Back to Business Playbook:

Compliance and Risk Management Considerations during the COVID-19 Pandemic

Updated: August 17, 2020

HUB

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Key Changes in This Edition

Section	Sub Section	Description of Changes
B	2	CDC expanded guidance regarding use of masks, face coverings, and face shields

The COVID-19 pandemic challenges all aspects of work. As businesses attempt to return to work, there are many new liability risks and employer obligations to consider. How an employer assesses, implements, and communicates new policies and procedures will have a lasting impact on employee productivity, engagement, and commitment.

HUB Risk Services developed this playbook to assist clients in developing their risk mitigation strategy and coverage-specific issues related to people, property, and loss prevention. The team is available to help clients navigate the uncharted and uncertain territory ahead.

I. Employee Health, Safety and Compliance

As state and local officials begin to alter restrictions, employers want to return employees to the workplace or continue managing the essential employees who have remained at work. Each federal agency charged with the health and safety of workers has issued new guidance regarding employee relations and business operations in the COVID-19 crisis. Employers must develop and implement strategies for employee safety, legal liabilities, and planning for future setbacks or changes in requirements.

Reduce anxiety by consistently implementing policies and procedures. Additionally, employers should provide clear and regular communication about working conditions along with any scientific, public policy, and/or medical guidance changes.

A. Employer's Obligations and Liability for Safety

The OSHA General Duty Clause states that each employer:

1. shall furnish to each employee, 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 to his employees;

2. shall comply with occupational safety and health standards promulgated under this Act.

Each employer must comply with occupational safety and health standards pursuant to the General Duty Clause which are applicable to the employee's own actions and conduct.

In addition to the OSHA obligations, employers may also face liability from employees seeking compensation. In most situations, employers believe an employee who experiences an injury or illness in the workplace may be covered by workers' compensation insurance. However, workers' compensation generally does not respond to a pandemic unless there is demonstrable proof that the condition was solely contracted within the course and scope of the job duties. For example, most workers' compensation carriers have agreed that first-responders and healthcare professionals would likely receive coverage for a COVID-19 claim, but this will vary from state to state.[1]

Most workers' compensation state statutes include a provision called the "exclusive remedy" provision. The exclusive remedy provision provides that an employee's only course of action and remediation is through the workers' compensation claims process unless the employee experiences retaliation by the employer.

Because workers' compensation carriers may not cover COVID-19 cases, the exclusive remedy provision does not apply and employee-litigants (and their attorneys) are free to pursue other legal causes of action (absent any state statutes to the contrary). Consequently, both public nuisance and negligence claims have been gaining traction in the courts. Recently, cases have

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[1] For those states that are part of the NCCI (National Council on Compensation Insurance), refer to the latest information at: https://www.ncci.com/. For other states or provinces, refer to that jurisdiction's Department of Labor website for guidance.

been filed against employers arguing that the employer did not act reasonably to provide a safe working environment to their employees. In particular, there have been a number of class actions lawsuits filed against employers under two causes of action: (1) negligence; and (2) public nuisance. Under both causes of action, plaintiffs argue that the employer did not engage in the appropriate protocols to ensure the employee's health and safety in a COVID-19 working environment and as a result the employee suffered harm and/or damages.

Many of the claims rely on similar allegations – some examples of those allegations include the employer's failure to:

- Provide/require masks/face coverings for employees and/or customers/visitors

- Ensure proper social distancing for employees and/or customers/visitors

- Provide employees with time (breaks) to wash their hands throughout the day

- Provide employees with cleaning and disinfecting materials

- Install proper protective equipment to safeguard employees from each-other and/or customers such as plexiglass shields

- Engage in regular and appropriate cleaning and disinfecting of the workplace

- Engage in daily COVID-19 screening of employees, customers, and/or visitors

- Provide hand-sanitizer to employees

- Remove symptomatic employees from the workplace

- Provide COVID-19 safety training to employees

- Hold employees accountable for following established safety protocols and policies

- Establish responsive and appropriate COVID-19 safety protocols and policies

Employers may find these allegations instructive and should consider them as they build and implement their workplace COVID-19 safety programs. It's important that employers understand their obligations and their rights to mitigate and manage the risk of working in the new COVID-19 environment.

B. Employer Policies

Employers should consider creating new policies and standards of conduct (and updating existing policies) for employees in the workplace related to COVID-19 (see the HUB Handbook Best Practices in a COVID Working Environment for a detailed discussion employer policies and handbooks). More specifically, employers should set forth clear rules, processes, and expectations for employee behavior.

New policies (and/or updated language) may include:

1. **Standards of conduct** - Including handwashing, hand sanitizing, sharing of equipment, dissemination of hard-copy documents, donning and doffing of PPE, social distancing, and workstation cleaning and disinfecting.

2. **Face-masks, face-coverings, employee accommodations, and face shields** - Specifically, the DOL, in its recently issued FAQ (June 11, 2020) has delineated between "face-coverings" which are cloth and often home-made and "face-masks" which are the "surgical" masks (some however do not meet the surgical standards). According to the DOL:

> *Cloth face coverings are not considered personal protective equipment (PPE) and are not intended to be used when workers need PPE for protection against exposure to occupational hazards. As such, OSHA's PPE standards do not require employers to provide them.*

While face-coverings are not considered PPE, the DOL reminds employers of their General Duty Clause obligations to provide a safe working environment.[2] Employers may choose to ensure that cloth face coverings are worn as a reasonable means of controlling community spread as part of a larger COVID-19 health and safety plan. The DOL states specifically that "employers may choose to use cloth face coverings as a means of source control, such as because of transmission risk that cannot be controlled through engineering or administrative controls, including social distancing." In fact, the DOL clearly states that face-coverings are not a replacement for social distancing and other safety programs and initiatives.

Likewise, both OSHA and the CDC recommend that employers encourage and/or require employees to wear face-coverings in the workplace. The DOL has been clear that the employer is free to set its own rules and hold employees accountable for compliance with their workplace safety policies.

Employers have the discretion to determine whether to allow (and/or require) employees to wear cloth face coverings in the workplace based on the specific circumstances present at the work site. The DOL cautions employers that the requirement to wear a face-covering or face-mask must be job specific and take into account the specific hazards and requirement of the position. Likewise, N95 respirator requirements override any employer policy for face-coverings or face-masks. Employers should review the very specific DOL FAQs on face-coverings.

Recently, the CDC has taken a more directive stance on face coverings and stating, in part:

> *Masks are recommended as a simple barrier to help prevent respiratory droplets from traveling into the air and onto other people when the person wearing the mask coughs, sneezes, talks, or raises their voice . . . COVID-19 spreads mainly among people who are in close contact with one another (within about 6 feet), so the use of masks is particularly important in settings where people are close to each other or where social distancing is difficult to maintain. . . COVID-19 can be spread by people*

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[2] Section 5(a)(1) of the Occupational Safety and Health Act, requires each employer to furnish to each of his employees 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. Control measures may include a combination of engineering and administrative controls, safe work practices like social distancing, and PPE.

who do not have symptoms and do not know that they are infected. That's why it's important for everyone to wear masks in public settings and practice social distancing (staying at least 6 feet away from other people).

State Requirements

Beyond the recommendations provided by the DOL, some states and local jurisdictions are requiring face coverings at businesses, as part of their COVID-19 mitigation strategies. In areas where face coverings are mandated by state or local authorities, employers should adhere to these requirements as specified.

"Vented" Masks

The CDC also recently stated that masks with exhalation valves or vents are not recommended. Specifically, the purpose of masks is to keep respiratory droplets from reaching others to aid with source control. Masks with one-way valves or vents allow exhaled air to be expelled out through holes in the material. This can allow exhaled respiratory droplets to reach others and potentially spread the COVID-19 virus. Therefore, CDC does not recommend using masks if they have an exhalation valve or vent.

Masks and Accommodations

CDC recognizes that under certain circumstances, wear a mask is not possible or feasible. Adaptations and alternatives should be considered whenever possible to increase the feasibility of wearing a mask or to reduce the risk of COVID-19 spreading if it is not possible to wear one.

For example,
- Situations where wearing a mask may exacerbate a physical or mental health condition, lead to a medical emergency, or introduce significant safety concerns.
- People who are deaf or hard of hearing—or those who care for or interact with a person who is hearing impaired—may be unable to wear masks if they rely on lipreading to communicate. In this situation, consider using a clear mask. If a clear mask isn't available, consider whether you can use written communication, use closed captioning, or decrease background noise to make communication possible while wearing a mask that blocks your lips.

The CD explains, that masks are a critical preventive measure and are most essential in times when social distancing is difficult. If masks cannot be used, individuals must make sure to take other measures to reduce the risk of COVID-19 spread, including social distancing, frequent hand washing, and cleaning and disinfecting frequently touched surfaces.

Face Shields

The CDC states that a face shield is primarily used for eye protection and the CDC does not currently recommend use of face shields as a substitute for masks. In the event that wearing a mask is not possible or feasible and an individual will wear a face shield instead, the CDC advises that:

- Face shields that wrap around the sides of the wearer's face and extend below the chin.
- Hooded face shields.

The CDC also reminds those who wear face shields to engage in the proper hygiene including handwashing and avoiding touching eyes, nose and mouth when removing it. The CDC also provides specific guidance regarding the handling of the face shield equipment including:
- Disposable face shields should only be worn for a single use and disposed of according to manufacturer instructions.
- Reusable face shields should be cleaned and disinfected after each use according to manufacturer instructions or by following [CDC face shield cleaning instructions](#).
- Plastic face shields for newborns and infants are NOT recommended.

3. **Performance, Accountability, and Compliance** - Details and consequences regarding prohibited conduct and failure to comply with the standards of conduct such as coming to work with COVID-19 symptoms, failure to socially distance in the workplace, failure to wear and utilize PPE, and failure to disinfect/clean working areas and equipment.

4. **Workplace "Traffic" Rules** - Regarding entering and exiting the building to ensure social distancing – for example only two people in an elevator at one time and/or the requirement to wash one's hands before entering the office or workspace.

5. **Attendance and Calling-in Rules** - New procedures and policies regarding calling in sick, incentives to remain home when sick rather than come into the office (even if the employee feels they can work), and what circumstances or symptoms require (or mandate) employees to remain home.

6. **Schools – Day Care – Camp Closing – Children in the Workplace** – As schools remain closed, employees will continue to face the challenges of balancing child-care and work. When employers begin to recall employees, employees will find themselves facing childcare challenges and may request permission to bring children to the workplace. Employers will face a significant challenge adhering to social distancing requirements if they allow employees and their children to be present in the workplace. In fact, in the early stages of re-opening, employers will likely bring back a small percentage of the total employee population to facilitate social distancing and limit risk and exposure. Adding children to the number of people in the workplace would be counterproductive and hinder the employer's efforts to mitigate the risk of COVID-19 in the workplace.[3]

7. **Employee Acknowledgements** - Employers should disseminate new policies to employees and require the employees to sign an acknowledgement that includes the

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[3] Note: the [Families First Coronavirus Response Act](#) provides certain wage replacement benefits and job restoration rights for employees that are unable to work either on an intermittent or continuous basis because of the closure of their child's daycare, summer camp, or school.

obligation to read and comply with the policies. In addition, employers should explain the consequences for failure to comply. Finally, the acknowledgement should remind employees that they are employed "at will" and that compliance does not provide a guarantee of continued employment.

