



## Back to Business: Employer Guide for Safely Returning Employees to the Workplace

Various governmental agencies have issued evolving guidance on safely returning employees to work during this unprecedented COVID-19 pandemic. This employer guide provides an overview of recent guidelines for returning employees safely to the workplace, including guidance from the U.S. Equal Employment Opportunity Commission (“EEOC”), the Centers for Disease Control and Prevention (“CDC”) and the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”). Many state and local jurisdictions also have announced rules and guidelines for transitioning employees back to the workplace.

### I. EEOC GUIDANCE

The EEOC has issued a variety of guidance addressing COVID-19 concerns, including specific guidance on issues employers are facing when employees return to the workplace. All EEOC materials related to COVID-19 are collected at [www.eeoc.gov/coronavirus](http://www.eeoc.gov/coronavirus).

#### A. Screening and Mandatory Testing

Employers may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because their presence would pose a direct threat to health or safety. Therefore, when an employee calls in sick, employers may ask the employee whether they are experiencing COVID-19 symptoms, including fever, chills, cough, shortness of breath, or sore throat.

When employees enter the workplace, employers may ask them whether they have COVID-19 symptoms or have had contact with anyone who has been diagnosed with COVID-19 or is experiencing COVID-19 symptoms. However, employees who telework are not physically interacting with others; therefore, the employer would generally not be permitted to ask them questions about COVID-19 symptoms.

The EEOC clarified that employers may measure employees’ body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

If an employee refuses to answer questions about their COVID-19 symptoms or exposure, or refuses to allow their temperature to be taken, the Americans with Disabilities Act (“ADA”) would permit the employer to bar the employee from physical presence in the workplace.

The EEOC’s relaxed guidelines regarding medical examinations and inquiries relate solely to COVID-19-related symptoms, monitoring and diagnoses; employers must continue to follow the more stringent EEOC guidelines for all other medical inquiries. In addition, employers must be careful not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

Additionally, while employers may require workers to wear personal protective equipment (“PPE”) and engage in certain infection control practices like hand washing, they should be ready to discuss disability and religious accommodations.

The EEOC also affirmed that employers may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. The EEOC reasoned that the ADA requires any

mandatory medical testing of employees be “job related and consistent with business necessity,” and “an individual with the virus will pose a direct threat to the health of others.”

The EEOC guidance cautions that employers should (1) ensure the tests are accurate and reliable, (2) consider the incidence of false-positives or false-negatives associated with a particular test, and (3) bear in mind that accurate testing only reveals whether the virus is currently present, and a negative test does not mean an employee will not acquire the virus later.

The EEOC guidance further reminds employers that the ADA requires all employee medical information be maintained separately from personnel files, and the employer must ensure the confidentiality of employee medical information. The ADA, however, would not prevent a manager from reporting to appropriate employer officials that an employee has COVID-19 or associated symptoms, and it would not prevent an employee from disclosing a co-worker’s symptoms to a supervisor. The ADA also would permit employers to notify public health authorities if the employer learns an employee has COVID-19.

## **B. Reasonable Accommodations**

As employees are recalled or brought back to work, employers should be prepared to address requests for accommodation, including requests to continue teleworking due to pregnancy, pregnancy-related conditions and underlying medical conditions.

The EEOC has issued guidance to aid employers when addressing accommodation requests related to the pandemic. The agency has clarified that if an employee’s disability is not obvious or already known, employers still may ask workers for information or medical documentation to determine whether they have a disability under the ADA that requires accommodation. Given the current pandemic, employers also may forgo or shorten the interactive process and simply grant accommodation requests. Employers also may place end dates on accommodations, although employers need to give consideration to workers’ extension requests.

The EEOC emphasized that flexibility by employers and employees is important in determining whether accommodation is possible in the circumstances. For example, temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may permit an individual with a disability to perform the essential functions of the job safely while reducing exposure to others in the workplace or while commuting.

The EEOC suggested that low-cost solutions may be effective with materials already on hand or easily obtained. In addition, accommodations for those who request reduced contact with others due to a disability may require changing the work environment to reduce chances of exposure, such as designating one-way aisles, or using plexiglass, tables or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance.

As government directives are partially or fully lifted, the need for accommodations also may change, and there may be more requests for short-term accommodations. Employers may adapt the interactive process and devise an end date for the accommodation based on changing public health directives. Employers also may opt to provide a requested accommodation on an interim or trial basis with an end date while awaiting receipt of medical documentation. Choosing such an alternative may be particularly helpful where the requested accommodation would provide protection needed by an employee who has a pre-existing disability that places the employee at greater risk during this pandemic, or who has a disability exacerbated by the pandemic.

