CDC and state and local guidance with respect to these third-parties. Consider placing warning signs at entrances if there has been a known case of COVID-19 on the premises. Document your efforts.
    - Consider whether extra precautions are needed for certain vendors, in particular, inquire about cleaning/disinfecting services used by vendors. Ask your tenants to notify you of any COVID-19 known cases (but do not ask the identity of the person) and the areas where the person was present. You should also ask them to coordinate with you on any deep cleaning and disinfecting that is necessary as a result of the COVID-19 case. Based upon what you learn from the tenant, you will need to determine whether some or all of the building will need to be closed for such cleaning, taking into account applicable guidance. If you must shut down the building due to a case of COVID-19, you should know who is responsible for the resultant damages under each potential scenario (case by employee of tenant, case by invitee, case by your employee).
  - Ensure you have a suitable business interruption insurance policy.
  - Determine whether you can be added as an additional insured with respect to any cleaning work done by third parties for tenants.

- Limit where invitees, vendors and third parties can go in the building, to the extent possible to decrease exposure.
- Think about whether agreements can be amended to reduce risks.

- **Considerations for Franchisors/Franchisees**

- Franchisors will need to establish practices for their “company” locations consistent with applicable laws, regulations and orders and guidance from Federal, state and local health authorities.
- Franchise agreements should be reviewed to see if they allow franchisors to change the brand standards, including for public health, cleanliness and safety obligations, and how franchisees are to be notified of required changes and any limitations on the frequency or immediacy of the effectiveness of changes to standards.
- Companies with franchise or authorized retailer arrangements will want to develop and adopt new operating procedures that are temporary and flexible, and which include a mixture of requirements and recommendations in order to facilitate compliance with health, operational, occupancy and other legal requirements and standards. For example, franchisors may want to produce brand-specific decals for application and use by franchisees in areas where customers may stand in line. Franchisors will need to be careful of joint employer liability situations, including where it injects itself too far into the franchisee’s employment relationships and practices.
- Franchisors should emphasize that franchisees and retailers must comply with applicable laws and regulations. Franchisees should be instructed to advise the franchisor of any alterations to standard procedures that are required to maintain compliance with applicable laws.

## **5. Effectively Communicate with Employees, Customers, and Other Stakeholders**

Businesses are tasked with communicating with employees, customers and other stakeholders during the phases of this pandemic. These communications should be tailored based on the audience and purpose. In deciding how, when and what to communicate, businesses should make sure that each communication is timely, clear, appropriate and accurate, and to make sure to consider its effect on the public. Communications may be physically posted or on websites, social media, portals or delivered by text or email.

All businesses should be prepared with the following types of communications:

- Communications with practical advice for employees and visitors regarding new and updated guidelines as they evolve.
- Communications directed at the public to re-assure them that the business is aware of and has implemented best practices. These communications will need to be updated as the situation changes.
- Communications for employees regarding their legal rights and obligations under applicable laws, including the ADA, OSHA, FFCRA, and the like. Most of these communications will take the form of a mandatory poster to be placed in a physical store location.
- Communications to employees and the public about specific potential exposure to COVID-19. To the extent any information is shared about an employee's exposure to COVID-19, businesses should be sure to comply with their confidentiality obligations under the ADA (and applicable state and local laws). Additional information about issuing warnings to the public generally is available [here](#).

## **Conclusion**

As companies navigate this new normal, they will need to be nimble in adapting to the demands of protecting workers and guests from COVID-19 exposure. While preventing disease transmission is the highest priority, compliance considerations need to be built into processes for the protection of the business. In addition to compliance considerations, there will undoubtedly be significant operating costs associated with reopening, whether they are direct costs or passed through, so businesses will need to make sure they are appropriately allocated and accounted for when calculating the impact on profits.

## **RELATED PRACTICE AREAS**

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- Franchising
- Real Estate
- Real Estate Retail
- Real Estate Sector
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