8. **Employee Communications** - In an effort to limit risk and exposure, employers should consider leveraging their technology to deliver employee communications including new policies. Most HR, payroll and/or learning management systems have functionality to enable electronic distribution and acknowledgement tracking. Consider leveraging these systems to complete this process, which in turn align with new safety protocols.

i. Medical Questions – the General Rule

Confidentiality of Medical Information

As employers begin to learn about employee's individual medical concerns and conditions, it is important to remember that several laws have very specific confidentiality requirements. FMLA, ADA, and Workers' Compensation laws all contain provisions that protect the confidentiality of an employee's medical information. Employers have the obligation to ensure that all medical information obtained about an employee is private and confidential. Medical information gathered through the FMLA, ADA, disability insurance, workers compensation, or other sick-leave documentation is generally not protected under HIPAA but is confidential.

Health Insurance Portability Accountability Act (HIPAA) Requirements

Depending on the source of the medical information, employers may also face HIPAA privacy obligations. While HIPAA can be a complex law, in a nutshell, if the employer learns of the employee's medical information, condition, diagnosis etc. through the health plan, then that information is likely protected under HIPAA.

Generally, HIPAA obligations manifest themselves most frequently in employers with a self-funded health program that have access to claims information. Self-funded programs include health flexible spending arrangements and health reimbursement arrangements. However, employers that receive employee's Explanation of Benefits (even if fully insured) may unintentionally subject themselves to HIPAA. HIPAA also generally prohibits an employer from discriminating against an employee who has a medical condition.

a. Recruiting and Hiring

Prior to the impact of COVID-19 in the United States, the primary resources candidates used to find jobs were: (1) online job boards (60%); (2) social professional networks (56%); and (3) word of mouth (50%).[4] Today, in the new

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[4] https://business.linkedin.com/content/dam/business/talent-solutions/global/en_us/c/pdfs/Ultimate-List-of-Hiring-Stats-v02.04.pdf

COVID-19 environment, many employers have already transitioned to a virtual workforce. Likewise, employers will have to rethink their recruitment and hiring strategies.

With the implementation of social distancing rules, the days of in-person applications, interviews, and new-hire orientation may be over (at least for some time into the near future). This means employers who have not already implemented online recruitment and remote interviewing methods will find themselves in uncharted territory. Likewise, the employer screening process for rehires may also change.

The good news is that technology and virtual recruiting and hiring is not new to the recruitment and hiring industry. More specifically, many employers have been relying on job-boards, virtual interviews, and online onboarding for many years. For example, online Applicant Tracking Systems (ATS) are a standard module of most HR Information Systems (HRIS). Employers should connect with their current payroll providers to explore their system's capabilities to assist with online staffing efforts. Additionally, HUB clients have access to technology consultants who can assist with selecting and implementing online recruitment and hiring technology.

In addition to online recruitment resources, state agencies may prove to be a robust candidate resource. According to the Department of Labor (updated July 22nd):

> *In the week ending July 11, the advance figure for seasonally adjusted initial claims was 1,300,000, a decrease of 10,000 from the previous week's revised level. The previous week's level was revised down by 4,000 from 1,314,000 to 1,310,000. The 4-week moving average was 1,375,000, a decrease of 60,000 from the previous week's revised average. The previous week's average was revised down by 2,250 from 1,437,250 to 1,435,000[5]*

This means that there has been an influx of job candidates registered with each state's unemployment agencies. Along with paying wage replacement benefits to unemployed Americans, unemployment agencies (the names for these agencies vary by state) also provide job search and recruitment support. For example, Florida's Department of Economic Opportunity (the Florida agency charged with managing unemployment claims) has an entire division dedicated to reemployment - providing job opportunities, offering resume assistance, and providing interviewing tips. As part of their recruitment strategy, employers may partner with their state unemployment agency to identify qualified talent. The even better news is that most unemployment agencies are set up for online sourcing, searching, and recruitment.

b. Temp Employees (Labor Contractor Protocols)

Another recruitment and hiring solution for employers may be contract labor (i.e. "temps"). One of the advantages of contract labor is that the agency generally takes on the responsibility for recruitment and hiring of the worker. Outsourcing recruitment and hiring provides some relief to employers that are not prepared for

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[5] https://www.dol.gov/ui/data.pdf

remote, virtual, and online processes. Additionally, employers will be able to set the standards for pre-screening candidates. For example, many employers currently require their staffing agencies to conduct pre-employment drug screening and background checks and may specifically identify the scope and nature of these prescreening programs. Today, employers may add another form of prescreening – employers may require the staffing agency to conduct COVID-19 diagnostic testing for each candidate. Therefore, candidates may now have to satisfy criminal, drug, and medical testing – all of which a staffing agency can perform (generally through third-party vendors) for their employer-clients.

c. **Screening Applicants and New Hires**

Employers that are hiring and filling open positions may screen applicants for symptoms of COVID-19. More specifically, an employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, if it does so for all entering employees in the same type of job. Such screening may include requiring the applicant to successfully complete a COVID-19 pre-employment diagnostic test. Likewise, a hiring employer may take an applicant's temperature as part of the post-offer/pre-employment medical exam. However, employers should be aware that some individuals with COVID-19 do not have a fever or show any signs of symptoms from the virus.

Employers who are concerned about starting an applicant with symptoms may delay the applicant's start date. In fact, the CDC is clear that an individual who has COVID-19 or associated symptoms should not be in the workplace. Likewise, an employer may withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 symptoms. However, the employer may **not** postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer to a candidate. However, an employer may choose to allow telework or discuss with these individuals whether they would like to postpone the start date.

d. **Screening Current Employees**

In addition to pre-screening applicants, employers may conduct daily COVID-19 related pre-screening of employees who are going to the work location (see the employee screening form at the end of this bulletin). In fact, the CDC specifically recommends:

- Consider conducting routine, daily COVID-19 health screening (e.g., temperature and symptom screening) of all employees.
- Employers that implement daily COVID-19 health screening must ensure they do so in a manner that protects the confidential medical information of the employees (see above Confidential Medical Information).
- Encourage employees who are sick to stay at home.

People with COVID-19 have had a wide variety of symptoms – ranging from mild to severe illness. Symptoms may appear 2-14 days after exposure to the virus. People with these CDC Symptoms may have COVID-19. The CDC list does not include all possible symptoms. CDC will continue to update this list as it learns more about COVID-19.

- Fever/Chills
- Fatigue
- Headache
- Sore Throat
- Nausea/Vomiting
- Shortness of Breath/Difficulty Breathing

- Cough
- Muscle/Body Aches
- New Loss of Taste/Smell
- Congestion/Runny Nose
- Diarrhea

Employers may also ask employees:

- Are you currently waiting for COVID-19 test results?
- Have you tested positive for COVID-19?

e. Current Employees Exposure to Others

Likewise, employers should ask the following questions of current employees coming into the work location regarding their exposure to others who may have COVID-19:

- Have you self-quarantined? If so, how many days and why? (remaining in your home and participating in outdoor activities without coming closer than 6-feet from others)
- Have you been exposed to anyone currently waiting for COVID-19 test results?
- Have you been exposed to anyone who has tested positive for COVID-19?
- Have you been exposed to anyone with any of the CDC specified symptoms (see above)?
- Have you traveled outside your state or regional area?

It is important to note that employers may only ask these questions of employees who are coming into the workplace. Employers may not ask COVID-19-related medical questions of employees working remotely and telecommuting. Likewise, employers are not free to ask other medical questions unrelated to COVID-19 unless those questions are consistent with the ability to perform the essential functions of the job.

Employers should ensure that the person conducting the screening follows and complies with Personal Protective Equipment (PPE) guidelines such as wearing a mask, gloves, protective eyewear, and other devices to ensure their safety. The employer and the person handling the temperature checking (and any other screening measures) must ensure that they follow and enforce safety measures such as social distancing. For example, the "screener" must ensure that employees who are "waiting to be screened" remain at least 6 feet apart before entering the

workplace. There should also be considerations made for the proper documenting, handling and managing the medical results of employees to ensure the information is kept confidential.

Note: Non-exempt employees who are "waiting" to be screened at the beginning of each workday may need to be paid for that "waiting" time. Therefore, employers should check with local employment law counsel regarding the wage and hour (FLSA) requirements.

ii.   Employee COVID-19 Diagnostic Testing

On April 23, 2020, the EEOC provided updated guidance (see FAQ A.6) paving the way for employers to conduct COVID-19 diagnostic testing.[6] More specifically, the EEOC specifically reminded employers that any mandatory medical test of employees be "job related and consistent with business necessity." It is within this framework that the EEOC has stated that employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat[7] to the health of others. However, the EEOC has likewise been very clear that the ADA prohibits employer antibody testing of employees (see FAQ A.7).

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. The EEOC suggests that employers review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. It is also important for employers to consider the accuracy of the testing and the incidence of false-positives or false-negatives associated with a particular test. The EEOC cautions that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

1.   How to Test

Employers may adopt one of at least two approaches to testing:

a.   Employer Administered Testing
Employer testing of employees is wrought with complexity and is not something that an employer should take lightly or casually. Testing for COVID-19 is a medical diagnostic test that obtains confidential and private health information from an employee in the employment setting which means

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[6] It's important to note that antibody testing has not been approved by the EEOC.

[7] "Direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. §1630.2(r)(1998). Direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence. Id. To determine whether an employee poses a direct threat, the following factors should be considered: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and, (4) the imminence of the potential harm. 42 U.S.C. §12112(d)(3)(1994); 29 C.F.R. §1630.14(b)(1998).

handling and managing this information is highly regulated. Additionally, the testing requires taking a nasal swab from the employee – this is the procurement of a bodily fluid which in turn subjects the employer to rigorous OSHA rules, including the very complex Blood Borne Pathogen rules. It would be prudent for employers to work with their outside counsel and the HUB Risk Services Division to set up an internal program.

b. **Vendor/Outsourced Testing**

Employers may choose to outsource their testing program. In this case, employee testing would resemble other similar employment physical and screening programs. Employers should be sure that they thoroughly vet testing vendors including the testing methods and accuracy and efficiency of the equipment/test-kits. Likewise, they should have their attorney review the program, process, and service agreement (if any). In fact, the EEOC contemplates that employers may outsource these services advising that "[a]n employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that . . . will pose a direct threat." Outsourcing the testing program may shift some of the compliance obligations directly to the vendor which may provide some relief to the employer.

2. **When to Test**

The CDC has developed guidance for employers to provide them with strategies for consideration of incorporating both proactive and responsive screening and testing protocols for COVID-19. More specifically, the CDC has developed five categories and specific guidance for an employer's responsive protocols:

1. Testing individuals with signs or symptoms consistent with COVID-19
2. Testing asymptomatic individuals with recent known or suspected exposure to SARS-CoV-2 to control transmission
3. Testing asymptomatic individuals without known or suspected exposure to SARS-CoV-2 for early identification in special settings
4. Testing to determine resolution of infection (e.g., discontinuation of home isolation)
5. Public health surveillance for SARS-CoV-2

Employers may adopt a regularly scheduled pro-active approach to medical testing or may choose to test on responsive/case-by-case basis if an employee manifests symptoms or exposure. For example, if an employee exhibits symptoms during a daily screening (see above) the employer may require the employee to receive a test provided by a third-party vendor (similar to reasonable suspicion testing). Likewise, employers may require an employee to submit to a COVID-19 test if they learn of an employee's symptoms through a co-worker. The EEOC provides the following very relevant example:

Example: Bob and Joe are close friends who work as copy editors for an advertising firm. Bob tells Joe that he is worried because he has just learned that he had a positive reaction to a tuberculin skin test and believes that he has tuberculosis. Joe encourages Bob to tell their supervisor, but Bob refuses. Joe is reluctant to breach Bob's trust but is concerned that he and the other editors may be at risk since they all work closely together in the same room. After a couple of sleepless nights, Joe tells his supervisor about Bob. The supervisor questions Joe about how he learned of Bob's alleged condition and finds Joe's explanation credible.