The EEOC further addressed reasonable accommodations for individuals with preexisting disabilities and who are at higher risk from COVID-19. The CDC has identified a number of medical conditions, such as chronic lung disease and serious heart conditions, as potentially putting individuals at higher risk. If an employee requests reasonable accommodation based on a disability that puts them at greater risk of severe illness if they

contract COVID-19, the employer may verify the existence of the disability and that the accommodation is needed because the particular disability may put the individual at higher risk. The employer should discuss both why an accommodation is needed and the type of accommodation that would meet the employee's health concerns

The EEOC explained that if the job may only be performed at the workplace, reasonable accommodations may be available that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

The EEOC clarified that an employer may not exclude from the workplace an employee who is 65 years old or older and who does not have COVID-19, or symptoms associated with this disease, solely because the CDC has identified this age group as being at a higher risk of severe illness if they contract COVID-19. An employer also need not grant a request to telework from an employee who is 65 years old or older simply because the CDC has stated older people are more likely to experience severe symptoms if they get COVID-19. However, if an employer allows other comparable workers to telework, it should not treat older workers differently based on their age.

The CDC's list of people who are at higher risk for severe illness if they contract COVID-19 includes a recommendation to monitor women who are pregnant. An employer, however, may not decide to lay off or place on furlough a woman who is pregnant but does not have COVID-19, or even any symptoms. In addition, requests to telework from pregnant employees must be treated the same as requests from non-pregnant employees who are similar in their ability or inability to work. Therefore, a pregnant employee should not be denied a needed adjustment that the employer provides to other employees for other reasons but who are similar in their ability or inability to work. In addition, pregnancy-related medical conditions sometimes may be ADA disabilities, and if that is the case, they may trigger ADA accommodation rights. However, pregnancy itself is not an ADA disability. Employers should check state law, as some states provide more protection and require reasonable accommodation to pregnant workers, even when such accommodation is not provided to non-pregnant employees.

If an employee has a preexisting mental illness or disorder, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder that has been exacerbated by the pandemic, employers may ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist and enable the employee to keep working; explore alternative accommodations that may effectively meet the employee's needs; and request medical documentation if needed.

### **C. Undue Hardship**

The guidance also addressed how the pandemic may impact whether a requested accommodation is an undue hardship, i.e., "significant difficulty or expense," noting accommodations that may not have posed a hardship for an employer previously could now constitute a hardship. The agency suggests employers consider whether the current circumstances create "significant difficulty" in providing an accommodation. For instance, it may be significantly harder during the pandemic to give workers temporary assignments or acquire certain items. If a particular accommodation poses an undue hardship, the agency advises that employers and employees should work together to determine whether alternatives may be available.

The EEOC further noted that the "sudden loss of some or all of an employer's income stream" from the pandemic and the "amount of discretionary funds available" should be considered when deciding if an accommodation constitutes a "significant expense." According to the EEOC, "[t]hese considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic."

## II. CDC GUIDANCE

### A. When an Employee With COVID-19 May Return to Work

As businesses reopen, hire and bring employees back to work, employers should evaluate their policies and protocols related to employees who test positive for COVID-19 or who become ill with COVID-19 symptoms. Employers also should regularly remind their employees of the most recent CDC guidance, and the company's expectations and protocols.

The CDC has issued "decision tools" to assist in the reopening of [workplaces](#) generally, as well as specific guidance for [bars and restaurants](#), [child care programs](#), [youth programs and camps](#), [schools](#), and [mass transit](#).

The CDC has issued updated [guidance](#) regarding when persons with COVID-19 may discontinue isolation. The conditions under which an individual may discontinue isolation depends on whether their COVID-19 diagnosis was based on their symptoms or testing.

- If the employee was not tested:
  - At least three days (72 hours) have passed since the resolution of the employee's fever without the use of fever-reducing medicine; AND
  - The employee's other symptoms (e.g., cough, shortness of breath) have improved; AND
  - At least seven days have passed since the employee's symptoms first appeared.
- If the employee was tested and experienced symptoms:
  - At least three days (72 hours) have passed since the resolution of the employee's fever without the use of fever-reducing medicine; AND
  - The employee's other symptoms (e.g., cough, shortness of breath) have improved; AND
  - The employee has had negative results of an FDA Emergency Use Authorized molecular assay for COVID-19 from at least two consecutive upper respiratory swab specimens collected at least 24 hours apart (a total of two negative specimens).
- If the employee had laboratory-confirmed COVID-19 but did not experience any symptoms:
  - At least seven days have passed since the date of the employee's first COVID-19 diagnostic test; AND
  - The employee has not experienced any subsequent illness and remains asymptomatic.
  - Note: for three days following discontinuation of isolation, these persons should continue to limit contact (i.e., stay at least six feet away from others) and wear a barrier mask (such as a bandana, scarf or cloth mask) covering their nose and mouth whenever they are in settings where other persons are present.

Employers may request employees to certify truthfully to the above requirements and ask for medical certification. Kutak Rock's employment attorneys have developed a return-to-work form specifically for this purpose.

## **B. CDC Guidance for Critical Infrastructure Workers Who May Have Been Exposed**

The CDC additionally has issued [interim guidance](#) pertaining to critical infrastructure workers who may have had exposure to a person with suspected or confirmed COVID-19. The CDC's guidance aims to ensure continuity of operations of essential functions by permitting critical infrastructure workers to continue working following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community.

A potential exposure means a household contact or having close contact within six feet of an individual with confirmed or suspected COVID-19. The timeframe for having contact with an individual includes the 48 hours before the individual became symptomatic.

### **1. Who is a critical infrastructure worker?**

Critical infrastructure workers include: federal, state, and local law enforcement; 911 call center employees; hazardous material responders from government and the private sector; janitorial staff and other custodial staff; workers and contracted vendors in food and agriculture, critical manufacturing, informational technology, transportation, energy and government facilities.

In addition, stay-at-home directives with categories of essential workers have been issued by almost every state, some counties and many local governments, which should be reviewed where applicable. Guidance for determining critical infrastructure workers is available from the U.S. Department of Homeland Security, Cybersecurity and Infrastructure Security Agency. See <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>.

Presidential Policy Directive 21 has identified 16 critical infrastructure sectors whose assets, systems and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.

### **2. Should employers take additional safety precautions for critical infrastructure workers?**

Employers of critical infrastructure workers who may have been exposed to COVID-19 should do the following:

- Take employee's temperature and assess symptoms before they start work.
- If an employee becomes sick during the day, send them home immediately.
- Test the use of face masks to ensure they do not interfere with workflow.
- Increase air exchange in the building.
- Increase the frequency of cleaning commonly touched surfaces.
- Encourage employees to distance physically when they take breaks together, stagger breaks, do not permit congregating in the break room, and encourage employees not to share food or utensils.

### **3. What if a critical infrastructure worker becomes sick during the day?**

If a critical infrastructure worker becomes ill, the employer should send the employee home immediately. Surfaces in the workplace should be cleaned and disinfected. The employer also should compile information on persons who had contact with the ill employee during the time the employee had symptoms and within two days before the sick employee began experiencing symptoms. Others at the facility who had close contact (within six feet) with the sick employee during this time are to be considered exposed.

### III. OSHA GUIDANCE

Employers who are reopening, hiring and/or recalling workers should also review and be compliant with the most up-to-date guidance issued by OSHA. OSHA has published [Guidance on Preparing Workplaces for COVID-19](#), containing recommendations and mandatory safety and health standards to assist employers and workers in identifying risk levels in workplace settings and determining appropriate control measures.

#### A. Preventing Exposure to COVID-19 in the Workplace

OSHA requirements apply to preventing occupational exposure to COVID-19. To this end, OSHA regulations require employers furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” OSHA regulations also require the use of PPE, such as gloves, eye and face protection, and respiratory protection where job hazards warrant it.

OSHA has provided [guidance](#) on steps all employers may take to reduce workers’ risk of exposure in the workplace, and it has provided specific recommendations for employers and workers based upon the level of risk involved in certain jobs, i.e., low, medium, high and very high exposure risks. OSHA has also provided guidance specific to the [construction industry](#), as well as alerts for [rideshare/taxi/car services](#), [retail pharmacy workers](#), [nursing home and long-term care facility workers](#), [dental industry practitioners](#), and [restaurant/food and beverage businesses providing curbside pickup and takeout](#).

According to OSHA, most American workers will likely experience low or medium risk levels at their job or place of employment.