Because tuberculosis is a potentially life-threatening medical condition and can be passed from person to person by coughing or sneezing, the supervisor has a reasonable belief, based on objective evidence, that Bob will pose a direct threat if he in fact has active tuberculosis. Under these circumstances, the employer may make disability-related inquiries or require a medical examination to the extent necessary to determine whether Bob has tuberculosis and is contagious.

However, employers should remain vigilant and review the CDC guidelines and recommendations. On July 20th the CDC updated its Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings. Significantly, the CDC has recommended that employers apply the symptom-based strategy. Specifically, the CDC no longer recommends the test-based strategy for anyone who is not immunocompromised:

> RT-PCR testing for detection of SARS-CoV-2 RNA for discontinuing isolation could be considered for persons who are severely immunocompromised, in consultation with infectious disease experts. **For all others, a test-based strategy is no longer recommended except to discontinue isolation or other precautions earlier than would occur under the symptom-based strategy** (**emphasis added**).

The employers' approach to mitigating risk through employee screening should be part of a larger and more holistic risk management program that also includes other infection control practices (such as regular cleaning, disinfecting, social distancing, regular handwashing, PPE, and other measures) in the workplace to prevent transmission of COVID-19.

iii.   Responding to Symptomatic and/or Diagnosed Employees

Part of any workplace readiness program should include specific protocols for managing scenarios that include symptomatic and/or employees diagnosed with COVID-19. The CDC specifically recommends:

1. Conduct daily COVID-19 health screening.

2. Employees with symptoms (CDC list of Symptoms) at work should immediately be separated and sent home.

3. Establish procedures for safely transporting anyone sick to their home or to a healthcare facility.

4. Notify local health officials, staff, and customers (if possible) immediately of a possible case while maintaining confidentiality consistent with the Americans with Disabilities Act (ADA) and other applicable federal and state privacy laws.

5. Close off areas used by the sick person until after cleaning and disinfection. Wait 24 hours to clean and disinfect. If it is not possible to wait 24 hours, wait as long as possible before cleaning and disinfecting. Ensure safe and correct application of disinfectants and keep disinfectant products away from children.

6. Inform those who have had close contact with a person diagnosed with COVID-19 to stay home and self-monitor for symptoms, and to follow CDC guidance if symptoms develop. If a person does not have symptoms they should follow appropriate CDC guidance for home isolation.

7. Sick employees should not return to work until they have met the CDC's criteria to discontinue home isolation (see below as well).

iv. Return to Work for Symptomatic and/or Positively Diagnosed

The CDC guidance provides that the decision to discontinue home isolation for persons with confirmed or suspected COVID-19 should be made in the context of local circumstances as follows:

1. **Employees Diagnosed with COVID-19 AND Symptoms (and those with symptoms but without a COVID-19 diagnosis):**

   Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:

   - At least 10 days* have passed since symptom onset and
   - At least 24 hours have passed since resolution of fever without the use of fever-reducing medications (changed from "at least 72 hours" to "at least 24 hours" have passed *since last* fever without the use of fever-reducing medications); and
   - Other symptoms have improved (changed from "improvement in respiratory symptoms" to "improvement in symptoms" to address expanding list of symptoms associated with COVID-19).

   *A limited number of persons with severe illness[8] may produce replication-competent virus beyond 10 days, that may warrant extending duration of isolation for up to 20

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[8] **Severe Illness**: Individuals who have respiratory frequency >30 breaths per minute, SpO2 <94% on room air at sea level (or, for patients with chronic hypoxemia, a decrease from baseline of >3%), ratio of arterial partial pressure of oxygen to fraction of inspired

days after symptom onset. The CDC recommends that the individual consider consultation with infection control experts.

2. **Employees Diagnosed with COVID-19 but no Symptoms:**

Persons infected with SARS-CoV-2 who never develop COVID-19 symptoms may discontinue isolation and other precautions 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA.

3. **Employees Exposed to COVID-19 but Not Diagnosed**

CDC recommends 14 days of quarantine after exposure based on the time it takes to develop illness if infected. Thus, it is possible that a person *known* to be infected could leave isolation earlier than a person who is quarantined because of the *possibility* they are infected.

As noted in the previous section, the CDC now recommends using a test-based strategy **only for those who are severely immunocompromised**. However, employers should proceed with caution. Under the ADA, employers may not treat employees differently on the basis of the employee's medical condition. Therefore, employers should speak with their own legal counsel to determine their approach regarding return-to-work for COVID-19 diagnosed immunocompromised employees.

Test-based strategy

A test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing.

Persons who *have* COVID-19 who *have* symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:

- Resolution of fever without the use of fever-reducing medications;

- Improvement in respiratory symptoms (e.g., cough, shortness of breath); and

- Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens). All test results should be final before isolation is ended. Testing guidance is based upon limited information and is subject to change as more information becomes available. See Interim Guidelines for Collecting, Handling, and Testing Clinical Specimens from Persons for Coronavirus Disease 2019 (COVID-19).

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oxygen (PaO2/FiO2) <300 mmHg, or lung infiltrates >50%. **Critical Illness**: Individuals who have respiratory failure, septic shock, and/or multiple organ dysfunction

August 17, 2020

v.   Managing High-Risk Employee Safety

Employers should create specific response and operational protocols for each category of employee that may occur as a result of COVID-19 daily screening:

1. High-risk employees;
2. Employees exposed to someone with symptoms or diagnosed with COVID-19;
3. Employees with their own symptoms of COVID-19; or,
4. Employees diagnosed with COVID-19 (see Return to Work for Symptomatic and/or Positively Diagnosed Employees above)

Additionally, employers should provide employees with the proper and appropriate protective equipment and workplace rules (see sections below regarding workplace health and safety).

High-Risk Employees
The CDC has identified a number of conditions that can potentially put individuals at greater risk if they contract COVID-19. As a threshold matter, employers should not ask employees about any underlying health conditions or if they are in the CDC high-risk categories. However, they may open the door for employees to self-identify. Employees likewise may not single out high-risk employees and treat them differently than the rest of the employees. For example, employees may not require all employees over age 65 or immune compromised to work from home. But, if the employee requests a change in his/her working arrangements due to an underlying medical condition outlined by the CDC, the employer is responsible for following the interactive process under ADA to determine if a reasonable accommodation can be made.

The EEOC instructs that there may be lost-cost solutions available to employers that will provide an accommodation for the employee. For example, there may be "materials already on hand or easily obtained [that] may be effective." Employers may make changes to the work environment including one-way hallways, social distancing in common areas, reduced seating capacity in conference and break rooms, and installing barriers between employees and customers. Employers may also consider temporary job restructuring, temporary transfers to a different position, and modifying work schedules.

However, employers should proceed with some caution. The EEOC has made clear that an employer may not exclude an employee from the workplace solely because he/she is someone that the CDC has identified as a higher-risk for serious illness with COVID-19. An employer may only do so if the employee's condition poses a "direct threat" to the employee's health and that direct threat cannot be eliminated by a reasonable accommodation. It's important to note that the "direct threat" is a very high standard and requires a case-by-case assessment. Employers must rely on reasonable medical judgment about the specific employee's disability (not a generalized assessment) using the most current medical knowledge and/or the best objective evidence. However, even if the employee's condition does pose a direct threat to the employee's health, the employer still may not exclude the employee from the workplace unless there is no available reasonable accommodation that will not pose an undue hardship on the business.

Telecommuting

In addition to enabling employers to continue operating their business during the COVID-19 crisis, a remote working environment offers employers an avenue to mitigate the risk of community spread of the virus in the workplace. It's against this backdrop that employers may consider (or reconsider) their current approach and policy for telecommuting as an alternative work-arrangement most especially for their high-risk employees.

Employers that continue to utilize telecommuting in their workforce should ensure they have a clear telecommuting policy and agreement provided to (and signed by) each telecommuting employee. Telecommuting policies may include provisions such as:

- Eligibility for a telecommuting arrangement
- Description of policies that remain in effect while working remotely
- Time and attendance expectations – most especially for non-exempt employees
- Confidentiality and data security requirements
- Expenses
- Workers compensation
- Employee acknowledgement including a statement of that "at will" relationship
- Accountability and consequences for non-conforming behavior

Employee's Household Member's Condition

As a threshold matter, under certain circumstances, an employee may be eligible for Emergency Paid Sick Leave (see above discussion). The ADA does not apply if the employee is asking for an accommodation because the employee lives with someone who is at a greater risk of complications if they contract COVID-19. Under the ADA, reasonable accommodations are only required for an employee's own disability and does not cover disabilities of other individuals that the employee lives or interacts with. It's important to note that the Genetic Information Non-discrimination Act prohibits an employer from asking an employee about his/her family member health conditions.

Employers may consider a telecommuting arrangement for an employee requests a variance in his/her position because of a high-risk individual at home. Additionally, employers may also consider job variances to allow an arrangement that will address the employee's safety concerns such as job sharing, staggered schedules, or a temporary reassignment of duties. Likewise, an employer may re-visit its paid time off programs to identify some flexibility or expansion of wage replacement benefits.[9]

vi. Employee Obstacles to Return to Work

Employees Afraid to Return to Work

"Being afraid to come to work" is not a qualifying leave reason under any federally regulated leave entitlement program. The underlying reason for the employees' request to work from home is an important factor. Employees who are merely afraid to come to

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[9] Employees working for employers with under 500 employees may be eligible for expanded benefits under the Families First Coronavirus Response Act. See DOL page: https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave

work may not be eligible for work from home. Likewise, fear alone is not a protected reason under federal leave or accommodation programs – in other words, federally protected leaves, job accommodations, and/or job restoration rights likely will not apply to an employee who is simply afraid to come to work.

While merely "being afraid to come to work" (without more) is not a qualifying leave reason under any federally regulated leave entitlement, employers may nonetheless consider flexibility in their leave of absence and paid time off policies. For example, employers may consider providing employees with expanded paid time off or what some refer to "pandemic pay". Employers may build their program based on criteria that it establishes but must be sure to be both clear and consistent. Alternatively, employers may allow an employee to remain on furlough or leave of absence without pay for an extended period of time.

Employees Receiving Unemployment

Employers may be surprised to receive resistance to return to work from employees who are receiving unemployment. It's important to know that an offer to return to work cuts off an employee's eligibility for unemployment. Employers should document their offer in writing (see above and recall letter in this appendix). When an employee objects to return to work, employers should first talk with the employee to better understand the employee's reasoning. If the employee's sole objection is because he/she is receiving unemployment, then the employer may notify the state of the employee's rejection of its offer to return. If the employee provides other health or safety reasons, the employer should address those concerns and conditions (see above sections).

vii. OSHA Recordkeeping

In a memo issued on May 19, 2020 (effective as of May 26, 2020), OSHA rescinded its previous interim enforcement guidance regarding treatment of COVID-19 with respect to the occupational illness recordkeeping requirements of 29 CFR § 1904. OSHA's revised stance is now that COVID-19 cases shall be treated as recordable illnesses if the following conditions are met:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);

2. The case is work-related as defined by 29 CFR 1904.5; and

3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7.

OSHA acknowledges the potential difficulty in determining work-relatedness and is therefore exercising discretion with enforcement. In determining whether an employer has complied with this requirement, Compliance Safety and Health Officers (CSHOs) are being advised to apply the following considerations:

1. The reasonableness of the employer's investigation into work-relatedness.

2. The evidence available to the employer.

3. The evidence that a COVID-19 illness was contracted at work.

Additional information including situational examples are contained in the complete memo: [Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)](#)

Additionally, On or about July 27, 2020 OSHA updated it's FAQ noting that:

(1)   Hospitalizations:
OSHA requires employers to report the in-patient hospitalization of an employee with a confirmed, work related case of COVID-19. The guidance change requires that employers must report the hospitalization within 24 hours of knowing that the employee has been hospitalized as a result of COVID-19, irrespective if the case was confirmed after the employee was hospitalized.