Steps all employers may take to reduce exposure include:

- Developing an infectious disease preparedness and response plan to help guide protective actions against exposure to COVID-19.
  - Give consideration to where and how workers may be exposed to COVID-19, both in and outside the workplace, including their non-occupational risk factors related to their home or community setting, as well as their individual risk factors such as age and underlying conditions. Employers should identify, implement and evaluate controls as reasonable and necessary to address and minimize these risks.
  - Develop a contingency plan for a resurgence of the virus, a forced shut-down or situations that may arise as a result of outbreaks, including:
    - Increased rates of worker absenteeism.
    - The need for social distancing, staggering work shifts, downsizing operations, delivering services remotely, and other exposure-reducing measures.

- Options for conducting essential operations with a reduced workforce, including cross-training workers across different jobs to continue operations or deliver surge services.
    - Interrupted supply chains or delayed deliveries.
  - Implement engineering and administrative controls, including safe work practices and use of PPE that, even if not required, could reduce the spread of infection and risk to employees.
- Prepare to implement basic infection prevention measures.
  - Promote frequent and thorough hand washing, including providing workers, customers and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol.
  - Post handwashing signs in restrooms.
  - Encourage workers to stay home if they are sick.
  - Encourage respiratory etiquette, including covering coughs and sneezes.
  - Provide customers and the public with tissues, hand sanitizer and trash receptacles.
  - If state and local health authorities recommend the use of social distancing, explore establishing policies and practices to increase the physical distance among employees and between employees and others, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts).
  - Discourage workers from using other workers' phones, desks, offices or other work tools and equipment, when possible.
  - Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment and other elements of the work environment. When choosing cleaning chemicals, employers should consult information on EPA-approved disinfectant labels with claims against emerging viral pathogens.
  - Increase physical space between employees and customers (e.g., drive through, partitions, and delivering products via curbside pick-up or delivery).
- Develop policies and procedures for prompt identification and isolation of sick people, including visitors and customers, if appropriate.
  - Inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure.
  - Develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19.
  - Where appropriate, develop policies and procedures for immediately isolating people who have signs and/or symptoms of COVID-19, and train workers to implement them. Move potentially infectious people to a location away from workers, customers and other visitors.

Although most worksites do not have specific isolation rooms, designated areas with closable doors may serve as isolation rooms until potentially sick people can be removed from the worksite.

- Take steps to limit spread of the respiratory secretions of a person who may have COVID-19. Provide a face mask, if feasible and available, and ask the person to wear it, if tolerated. Note: A face mask (also called a surgical mask, procedure mask, or other similar terms) on a patient or other sick person should not be confused with PPE; rather, a face mask acts to contain potentially infectious respiratory secretions at the source (i.e., the person's nose and mouth).
  - Protect workers in close contact with (i.e., within six feet) a sick person or who have prolonged/repeated contact with such persons by using additional engineering and administrative controls, safe work practices and PPE. Note: Workers whose activities involve close or prolonged/repeated contact with sick people are addressed further in connection with workplaces classified at medium, high and very high risk exposure.
  - Consider regular health checks (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings if feasible.
- Develop, implement and communicate about workplace flexibilities and protections. The CDC has issued [Interim Guidance for Businesses and Employers to Plan and Respond to COVID-19](#) to help prevent workplace exposures to COVID-19 in non-healthcare settings. The CDC has provided separate guidance for [healthcare settings](#). The CDC's updated guidance includes strategies and recommendations for employers seeking to reopen, such as:
    - Conducting daily health checks.
    - Conducting a hazard assessment of the workplace.
    - Encouraging employees to wear cloth face coverings in the workplace, if appropriate.
    - Implementing policies and practices for social distancing in the workplace.
    - Improving the building ventilation system.
  - The CDC further provides a table outlining the engineering controls, administrative controls and PPE that employers may use to help prevent the spread of COVID-19 in the workplace.
  - The CDC's guidance also includes the following recommendations:
    - Encourage sick employees to stay home.
    - Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of the policies.
    - Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.

- Do not require a healthcare provider’s note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
  - Maintain flexible policies that permit employees to stay home to care for a sick family member. More employees may need to stay at home to care for sick children or other sick family members. Flexible sick leave policies also may include giving advances on future sick leave or allowing employees to donate sick leave to each other.
- Employers should implement additional workplace controls depending upon risk level (i.e., very high, high, medium, and low), as summarized below.
- **Very High Exposure Risk:** Jobs with a high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem or laboratory procedures.
    - Workers Include: Healthcare and morgue workers performing aerosol-generating procedures on or collecting/handling specimens from potentially infectious patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.
    - Engineering Controls: Ensure appropriate air-handling systems are installed and maintained in healthcare facilities. The CDC recommends that patients with known or suspected COVID-19 (i.e., person under investigation) should be placed in an airborne infection isolation room if available. Use isolation rooms when available for performing aerosol-generating procedures on patients with known or suspected COVID-19. For postmortem activities, use autopsy suites or other similar isolation facilities when performing aerosol-generating procedures on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death. Use special precautions associated with Biosafety Level 3 when handling specimens from known or suspected COVID-19 patients.
    - Administrative Controls: If working in a healthcare facility, follow existing guidelines and facility standards of practice for identifying and isolating infected individuals and for protecting workers. Develop and implement policies that reduce exposure, such as grouping COVID-19 patients when single rooms are not available. Post signs requesting patients and family members to report symptoms of respiratory illness immediately on arrival at the healthcare facility and use disposable face masks. Consider offering enhanced medical monitoring of workers during COVID-19 outbreaks. Provide all workers with job-specific education and training on preventing transmission of COVID-19, including initial and routine/refresher training. Ensure that psychological and behavioral support is available to address employee stress.
    - Personal Protective Equipment: Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks. Those who work closely with (either in contact with or within six feet of) patients known to be, or suspected of being, infected with SARS-CoV-2, the virus that causes COVID-19, should wear respirators. PPE ensembles may vary, especially for workers in laboratories or morgue/mortuary facilities who may need additional protection against blood, body fluids, chemicals, and other materials to which they may be exposed. Additional PPE may include medical/surgical gowns, fluid-resistant coveralls, aprons, or other disposable or reusable protective clothing. Gowns should be large enough to cover the areas requiring protection.

- **High Exposure Risk:** Jobs with a high potential for exposure to known or suspected sources of COVID-19.
  - Workers Include: Healthcare delivery, healthcare support, medical transport, and mortuary workers exposed to known or suspected COVID-19 patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.
  - Engineering Controls: See Engineering Controls for Very High Exposure Risk.
  - Administrative Controls: See Administrative Controls for Very High Exposure Risk.
  - Personal Protective Equipment: See Personal Protective Equipment for Very High Exposure Risk.
  
- **Medium Exposure Risk:** Jobs that require frequent/close contact with people who may be infected, but who are not known or suspected patients.
  - Workers Include: Those who may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings), including individuals returning from locations with widespread COVID-19 transmission.
  - Engineering Controls: Install physical barriers, such as clear plastic sneeze guards where feasible.
  - Administrative Controls: Consider offering face masks to ill employees and customers to contain respiratory secretions until they are able leave the workplace. Keep customers informed about symptoms of COVID-19 and ask sick customers to minimize contact with workers until healthy again, such as by posting signs about COVID-19 in stores where sick customers may visit. Where appropriate, limit customers' and the public's access to the worksite, or restrict access to only certain workplace areas. Consider strategies to minimize face-to-face contact. Communicate the availability of medical screening or other worker health resources.
  - Personal Protective Equipment: Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job
  
- **Lower Exposure Risk:** Jobs that do not require contact with people known to be, or suspected of being, infected or frequent close contact with (i.e., within six feet of) the general public.
  - Workers Include: Workers in this category have minimal occupational contact with the public and other coworkers.
  - Engineering Controls: No additional engineering controls recommended.
  - Administrative Controls: Monitor public health communications about COVID-19 recommendations and ensure that workers have access to that information. Collaborate with workers to designate effective means of communicating important COVID-19 information.

- Personal Protective Equipment: Not recommended for workers in this risk group.

## **B. Manufacturing Workers and Employers**

The CDC and OSHA have jointly issued [Interim Guidance for Manufacturing Workers and Employers](#). This guidance focuses on the manufacturing industry, but it provides a general overview of issues concerning employers in other industries that are reopening.

This guidance provides information and recommendations on topics including:

- Worker exposure risk, including assessing distance, duration and nature of contact.
- Creating a COVID-19 assessment and control plan, including identifying a workplace coordinator, communicating with governmental health authorities, and establishing workplace contact tracing.
- Engineering controls, such as making changes to facilities, layouts and production processes.
- Administrative controls, including using face masks, employee workplace access and scheduling, leave policies, and worker access to handwashing or sanitizing facilities.
- Educating and training workers and supervisors to reduce the spread of COVID-19, including posters in languages other than English.
- Cleaning and disinfection.
- Screening and monitoring for illness (including verbal screening and temperature checks), as well as returning to work after illness.
- Determining if PPE is required, and properly training on and implementing use of PPE.
- Workers' rights to be protected from retaliation for raising workplace safety concerns.