(2)   Fatality:
OSHA requires employers to report the fatality of an employee with a confirmed, work related case of COVID-19. This change in guidance requires that employers must report the fatality within 8 hours of knowing that the employee died as a result of COVID-19, irrespective if the case was confirmed after the employee died.

18.   How do I report to OSHA?

Employers may report a fatality or in-patient hospitalization by either:
•   Calling the nearest OSHA office;
•   Calling the OSHA 24-hour hotline at 1-800-321-OSHA (6742); or
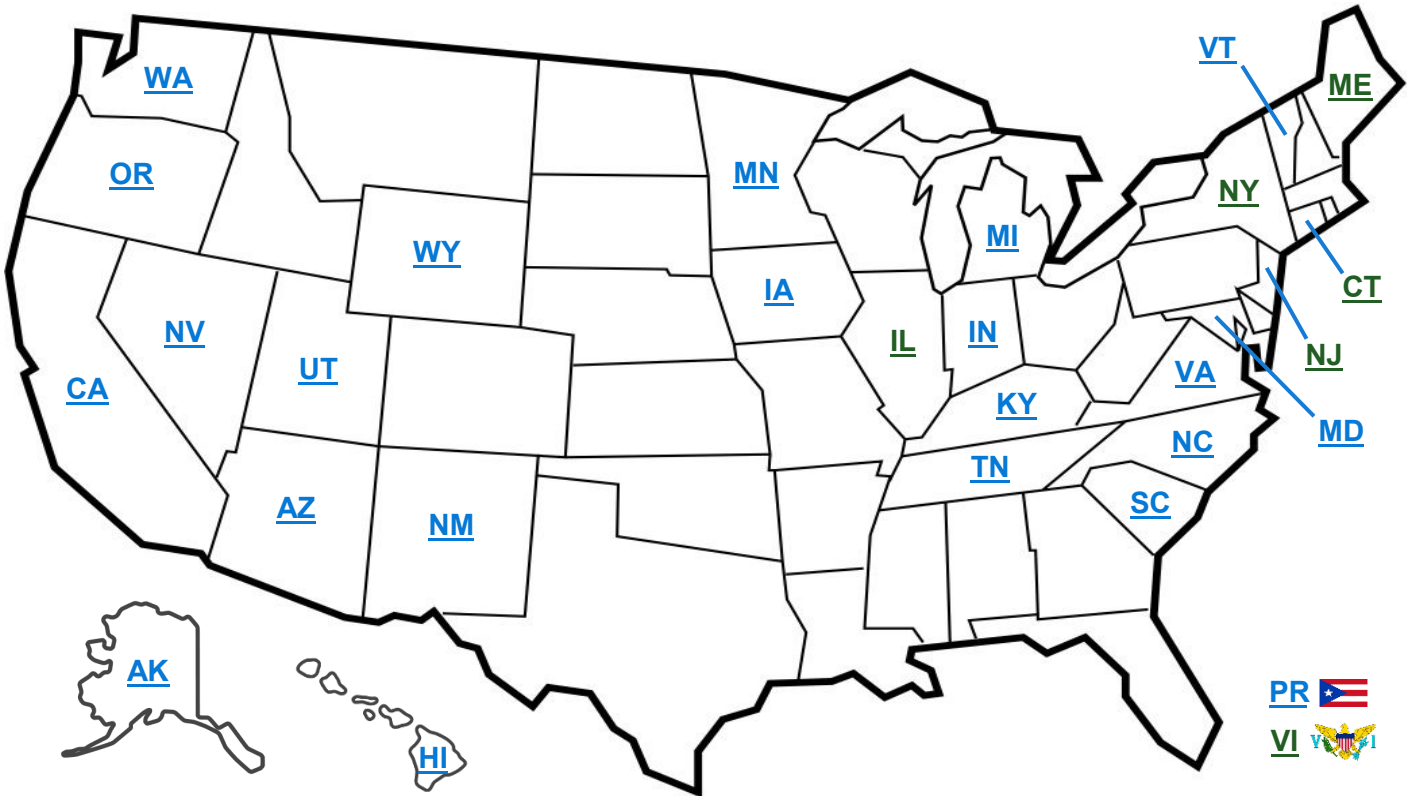•   Filing an online report.

Employers should be prepared to supply:
•   The business name;
•   Name(s) of affected employees;
•   Location and time of the incident;
•   Brief description of the incident; and
•   Follow-up contact person and phone number so that OSHA may follow-up (unless the reporter desires to make the report anonymously).

viii.   State OSHA Plans

The below map identifies states that have federal OSHA-approved Plans. The **BLUE** state abbreviations represent a State Plan that covers private and state/local government workplaces. The **BROWN** state abbreviations represent a State Plan that covers state/local government workers only. The states without their abbreviation do not have a State Plan. Each state abbreviation is a hyperlink to the respective State Plan's website.

When implementing certain workplace safety programs we suggest you review the below highlighted states with Plans for any specific state guidance.

C. Reducing Exposure- Practical Workplace Examples

Guidance for Employers by Exposure Risk Classification

Worker risk of occupational exposure to COVID-19 during an outbreak may depend in part on the industry type and need to be within 6 feet of people known to have, or suspected of

having, COVID-19. OSHA has provided the following guidance and has divided job tasks into four risk exposure levels:

Lower Exposure Risk (Caution)		
Lower exposure risk (caution) jobs are those that do not require contact with people known to be, or suspected of being, infected with COVID-19 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers.		
Engineering Controls	**Administrative Controls**	**Personal Protective Equipment**
Additional engineering controls are not recommended for workers in the lower exposure risk group. Employers should ensure that engineering controls, if any, used to protect workers from other job hazards continue to function as intended.	Monitor public health communications about COVID-19 recommendations and ensure that workers have access to that information. Frequently check the CDC COVID-19 website: https://www.cdc.gov/coronavirus/2019-ncov/ Collaborate with workers to designate effective means of communicating important COVID-19 information.	Additional PPE is not recommended for workers in the lower exposure risk group. Some states may require that all employees wear some form of face covering. Workers should continue to use the PPE, if any, that they would ordinarily use for other job tasks.
Medium Exposure		
Jobs that require frequent/close contact with people who may be infected, but who are not known or suspected patients. Workers in this category 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	**Administrative Controls**	**Personal Protective Equipment**
Install physical barriers, such as clear plastic sneeze guards, where feasible.	Consider offering face masks to ill employees and customers to contain respiratory secretions until they are able to leave the workplace (i.e., for medical evaluation/care or to return home). In the event of a shortage of masks, a reusable face shield that can be decontaminated may be an acceptable method of protecting against droplet transmission. See CDC/ NIOSH guidance for optimizing respirator supplies, which discusses the use of surgical masks, at: http://www.cdc.gov/coronavirus/2019-ncov/hcp/respirators-strategy/index.html 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 (e.g., pharmacies) or including COVID-19 information in automated messages sent when prescriptions are ready for pick up. 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 (e.g., drive through windows, phone-based communication, and telework). Communicate the availability of medical screening or other worker health resources (e.g., on-site nurse; telemedicine services).	When selecting PPE, consider factors such as function, fit, decontamination ability, disposal, and cost. Sometimes, when PPE will have to be used repeatedly for a long period of time, a more expensive and durable type of PPE may be less expensive overall than disposable PPE. Each employer should select the combination of PPE that protects workers specific to their workplace. 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. In rare situations that would require workers in this risk category to use respirators, see the PPE section beginning on page 14 of OSHA's booklet – Guidance on Preparing Workplaces for COVID-19, which provides more details about respirators. For the most up-to-date information, visit OSHA's COVID-19 webpage: http://www.osha.gov/covid-19.
High Exposure Risk Jobs with a high potential for exposure to known or suspected sources of COVID-19. Workers in this category include: Healthcare delivery, healthcare support (hospital staff who must enter patients' rooms), 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. **AND/OR** **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	**Administrative Controls**	**Personal Protective Equipment**
Ensure appropriate air-handling systems are installed and maintained in healthcare facilities. See "Guidelines for Environmental Infection Control in Healthcare Facilities" for more recommendations on air handling systems at: www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm CDC recommends that patients with known or suspected COVID-19 (i.e., person under investigation) should be placed in an airborne infection isolation room (AIIR), 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. See the CDC postmortem guidance at: http://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-postmortem-specimens.html. OSHA also provides guidance for postmortem activities on its COVID-19 webpage: http://www.osha.gov/covid-19. Use special precautions associated with Biosafety Level 3 when handling specimens from known or suspected COVID-19 patients. For more information about biosafety levels, consult the U.S. Department of Health and Human Services (HHS) "Biosafety in Microbiological and Biomedical Laboratories" at: http://www.cdc.gov/biosafety/publications/bmbl5.	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 cohorting (i.e., grouping) COVID-19 patients when single rooms are not available. Post signs requesting patients and family members to immediately report symptoms of respiratory illness 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.	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 6 feet of) patients known to be, or suspected of being infected with COVID-19, should wear respirators. In these instances, see the PPE section beginning on page 14 of OSHA's booklet – Guidance on Preparing Workplaces for COVID-19, which provides more details about respirators. For the most up-to-date information, also visit OSHA's COVID-19 webpage: http://www.osha.gov/covid-19. 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. OSHA may also provide updated guidance for PPE use on its website: http://www.osha.gov/covid-19. NOTE: Workers who dispose of PPE and other infectious waste must also be trained and provided with appropriate PPE. The CDC webpage "Healthcare-associated Infections" https://www.cdc.gov/hai/ provides additional information on infection control in healthcare facilities.

D. Creative and Adaptive Staffing Models

The best time to make changes or experiment with new models is when there is a high degree of ambiguity. Companies now have a better understanding of what it means to be agile, but the path forward is not particularly clear. Managers now have first-hand experience with work that may be successfully performed virtually and work that should be performed on-premises. With this new insight, leadership can take what they learned, go a step further and test new staffing models to better manage work place density and promote employee engagement.

Employers may consider at least two different scheduling approaches.

1. <u>Split Teams</u> -- the organization may divide a department or function into two teams that rotate between working in the office and working remotely. This approach may be especially beneficial when there is insufficient work space to maintain necessary social distancing.

2. <u>Phased-in Returning Employees</u> - employees may return in smaller groups such as 20-25% of the location population at a time. The company benefits from a phased approach which may include the following:

   a. New screening, cleaning, and social distancing protocol can be effectively tested, updated, and re-deployed with less confusion.

      b. There is more time to build an adequate PPE inventory and re-configure work spaces if needed.

Employers may consider a number of criteria to identify the teams/segments of employees that may return in each phase including:

      a. the criticality of a role;
      b. the necessity of specialized equipment to complete assigned tasks;
      c. the level of personal risk individual employees may have;
      d. individuals who feel their productivity has been negatively impacted by work at home environments; and/or
      e. employees that volunteer to return

Human resources, legal counsel, and leadership should collaborate to develop a practical and legally defensible staffing approach and plans. Employers should be sure to develop clear, transparent, and consistent communication regarding its criteria for the return to work process.

E. 10 Tips to Protect Employee Health and Safety

1. **Actively encourage sick employees to stay home**. Develop policies that encourage sick employees to stay at home without fear of reprisals, and ensure employees are aware of these policies.

2. **Develop other flexible policies** for creative work scheduling and telework (if feasible) and create leave policies to allow employees to stay home to care for sick family members or care for children if schools and childcare close.

3. **Promote etiquette for coughing and sneezing** and **handwashing**. Provide tissues, no-touch trash cans, soap and water, and hand sanitizer with at least 60% alcohol.

4. **Perform routine environmental cleaning**. Routinely clean and disinfect all frequently touched surfaces, such as workstations, countertops, handrails, and doorknobs. Discourage sharing of tools and equipment if feasible.

5. **Provide education and training materials** such as fact sheets and posters in an easy to understand format and in the appropriate language and literacy level for all employees.

6. **Have conversations with employees about their concerns**. Some employees, such as older adults and those with chronic medical conditions, may be at higher risk for severe illness.

7. **Talk with companies that provide the business with contract or temporary employees about their plans**. Discuss the importance of sick employees staying home and encourage them to develop non-punitive "emergency sick leave" policies.

8. **Plan to implement practices to minimize face-to-face contact between employees if social distancing is recommended by state or local health department**. Actively encourage flexible work arrangements such as teleworking, split teams, staggered shifts or phased staffing.

9. **Consider the need for travel and explore alternatives**. Check CDC's [Travelers' Health](#) website for the latest guidance and recommendations. Consider using teleconferencing and video conferencing for meetings when possible.

10. **If an employee becomes sick while at work**, they should be separated from other employees, customers, and visitors and sent home immediately. Follow [CDC guidelines](#) for cleaning and disinfecting areas the sick employee visited.

F. Infectious Disease Preparedness Response Plan

OSHA and the CDC recommend that employers develop an Infectious Disease Preparedness and Response Plan. If one does not already exist, an infectious disease preparedness and response plan that can help guide protective actions against COVID-19.

Stay abreast of guidance from federal, state, local, tribal, and/or territorial health agencies, and consider how to incorporate those recommendations and resources into workplace-specific plans.

Plans should consider and address the level(s) of risk associated with various worksites and job tasks workers perform at those sites. Such considerations may include:

1. Where, how, and to what sources of SARS-CoV-2 might workers be exposed, including: the general public, customers, and coworkers; and sick individuals or those at particularly high risk of infection (e.g., international travelers who have visited locations with widespread sustained (ongoing) COVID-19 transmission, healthcare workers who have had unprotected exposures to people known to have, or suspected of having, COVID-19).

2. Non-occupational risk factors at home and in community settings.

3. Workers' individual risk factors (e.g., older age; presence of chronic medical conditions, including immunocompromising conditions; pregnancy).

4. Controls necessary to address those risks. Follow federal and state, local, tribal, and/or territorial (SLTT) recommendations regarding development of contingency plans for situations that may arise as a result of outbreaks, such as:
    - Increased rates of worker absenteeism.
    - The need for social distancing, staggered 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 in order to continue operations or deliver surge services.
- Interrupted supply chains or delayed deliveries. Plans should also consider and address the other steps that employers can take to reduce the risk of worker exposure to SARS-CoV-2 in their workplace, described in the sections below.

i. Prepare to Implement Basic Infection Prevention Measures

For most employers, protecting workers will depend on emphasizing basic infection prevention measures. As appropriate, all employers should implement good hygiene and infection control practices, including:

1. Promote frequent and thorough hand washing, including by 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.
2. Encourage workers to stay home if they are sick.
3. Encourage respiratory etiquette, including covering coughs and sneezes.
4. Provide customers and the public with tissues and trash receptacles.
5. Employers should explore whether they can establish policies and practices, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), to increase the physical distance among employees and between employees and others if state and local health authorities recommend the use of social distancing strategies.
6. Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
7. Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment.
8. When choosing cleaning chemicals, employers should consult information on Environmental Protection Agency (EPA)-approved disinfectant labels with claims against emerging viral pathogens. Products with EPA-approved emerging viral pathogens claims are expected to be effective against SARS-CoV-2 based on data for harder to kill viruses. Follow the manufacturer's instructions for use of all cleaning and disinfection products (e.g., concentration, application method and contact time, PPE).

ii. Develop Policies and Procedures for Identification and Isolation of Sick People

1. Prompt identification and isolation of potentially infectious individuals is a critical step in protecting workers, customers, visitors, and others at a worksite.
2. Employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure.

3. Employers should develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19.
4. Where appropriate, employers should 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.
5. 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 for a worker; the mask acts to contain potentially infectious respiratory secretions at the source (i.e., the person's nose and mouth).
6. If possible, isolate people suspected of having COVID-19 separately from those with confirmed cases of the virus to prevent further transmission—particularly in worksites where medical screening, triage, or healthcare activities occur, using either permanent (e.g., wall/different room) or temporary barrier (e.g., plastic sheeting).
7. Restrict the number of personnel entering isolation areas.
8. Protect workers in close contact with (i.e., within 6 feet of) a sick person or who have prolonged/repeated contact with such persons by using additional engineering and administrative controls, safe work practices, and PPE. Workers whose activities involve close or prolonged/repeated contact with sick people are addressed further in later sections covering workplaces classified at medium and very high or high exposure risk.

iii. **Develop and Communicate about Workplace Flexibilities and Protections**

1. Actively encourage sick employees to stay home.
2. Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
3. 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.
4. 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.
5. Maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual.
6. Recognize that workers with ill family members may need to stay home to care for them. See CDC's Interim Guidance for Preventing the Spread of COVID-19 in Homes and Residential Communities: www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-prevent-spread.html.

7. Be aware of workers' concerns about pay, leave, safety, health, and other issues that may arise during infectious disease outbreaks. Provide adequate, usable, and appropriate training, education, and informational material about business-essential job functions and worker health and safety, including proper hygiene practices and the use of any workplace controls (including PPE). Informed workers who feel safe at work are less likely to be unnecessarily absent.
8. Work with insurance companies (e.g., those providing employee health benefits) and state and local health agencies to provide information to workers and customers about medical care in the event of a COVID-19 outbreak.

iv. Implement Workplace Controls

Occupational safety and health professionals use a framework called the "hierarchy of controls" to select ways of controlling workplace hazards. In other words, the best way to control a hazard is to systematically remove it from the workplace, rather than relying on workers to reduce their exposure.

During a COVID-19 outbreak, when it may not be possible to eliminate the hazard, the most effective protection measures are (listed from most effective to least effective): engineering controls, administrative controls, safe work practices (a type of administrative control), and PPE. There are advantages and disadvantages to each type of control measure when considering the ease of implementation, effectiveness, and cost. In most cases, a combination of control measures will be necessary to protect workers from exposure to SARS-CoV-2. In addition to the types of workplace controls discussed below, CDC guidance for businesses provides employers and workers with recommended SARS-CoV-2 infection prevention strategies to implement in workplaces.

II. Employee Benefits

Employees being rehired or returning from furlough raise a variety of employee benefits considerations. An employer's approach will largely depend on how the employer handled benefits during the shutdown. However, in doing so, employers should consider the following:

i. The Affordable Care Act ("ACA") Employer Mandate, if it applies;
ii. Waiting Period Issues;
iii. IRC Section 125 (pre-tax) Cafeteria Plan Elections for Health Coverage;
iv. Health Savings Account ("HSA") Contributions;
v. Health Care Flexible Spending Account ("FSA") Issues;
vi. Dependent Care Flexible Spending Account ("FSA") Issues;
vii. Commuter Benefits;
viii. Life and Disability Plan Issues (Including Evidence of Insurability);
ix. Premium Repayments for Extended Coverage;
x. ERISA and Other Disclosure Rules; and
xi. Chart: Potential Plan Amendments and Timing

i. The Affordable Care Act ("ACA") Employer Mandate

Generally, employers are subject to the ACA employer mandate if they employed more than 50 full-time and full-time equivalent employees in the prior calendar year (for more detail, see our [Employee Benefits Compliance Bulletins](#) on hubinternational.com). [10] Recent COVID-19-related job interruptions that triggered lay-off or furlough may have given employees an opportunity to drop their health coverage.[11] How the employer treats their elections when they come back to work depends on whether a reinstated worker is a "continuing" employee or a "new hire."[12]

1. **Identifying New Hires**

   The ACA employer mandate directs that one of the two following methods be used to treat employees as "new hires":

   - <u>Standard Break-in-Service (13 weeks or greater)</u>. If the employee is rehired after a period of at least 13 consecutive weeks (26 weeks for educational institutions) where the individual *did not work or provide even a single hour of service*, the employer can treat the employee as a new employee. (<u>Note</u>: A variety of absences can still generate hours of service, such as certain leaves. Special care is required to ensure not even one hour of service has been counted.)

   - <u>Rule of Parity (optional)</u>. Employers can also designate a "break in service" for periods shorter than 13 consecutive weeks (26 weeks for educational institutions) under a special "parity" rule. Under this rule, an employee can be treated as a <u>new employee</u> if the number of weeks during which no services are performed is *both*:

     a. At least four weeks long; and
     b. Exceeds the number of weeks of employment immediately before the period during which no services are performed/hours of service are credited

   <u>Example</u>: If an employer uses the rule of parity, an employee who works for five weeks and then has no credited hours for six weeks, may be treated as a "new employee" on rehire.

   This rule of parity really only applies to employees who leave before completing 13 (or 26, for education institutions) weeks of service, but it is helpful for employers who have high turnover.

2. **Restoring Health Coverage for "Continuing" Employees**

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[10] Employers not subject to the ACA employer mandate may skip this Section A.

[11] We are not discussing the application of the expanded FMLA, state leave, COBRA, or similar state continuation in this analysis. See articles in HUB's [Coronavirus Resource Center](#) for more detail on these rules.

[12] This analysis assumes the employer is using the lookback measurement period rules (which most do). Employers using the monthly measurement period rules would have a different analysis and should speak with their HUB advisor. Employers can apply the lookback measurement period to some employees and not others. The only permissible groupings are (1) salaried v hourly, (2) union v non-union, (3) each separate union group subject to a separate collective bargaining agreement, and (4) employees with primary places of employment in different states.

Employees who are not "new hires" are "continuing" employees. If a continuing employee was full-time before his/her break in service, then the employer avoids an ACA mandate penalty if the employee is offered health coverage either:

- Day one: The first day that the employee is credited with an hour of service (basically, when the employee starts work); or
- First day of the new month: If day one will not work practically, employers avoid ACA penalties if health coverage is restored "*as soon as administratively practicable.*" As a general matter, this is the first of the month following the date of reinstatement.

Importantly, the requirement to reinstate health coverage only applies if the continuing employee had health coverage before the termination or furlough. In other words, if the employee previously declined coverage for that stability period year, there is no need to offer health coverage upon their return.

Additionally, if the continuing employee was part-time when the individual left and is rehired into the same position, then that person would be treated as part-time upon reinstatement. Finally, the rules do not require the employer to offer retroactive coverage for the period the employee was gone just because the employee is returned to work and is a continuing employee.

On the other hand, if an individual was full-time when they left and they are rehired into a part-time position, or vice versa, different rules may apply. The treatment depends heavily on the facts, as explored more in our examples in Subsection 6 below. However, as a general principle, the rules favor providing offers of coverage to employees, even if the employee would not be eligible for coverage if s/he was hired into that position as a new hire.

3. "Phased-in" Operational Resumption

As a practical matter, many employers may not have been closed for 13 weeks. Therefore, anyone rehired immediately would likely be a "continuing" employee. However, employers rehire employees in phases should note that these rules apply *on a person-by-person basis*. As a result, employees hired later may not be considered "continuing" employees.

Employers could consider waiving the break-in-service rule for all returning workers for administrative simplicity. However, the employer must first obtain advance approval from the insurance carrier (or stop-loss provider) and should memorialize the change in a formal plan amendment with compliant participant disclosure. (See "Section (x). ERISA and Other Disclosure Rules" below.)