## **C. Reporting Cases of COVID-19 to OSHA**

Finally, employers need to be aware of their obligations under OSHA's recordkeeping requirements as they pertain to employees who contract COVID-19 in the workplace. OSHA considers COVID-19 as a recordable illness, and employers are responsible for recording cases of COVID-19 if the following conditions are met:

- (1) the case is a confirmed case of COVID-19 as defined by the CDC;
- (2) the case is work-related;<sup>1</sup> and
- (3) the case involves one or more of following: (i) death; (ii) days away from work; (iii) restricted work or transfer to another job; (iv) medical treatment beyond first aid; (v) loss of consciousness; or (vi) if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional even if factors (i) through (v) are not met.

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<sup>1</sup> An employer must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment.

OSHA recognizes that confirmed cases of COVID-19 have occurred in nearly all parts of the country, and outbreaks among workers in industries other than healthcare, emergency response, or correctional institutions have been identified. Given “the nature of the disease and ubiquity of community spread,” employers may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work. In light of those difficulties, OSHA has issued [revised Interim Enforcement Guidance for Recording Cases of COVID-19](#) (“Interim Memorandum”), which provides guidance for employers in making the determination as to whether the case of COVID-19 is work-related and must be reported.

The Interim Memorandum notes that employers should take action to determine whether employee COVID-19 illnesses are work-related and, therefore, recordable. OSHA acknowledges, however, that it may be difficult to determine whether a COVID-19 illness is work-related, particularly where an employee was potentially exposed both in and out of the workplace. For that reason, merely recording a COVID-19 illness does not alone mean the employer violated any OSHA standard.

In determining whether an employer has made a reasonable determination of work-relatedness, OSHA will consider the reasonableness of the employer’s investigation into work-relatedness, the evidence available to the employer, and the evidence that a COVID-19 illness was contracted at work.

Circumstances that OSHA would consider presumptive indicators that COVID-19 was contracted at work are:

- Where several cases develop among workers who work closely together and no alternative explanation exists.
- An employee’s COVID-19 illness is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and no alternative explanation exists.
- An employee had frequent, close exposure to the general public in a locality with ongoing community transmission and no alternative explanation exists.

Conversely, circumstances that OSHA would not consider presumptive indicators that COVID-19 was contracted at work are:

- The employee is the only worker to contract COVID-19 in her vicinity, and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- The employee, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

If, after a reasonable and good faith inquiry, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness. In all events, however, it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related.

OSHA further noted that, pursuant to existing regulations, employers with 10 or fewer employees and certain employers in low-hazard industries have no recording obligations; they need only report work-related COVID-19 illnesses that result in a fatality or an employee’s in-patient hospitalization, amputation or loss of an eye.

Finally, if an employee voluntarily requests that their name not be entered on the log, the employer must comply with the request. The employer may enter “privacy case” in the space normally used for the employee’s name. The employer must keep a separate, confidential list of the case numbers and employee names for privacy concern cases.

#### **IV. FFCRA COMPLIANCE**

The Families First Coronavirus Response Act (“FFCRA”), which took effect April 1, 2020, applies to private employers with fewer than 500 employees as well as public employers. The FFCRA creates two new emergency paid leave requirements in response to the COVID-19 global pandemic: (1) the Emergency Paid Sick Leave Act (“EPSLA”), which allows certain employees to take up to two weeks’ paid sick leave; and (2) the Emergency Family and Medical Leave Expansion Act (“EFMLEA”), which amends the Family and Medical Leave Act (“FMLA”) and permits certain employees to take up to 12 weeks’ expanded family and medical leave.

On March 27, 2020 President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), which amends certain provisions of the EPSLA and provisions of the FMLA added by the EFMLEA. The CARES Act also amended the FFCRA by clarifying the caps for payment of leave, expanding family and medical leave to certain employees who were laid off or terminated after March 1, 2020 but are reemployed by the same employer before December 31, 2020, and excluding certain federal employees from receiving paid sick leave and expanded family and medical leave.

As businesses reopen, employers need to be prepared to comply with the FFCRA. To keep pace with the continually evolving COVID-19 rules, Kutak Rock has developed an [employer back-to-business checklist](#) and template forms to help companies return to business. Please contact your Kutak Rock attorney or a member of our [Employment Law Group](#) should you have specific needs in managing the unique legal challenges in the current circumstances.

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