4. Crossing Stability Periods

What if an employee is deemed a "continuing" employee but was furloughed (or laid off) in one stability period comes back to work in the following measurement period (e.g., leaves in one plan year and comes back in the next plan year)? Do these rules still apply? The answer is yes, but with a twist.

If an employee returns to work in the employer's next measurement period, the employee's benefit eligibility would be based on the measurement period result in effect at the time of (or just prior to) their job interruption. In other words, if the employee was full-time based on the hours in that last measurement period, then the employer would need to offer coverage as described above for a continuing employee. On the other hand, if the employee was part-time based on the hours in that measurement period, no offer of coverage would be required.

5. **"Affordable" Offers**

To avoid an ACA employer mandate penalty, all full-time employees must be offered health coverage that provides minimum value and is "affordable." There are three employer "safe harbors" for affordability: (1) W-2, (2) rate-of-pay, and (3) the federal poverty threshold. (Further ACA affordability details see our Employee Benefits Compliance Bulletins on hubinternational.com.)

Each of these safe harbors each has specific conditions for use. A job interruption and its impact on salary could affect the affordability of an employee's coverage offer – particularly if the W-2 safe harbor is being used since it reflects earnings for the year. As a result, employers could inadvertently become subject to an ACA mandate penalty if employees are placed on furlough or leave during a stability period (rather than being terminated), and are not offered minimum essential coverage, or are offered coverage deemed unaffordable, during the job interruption. Employer lobbying groups have reached out to the IRS to request some temporary relief in this area.

6. **Examples**

Below are some examples that help illustrate how to address specific return-to-work situations based on the ACA employer mandate rules. The examples are intended to show how the rules apply when employees shift positions when they come back from work. However, please note that the examples are not intended to address all potential factual scenarios; each example only applies to the specific facts described in the example. If an employer's facts are different, then the answer may be different. Note that in each case, the employer's plan could be more generous than the law requires (which may create some administrative simplicity), but would need to review any of those rules with their insurance carrier (if they are full-insured) and stop-loss carrier and TPA (if they are self-funded).

Assumptions for all examples: Unless a specific example says otherwise, the employee is always rehired during the same stability period in which he or she left. Additionally, the examples assume a calendar plan year/stability period and that the employer is, at all times, subject to the ACA employer mandate. In all cases, the employees are not recently hired; they have been with the employer for at least one full standard measurement period.

Example 1: Law Firm, LLP uses the lookback measurement period for all employees (hourly and salaried, full-time and variable hour). Alex was full-time prior to going on

furlough. The furlough is less than 13 weeks. At the end of the furlough, Alex is brought back into a variable hour position.

In this case, Alex should continue to be treated as full-time for the remainder of the stability period. Because Alex is a continuing employee, Alex's status as a full-time employee is not affected by being rehired into a variable hour position.

Example 2: Baker Corp. uses the lookback measurement period for all employees (hourly and salaried, full-time and variable hour). Barry was full-time prior to going on furlough. The furlough is less than 13 weeks. At the end of the furlough, Barry is brought back into a part-time position where the employer knows Barry will only be working an average of 20 hours per week because of a lack of work.

Similar to Example 1, Baker Corp. may continue to treat Barry as full-time for the remainder of the stability period.

However, a special rule (sometimes referred to as the "downshift" rule) may allow Baker Corp to move Barry into the monthly measurement period. Under this rule, if Barry was continuously offered coverage from the fourth month following Barry's month of hire, then this shift to a part-time position gives Baker Corp. some flexibility. Baker Corp. can move Barry into a monthly measurement period and measure Barry's hours for three months. If Barry does not average at least 30 hours per week over those three full calendar months, Baker Corp. can stop offering coverage to Barry beginning with the fourth full calendar month following Barry's rehire into the part-time position.   Baker Corp. can continue to use the monthly measurement period for Barry through the end of the next full measurement period, if it so chooses.

Example 3: Candlestick, Inc. uses the lookback measurement period for hourly employees and the monthly measurement period for salaried employees. Cece is put on furlough for less than 13 weeks. When the furlough ends, Cece is brought back from furlough into a variable hour position.

In this case, Cece gets whatever is mostly likely to get her an offer of coverage. If Cece's hours in the measurement period before moving into a variable hour status would have made her full-time, then Cece must be treated as full-time for the stability period in which she comes back to work. If not, then Cece's full-time status will be determined each month using the monthly measurement method for the rest of the stability period in which she comes back.

Similarly, for the stability period *after* Cece returns to work, she must either be treated as full-time based on her hours for the measurement period she returns to work OR, if she did not work full-time hours during that measurement period, she must be treated as full-time for any month (using the monthly measurement rules) in which she would be considered full-time during that stability period.

After that *second* stability period, the regular lookback measurement rules apply.

ii. Waiting Period Issues

1. **Employers Subject to the ACA Employer Mandate**

   Employers also need to consider whether employees should be required to complete a new waiting period. For employees who terminated employment and are rehired or furloughed without any pay, it will depend on the terms of the plan and whether the employer is subject to the ACA employer mandate as described in Section (i). above.

   Employers subject to the employer mandate generally can only apply a new waiting period if the employee is treated as a "new hire" (as opposed to a continuing employee). As noted above, an employee can generally be treated as a new hire if they did not provide, and were not paid for, any hours of service for at least 13 weeks (or, for educational institutions only, 26 weeks). In most cases, the break in employment due to the COVID-19 crisis is likely to be less than 13 or 26 weeks, so most employees could not have a new waiting period applied to them on rehire or return to work.[13]

   Plan terms can be more generous. However, if an employer wants to amend its plan terms to be more generous, it should make sure it has consent from its insurance carrier (if insured) or stop loss carrier (if self-funded). Self-funded employers should also coordinate with their third-party administrators on any administrative changes.

2. **Employers not Subject to the ACA Employer Mandate**

   For employers not subject to the ACA employer mandate, the answer hinges on the plan terms and the ACA waiting period rules. For employees who terminated employment, the ACA waiting period rules say employers may impose a new waiting period if it is "reasonable under the circumstances." In other words, the termination of employment must be a legitimate termination of employment.

   For employees who are furloughed and return to work, employers likely <u>cannot</u> impose another waiting period. The ACA waiting period rules only allow a new waiting period if the employee terminated employment. A furlough is generally not a termination.

   Plan terms can always be more generous than the law requires. However, if an employer wants to amend its plan terms to be more generous, it should make sure it has consent from its insurance carrier (if insured) or stop loss carrier (if self-funded). Self-funded employers should also coordinate with their third-party administrators on any administrative changes.

iii. **IRC Section 125 (pre-tax) Cafeteria Plan Elections for Health Coverage**

   What election options should employees' receive upon return to work?   What happens if economic circumstances force the employer to increase required health coverage contributions or reduce pay?

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[13] This assumes the employer is using the lookback measurement period rules (which most do). Employers using the monthly measurement period rules would have a different analysis and should speak with their HUB advisor.

1. **IRS gives optional flexibility**

   The normal rules for cafeteria plan elections (described more fully below) can be restrictive and limiting. Recognizing the potential need employers may have to provide more flexibility, the IRS issued Notice 2020-29 which allows the more flexibility for election changes during calendar year 2020. Specifically, employees may:

   - make a new election to enroll in the employer's health plan, if the employee initially declined;
   - change to a different health coverage option or tier sponsored by the same employer (such as moving to a different plan or changing from single to family coverage);
   - unenroll from the employer's plan, if the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer (including coverage through a spouse or on an ACA exchange – the IRS notice has a sample attestation);
   - enroll in, drop, or change the elected amount for a health flexible spending account ("FSA"); and
   - enroll in, drop, or change the elected amount for a dependent care FSA.

   All these changes only apply on a going-forward basis, meaning there are no retroactive changes that can be made to employee elections. However, to the extent employers allowed these elections earlier this year, they can retroactively amend their plan to reflect what they have allowed.

   Most importantly, employers are not required to allow any of the above changes. Additionally, employers may put limits on making these changes, such as requiring elections within a certain period of time after the changes are adopted or only allowing employees to elect more favorable employer coverage rather than any employer coverage. Also, for the health and dependent care FSAs, employers may require that an election cannot be reduced below amounts already reimbursed. Any changes should be reflected in applicable plan amendments.

   Additionally, in Notice 2020-23, the IRS confirmed that cafeteria plan enrollment elections that would normally have to be made before the beginning of the plan year may instead be made at any point up until July 15, 2020. This only applies for employers with cafeteria plan years that begin between April 1, 2020 and July 15, 2020. However, the IRS guidance is clear that benefits can only be provided after the election becomes effective.

   Employers could consider offering employees this additional flexibility on returning to work. However, in doing so, they should consider the cost implications of employees potentially moving between plans or signing up for coverage they did not previously elect. Because this flexibility is optional (like all change in status rules, other than HIPAA special enrollment rights), employers can also decide not to offer it.

2. **Cafeteria Plan Rules: Cost/Coverage changes**

Even for employers who do not adopt the newly-available flexibility described above, they may have existing rules in their plans that address cost and coverage changes.

> **Note:** *Only plan cost changes are considered*. If the plan cost remains the same, but the employee "feels" the contribution expense become more expensive because his or her hours have been reduced or if the individual suffered a pay cut, the IRS does <u>not</u> consider that the basis for a compliant election change.

If the cost increase is merely "insignificant," then the cafeteria plan can *automatically* increase the pre-tax withholding from participants – but no other changes can be allowed. However, if the cost change is "significant," then employees have the option to drop elections and switch to lower cost coverage, if similar lower cost coverage is available. The employee may not drop coverage unless no similar lower cost coverage option is available.

That means that for a "significant" increase in cost, an employee could go from gold to silver, silver to bronze, or move down the "cost" ladder to any similar, less expensive coverage. If the person was already on the lowest price coverage (lowest rung of ladder), then they could drop coverage.

The IRS has never officially defined "significant," but as an informal rule of thumb for lower to medium paid work forces, some experts suggest that an increase of more than ten percent is significant. Employers with a question about whether a change is "significant" should discuss with counsel of their choosing.

3. **Other Change in Status or Special Enrollment Rules May Also Apply**

Note that employees might also have the opportunity to drop coverage and switch to obtain coverage in another plan, such as a spouse's plan. Whether that would be possible will depend in part on the other plan's eligibility rules as stated in the plan document.

In addition to cafeteria plan change in status rules, employees and dependents have a HIPAA special enrollment right if the employer ceases to contribute to the plan. In other words, if the employer stops subsidizing <u>any</u> part of the coverage, the employee or dependent may be eligible to enroll in a different plan (for example, a spouse's plan). As a general matter, this tends to be a rarely invoked HIPAA special enrollment event. Note that under current disaster relief guidance, the 30-day period to make election changes due to HIPAA special enrollment events is extended. Specifically, any period between March 1, 2020 and sixty (60) days after the end of the National Emergency related to the coronavirus (the "Outbreak Period") is disregarded in counting the 30-day period. Therefore, if an employee has a special enrollment event that occurs during the Outbreak Period, then he or she would have 30 days after the end of the Outbreak Period to make the election. Additionally, if an employee had a special enrollment event within 30 days before March 1, 2020, the rest of the 30 days would be available after the end of the Outbreak Period. Note, however, the election delay cannot be more than one year.

4. Carrier Considerations

Note that the IRS change in status rules and the HIPAA special enrollment rights are often incorporated insurance policies. Therefore, for employers with insured plans need to make sure that any change in elections intend to allow are available under their insurance contracts.

Employers that want to offer the expanded change in status opportunities described above should make sure that their insurance carrier (if their plan is insured) or stop loss carrier (if it is self-funded) is on board with those changes.

Finally, if employers do make changes to the cost of coverage, they should similarly make sure that the carrier or stop-loss provider is made aware of that decision. Advanced carrier/stop-loss approval is critical to ensure that there will not be a coverage dispute later.

iv. Health Savings Account ("HSA") Contributions

If an employer was making HSA contributions and suspended them while employees were on furlough, the employer should decide whether they are going to make up those missed contributions. Alternatively, the employer could simply prorate and make contributions for the months left in the year.   Employers should review their communications to employees and their plan documents to determine if plan amendments are necessary for these changes.

Note that employees also have the opportunity to make new elections to either increase, decrease or suspend contributions to their HSA at any time. Employers may want to communicate this to employees who are returning to work so they can make appropriate changes in their elections.

v. Health Care Flexible Spending Account ("FSA") Issues

How employee health care FSA elections are handled on returning to work depends on how they were handled while the employees were out. Employees who had their employment terminated likely became ineligible and would have the ability to make new elections upon returning to work.

The treatment of employees on furlough varies. If the employee's contribution election was continued during furlough (because the furlough was fully or partially paid), then it would continue when they return.

If the employee's contribution were stopped during the furlough (for example, because the furlough was unpaid), the employer will need to confirm how their plan document treats the election when the employee comes back. For example, if the employer allowed the employee's election to continue during leave, subject to payment of the contributions on return, then the employee's payroll period contributions on return would be increased to recover the missed contributions.

On the other hand, if the employee cancelled his or her election on commencing leave, then he or she may be able to reinstate the election on return. However, again, the employer needs to review the terms of their plan to determine how it treats paid and unpaid leaves and return from those leaves.

Beyond the standard rule above, employers may choose to provide additional flexibility. The IRS issued Notice 2020-29 which allows the more flexibility for election changes during calendar year 2020 due to the COVID-19 crisis. Specifically, employees may enroll in, drop, or change the elected amount for a health FSA. This change only applies on a going-forward basis, meaning there are no retroactive changes that can be made to employee elections and no refunds of unused amounts can be made. However, to the extent employers allowed these elections earlier this year, they can retroactively amend their plan to reflect what they have allowed.

Most importantly, employers are not required to allow the above additional flexibility. Additionally, employers may impose limits, such as requiring elections within a certain period of time after the changes are adopted or requiring that an election cannot be reduced below amounts already reimbursed from the FSA.

Any election changes must be permitted by the applicable plan document. Employers will need to confirm what election changes are available that by reviewing their plan document (or amending to add them if they choose to do so).

vi. Dependent Care Flexible Spending Account ("FSA") Issues

For dependent care FSAs, employees may elect to increase their contributions to reflect the cost of dependent care, to the extent it is available when they return to work. Note this does not apply if their dependent care provider is a relative of the employee, such as a child, sibling, or parent (including in-laws of these three), stepparent, cousin, aunt, uncle, or other person living with the employee.

Beyond that standard rule, employers may choose to provide additional flexibility. The IRS issued Notice 2020-29 which allows the more flexibility for election changes during calendar year 2020 due to the COVID-19 crisis. Specifically, employees may enroll in, drop, or change the elected amount for a dependent care FSA. This change only applies on a going-forward basis, meaning there are no retroactive changes that can be made to employee elections and no refunds of unused amounts can be made. However, to the extent employers allowed these elections earlier this year, they can retroactively amend their plan to reflect what they have allowed.

Most importantly, employers are not required to allow the above additional flexibility. Additionally, employers may impose limits, such as requiring elections within a certain period of time after the changes are adopted or requiring that an election cannot be reduced below amounts already reimbursed from the FSA.
As a practical matter, the dependent care FSA rules are already fairly flexible in allowing employees to change their elections. Therefore, employers may not see a need to provide this additional flexibility.

Any election changes must be permitted by the applicable plan document. Employers will need to confirm what election changes are available that by reviewing their plan document (or amending to add them if they choose to do so).

vii. Commuter Benefits

Employees may also want to change their elections for pre-tax commuter benefits, such as qualified parking or transit. Note that there are two general timing conditions. First, the election must be for future commuter/transportation benefits. Second, the election must be made before the employee is able to receive the cash compensation that is paying for the benefits. In other words, the election generally must be made before the beginning of a pay period. The above election changes must be permitted by the applicable plan documents.

viii. Life and Disability Plan Issues (Including Evidence of Insurability)

For life insurance and disability, an employer will likely need to give a returning worker who lost coverage (whether furloughed or laid-off) new election forms so that the employee can again elect benefits. This is because most fully-insured life and disability plans will contain an actively-at-work requirement for continued coverage. Upon rehire or returning to work, the employee may have to satisfy evidence of insurability requirements.

However, plan sponsors should work with their HUB advisor to determine whether an insurance carrier providing coverage for life insurance or disability benefits will waive the actively-at-work requirements or require (or waive) evidence of insurability provisions for returning workers. May carriers have provided flexibility on these and other requirements during the pandemic. In some cases, state insurance regulators may require additional flexibility.

ix. Premium Repayments for Extended Coverage

In many cases, employers chose to maintain health insurance (and in some cases ancillary coverage) for job interrupted employees.[14] Many employers who maintained their employee's health coverage also continued to pay the corresponding premiums, often without any contribution from the employees. As a result, some employers may wish to seek employee repayment upon return to work.

Typically, there are three ways to for employees to pay for continued coverage:

1. Pay as you go (*after-tax*; usually check or money order during absence);

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[14] Interruptions that triggered legal protections under newly expanded FMLA (or state leave laws), or individuals that elected COBRA (or state continuation) are subject to a different analysis that is beyond the scope of this article. Please review the materials on HUB's Coronavirus Resource Center for more information on those situations.

2. Pre-pay (*pre-tax or after-tax*; unlikely applicable for Corona-related job interruption); or

3. Employee "catch-up" (*pre-tax or after-tax*; employer pays to maintain coverage during absence but intends to capture repayment from future employee compensation).

Employers subject to FMLA will likely already use plan language that specifically permits the three funding approaches (described above) during unpaid FMLA leave. Many well-drafted plans will adapt the FMLA-style funding plan document language to broadly apply to other types of unpaid leave, like a furlough due to the COVID-19 pandemic. (In general, the payment options available under non-FMLA leave cannot be more generous than those available to employees on FMLA leave.)

Some circumstances may require a combination of options to maintain benefits. For example, the employer may direct "pay as you go" funding during the absence, but then choose to cover the cost if the employee stops payment (with an expectation that the employer will later recover the expense from the individual). In addition to the plan document, employers should consult state law since state wage withholding laws may also apply.

As a best practice, employers should have sought an employee's advance authorization to recoup any premiums. However, under the circumstances, employers may not have been able to do it. Finally, employers bear some risk of loss under the "catch-up" option for employees who do not return (or do not return long enough to recoup payments). Getting repayment from them is usually difficult.

Employers should also consider the interaction of any repayment plans with the optional expanded election opportunities described in Section (iii) above. For example, if an employer allows those expanded election opportunities, then employees may choose to drop coverage upon returning to work if they discover that they also have to repay premiums for previous coverage.

x. **ERISA and Other Disclosure Rules**

1. **Coverage Changes That Need Communicating Under ERISA**

   Various relief legislation has made key benefit changes that need to be communicated to participants as described in more detail in our Employee Benefits Compliance Bulletins on hubinternational.com. Among other items, plan documents and summary plan descriptions (SPDs)/summaries of material modification (SMMs) should be revised to address:

   - Added plan coverage of testing for COVID-19;
   - Permitted coverage for telemedicine under high deductible health plans prior to the deductible through for plan years before January 1, 2022;
   - Health FSAs (along with health savings accounts and health reimbursement arrangements) may reimburse over-the-counter medicine and drugs and menstrual care products (effective January 1, 2020), if the employer adopts that change.

In addition to SPDs and SMMs, normally if there is a material change in plan terms mid-year that affect the content of the most recent Summary of Benefits and Coverage ("SBC"), an updated SBC must be distributed at least 60 days before the change can take effect. However, the relevant government agencies have said they will not enforce this deadline against plans that adopt any required changes, other changes to provide greater coverage for testing or treatment of COVID-19, or expanded telehealth with less than 60 days' advance notice. However, plans must provide notice as soon as they reasonably can. This relief only applies while the COVID-19 national state of emergency or public health emergency are in effect. Once these have been lifted, the standard 60-day advance will apply. Additionally, plans that attempt to offset the cost of COVID-19 testing and treatment by raising the cost-sharing, or limiting coverage of, other benefits could be subject to penalties and enforcement by the federal government.

2. **Election Changes That Need Communicating Under ERISA**
   Employers will likely also need to include the expanded deadlines for special enrollment elections (described in Section (iii)(3)), claims filing and appeal deadlines, COBRA elections, and COBRA premium payments that were released by the IRS and U.S. Department of Labor. In general, any of these deadlines are on pause. Specifically, any period between March 1, 2020 and sixty (60) days after the end of the National Emergency related to the coronavirus (the "Outbreak Period") is disregarded in counting the number of days. Therefore, one of these deadlines occurs during the Outbreak Period, then the employee would have the Outbreak Period added to their time to complete the requirements.
   For example, if the plan had a one-year deadline to file a claim and that one-year period started during the Outbreak Period, the employee would have until one year after the end of the Outbreak Period to file the claim. Similarly, if an employee incurred a claim one month before the Outbreak Period (February 1, 2020), then the one-year claim deadline is paused during the Outbreak Period. This means the employee would have an additional 11 months after the end of the Outbreak Period to file the claim. Note, however, the delay due to the Outbreak Period cannot be more than one year. More details on this are available in our Employee Benefits Compliance Bulletins on hubinternational.com.

3. **Benefit Enhancement Versus Cutback under ERISA**

   Generally, an employer has until 210 days following the end of the plan year in which it was effective to let employees and dependents know of a change. For now, as long as the plan is "operationally" following the new requirements, then formally updating the document and issuing the SMM is less urgent.

   However, due to the current economic climate, employers may be contemplating group health plan *benefit cutbacks and other benefit takeaways* (such as described above for plan cost increases). Under ERISA's accelerated notification rule, a much shorter (and strictly enforced) notification timeline applies. A revised SPD or SMM must be distributed describing changes that the average plan participant would consider a significant reduction in covered services or benefits. Notification must be provided within 60 days of the *adoption* of the change (as opposed to 60 days from the effective date of the change). Conservatively, employers should assume any

reduction of health plan benefits or services must be disclosed using the accelerated timeframe.

    4. **Other Disclosures**

If the employer adopts any of the additional flexibility for making Cafeteria Plan. Health FSA, or Dependent Care FSA elections described in Sections <u>iii</u>, <u>v</u>, and <u>vi</u> above, the employer may want to communicate that flexibility as well. These election changes are part of the cafeteria plan, which is generally not subject to ERISA. However, an employer adopting these changes will want to let employees know so they can take advantage of them.

III. Premises Liability & Customer Safety

Organizations need to consider their premises liability exposures when re-opening their business and take steps to reduce the risks associated with customer and employee interaction. To assist in developing an action plan, below are steps an employer may follow to develop their own premises liability risk mitigation program:

Assessment – Representatives from management, along with employees, should evaluate operations to identify risk mitigation opportunities. Look for conditions on the premises that may contribute to potential exposures that could present adverse risk and result in claims.

Planning – Management should create guidelines to standardize the practical considerations that arise from the assessment. Managers should specifically identify the measures and steps it must take to remedy the conditions identified in the "Assessment" phase.

Implementation – Management will execute the plan and risk mitigation steps and strategies. Execution includes training for the new policies / procedures and related documentation.

Evaluation – Once the organization has implemented the premises liability risk mitigation program, it's important to establish an ongoing evaluation and review of the program. The company should engage in a continual review of the process, policies, procedures, and outcomes.

A. Phase 1 – Assessment

    1. Create a working group that consists of stakeholders from various levels in the organization to perform an assesment to determine feasibility, timing and process for re-opening. The working group should also assist in developing and enforcing policies, procedures, and guidelines.

    2. Consider identifying a single point of contact for employees, vendors, and customers regarding the above.

    3. Confirm that local, state, and/or federal organizations have authorized your business to re-open.

4. Determine the occupancy of the building/space to assist with phased occupancy and to meet social distancing standards.

5. Identify physical items that could expose customers, vendors, or employees to COVID-19.

6. Identify areas where frequent employee/customer/vendor interactions occur and where customers, visitors, and/or employees may gather; establish a game-plan to ensure social distancing and limit exposure risks in these areas (for example, points of sale, elevators, public restrooms, vending machine areas, breakrooms, smoking areas, conference rooms, reception areas).

7. Business owners may want to consider varying and/or limiting hours of operation to limit risk to employees and visitors/customers.

8. If there are customer seating areas or table service, consider a plan to establish safe social distancing placement or potentially postponing these services until full occupancy becomes safely possible. Additionally, consider closing or limiting break room and conference room access.

9. Review, evaluate, and determine which vendors are essential to immediate operations. Organizations should consider which vendors are essential to operations or what contractual obligations and duties may require continued services.

10. In addition to developing policies, organizations should also consider signage putting people on notice of specific rules and expectations. For example, organizations may identify areas where signage regarding hand sanitizer/wipes, social distancing, and prohibited entry for individuals with the CDC identified symptoms. Be sure to inform visitors of the organization's expectations and encourage proper sanitary practices, respiratory etiquette, and social distancing measures. There are a variety of signs available on the CDC website.

B. Phase 2 – Planning

The planning stage should incorporate all the items that were evaluated in the assessment phase and support the development of standardized processes for staff, vendors, and customers to follow.

1. Create a checklist of high traffic areas that need to be sanitized. This may include shared electronic equipment, or shared items such as display merchandise, carts, baskets, parking terminals/meters, doors, handles, etc.

2. Consider limiting occupancy of a building or space as part of a phased re-opening strategy, keeping the following considerations in mind:

     i.   Limit occupancy in elevators, stairwells, etc. depending on the layout and location of the business

    ii.   Continually monitor the effectiveness of limiting maximum occupancy. This will largely depend on the size and layout of the building or space

   iii. Defer to local regulations and officials to assess regional impact of the pandemic

3.   Consider limiting occupancy of the building or space to between 25-50% (or less) of maximum capacity for the first 2 weeks of re-opening:

     i.   Note that this may also include limiting occupancy in elevators, stairwells, etc. depending on the layout and location of the business

    ii.   Continually monitor the effectiveness of limiting maximum occupancy. This will largely depend on the size and layout of the building or space

   iii. Defer to local regulations, as they may be more stringent than the guidelines provided above

4.   Consider identifying and allocating staff to monitor customers/visitors entering and exiting the location during peak hours. Some businesses may need to institute a "one-in/one-out" policy during peak hours, with staff or security on standby at entrances/exits to monitor and control customer traffic.

5.   Once all high traffic areas are accounted for, consider creating a checklist of the areas that require frequent sanitizing and develop a corresponding schedule.

     i.   Document cleaning activities

    ii.   Determine areas that need sanitizing on an ongoing basis vs. on a schedule, such as a Point of Sale (PoS) system that is frequently handled.

6.   Depending on the nature of the operations consider suspending certain services that pose a significant threat to public health (e.g. self-service food and beverage stations, table service, etc.).

7.   Consider creating partitions between employees and customers in areas where there is significant customer-employee interaction (e.g. order terminals and other PoS).

8.   Create signage to alert customers if employees are being tested and monitored for COVID-19.

9.   Prior to giving access to vendors, consider sending a document to them electronically, requiring their agreement, that their employees will not be allowed to continue services if they have had any COVID-19 symptoms including fever, dry cough or difficulty breathing (CDC Symptoms), have been exposed to anyone who has tested positive for COVID-19 or is currently waiting for test results.

10.   Defer non-essential vendor use. Consider developing a vendor credentialing or screening program and access list with a disposable badge that they receive if needed

to enter. This should be a one-time-only use badge to identify they are approved to be "on-site."

11. Follow public health guidelines regarding the use of face coverings for employees, customers, visitors, vendors and the general public. Current CDC guidance is to wear cloth face coverings in public settings where social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies), especially in areas of significant community-based transmission.

12. Planning should include various communications designed to provide information on what the organization is doing, why it is being done, and how guidelines are being applied in a consistent manner.

C. Phase 3 – Implementation

As employers engage in re-opening activities, they should focus on the following aspects of their operation including; access, disinfection, communication, and evaluation.

Access

1. Have controls in place to maintain social distancing for high-traffic areas:

    i. Areas of concern may include: entrances/exits, elevators, stairwells, points of sale, shared electronic equipment such as ATMs and vending machines, areas where queues may form, etc.
    ii. Consider marking the floor with spaces that are at least 6 feet apart and placing signage alerting customers of the system in place.
    iii. In addition, provide hand sanitizer/wipes or have staff on standby to sanitize these areas frequently throughout operating hours.

2. During this period of Phased Occupancy, consider that seating areas, tables, etc. may still need to be eliminated or at least limited until it is deemed safe for people to congregate in larger groups.

3. Limited operating hours: Consider implementing a process by which only certain customers are permitted in a location during certain hours (i.e. opening an hour early for higher risk customers like those who are elderly or have certain medical conditions that make them more susceptible to contracting COVID-19).

4. Confirm all lighting (exterior and interior) is in good working condition.

5. Verify that all security cameras are in good working condition, being monitored, and continuing to save footage.

6. For general housekeeping, verify the refuse collection company has been advised to resume their regular pickups. All walking paths and means of egress must be cleared in accordance with standard maintenance procedures.

7. Encourage all non-essential rooms or areas to keep doors closed.

8. Continue to require 6ft / 2m social distancing in all areas.

9. Elevator use should be restricted to 1-2 employees at one time, dependent upon elevator size (with signage posted).

10. Consider closing office break areas/kitchens and shared coffee machines, water machines or other kitchen appliances. Consider supplying bottled water. If a refrigerator is shared, provide wipes and require that the refrigerator be wiped down before and after each individual use.

11. Where possible, maintenance work "shift" times should be staggered.

12. Limit, when possible, the locations where vendors are permitted to go in the facility.

13. Stagger the vendor on-site dates and times so that vendors are provided access during times that have the least customer or employee presence.

14. Provide a separate and specific intake area solely for vendors (separate from areas that would be used by customers or employees) and ensure that this area is disinfected regularly and has disposal for PPE.

15. Limit or deny vendor access to common areas such as bathrooms and breakrooms.

16. Limit vendors from entering facilities if they can provide the service outside (e.g., packages, food delivery, etc.)

17. If possible, require a contactless temperature check prior to vendors having access to facilities.

18. Please see the property section for more information on engineering and building equipment maintenance.

Disinfecting

1. High traffic areas will need to be cleaned and sanitized with increased frequency.

2. Depending on the nature of operations, high traffic areas will differ, some may include the following:

- Entrances and exits (including door handles)
- Stairwells
- Elevators
- Shared terminals or electronic equipment (ATMs, areas where customers place orders, points of sale, parking terminals, vending machines, gas pumps, etc.)
- Public restrooms
- Areas where queues form
- Coolers or display cases
- Food or beverage dispensers
- Seating areas and tables
- Customer assistance items like carts, baskets, electronic wheelchairs, etc.

3. Stock all standard cleaning supplies for janitorial staff on site, regardless of whether there is a contract with a 3rd party cleaning company for COVID-19 cleaning.

4. If contracts, invoices, or other documents need to be signed, offer electronic signatures first. If that is not available, either use a disposable pen or clean and disinfect after each use including clipboards, PoS systems, or other similar items.

5. Provide disinfecting wipes and hand sanitizer in the main entrances, conference rooms, kitchen/break area for employee usage on door handles, light switches, etc.

6. All disinfectants should be approved by the EPA for COVID-19 use.

7. Provide notice / signage of chemicals used during cleaning process.

8. Clean and disinfect all shared areas such as offices, bathrooms, break rooms, shared electronic equipment (tablets, touch screens, keyboards, remote controls).

9. Close off and deep clean any areas where a probable or confirmed case of COVID-19 was identified.

10. Contract with a licensed and insured 3rd party cleaning company to clean the facility regularly.

11. Coordinate with landlords (and communicate expecations) to have common building areas cleaned at increased frequencies. Focus areas should include but not be limited to: public lobbies and hallways, public bathrooms, security desks, access control points, elevators, and parking garage access points.

12. Request an increased frequency of cleaning (at a minimum of daily) for washrooms and common areas.

Communication

1. Create signage alerting customers of:
    - Occupancy limitations and procedures that are in place
    - Social distancing expectations and requirements
    - Employee health testing and monitoring procedures
    - Cleaning efforts in high traffic areas
    - Face masks, social distancing, and respiratory etiquette
    - Changes to foot traffic to reduce overcrowding
    - Prohibition of anyone entering who has experienced any of the COVID-19 symptoms
    - Other CDC notices and posters

2. If an employee tests positive for COVID-19, a generic notice should be posted in a conspicuous space notifying vendors, visitors, and others (ensuring that no personal identifying information is included) of a positive test at the facility.

3. Allow employees an opportunity to "opt-out" of returning to the workplace if they are not comfortable or not able to do so. Encourage any employees in this situation to talk with local HR.

4. For employees returning to the workplace, consider having them sign an acknowledgement of employer workplace rules and policies established to mitigate and manage the COVID-19 risk.

5. Consider including signage in the washroom areas reminding staff of proper handwashing protocols.

6. Assess local situations regarding virus activity, local governmental restrictions, and consider opening to full capacity.

7. Keep logs of all maintenance work done including time, work done, staff completing the work. This should be kept for any 3rd party work on site as well.

8. Request the use of PPE by vendors (and all visitors) while they are on premise. That use may be limited to cloth mask face coverings, so it is recommended to have a dedicated hand-sanitizing station along with disinfectant wipes for their equipment or product they are bringing in. Do not allow vendors to use gloves; rather, have them use hand sanitizing soap prior to having access to the premises.

D. Phase 4 – Evaluation

1. As public health officials permit, consider increasing the allowed occupancy so long as it allows for proper social distancing protocols. Depending on the size and layout of the premises, the allowed occupancy may need to be limited.

2. Evaluate the effectiveness of measures provided above.

3. Re-evaluate vendor lists to determine if there iscapacity to safely include more.

4. Continue all social distancing practices as outlined above.

5. Assess local situations regarding virus activity, local governmental restrictions, and consider opening to full capacity.

6. Re-evaluate deferred service.

IV. Property Loss Prevention

Ramping up or restarting a business during a pandemic requires continuous adjustment. Because the COVID-19 pandemic continues to have an unprecedented impact on daily life, business owners looking forward to ramping up or re-opening operations face significant challenges. Businesses should consider re-organizing and refreshing their property and operational policies and procedures.

A. Evaluation

At the earliest, implement change management measures to:

1. Assess the facility for property damages

2. Identify all changes

3. Identify additional required controls

Understand and evaluate the new operating conditions and exposures:

1. **Authorities, state and local governmental guidance and requirements for property and facility occupation:**
    Include guidance review from the Occupational Safety and Health Administration (OSHA). This includes social distancing requirements that will affect the facility operations, workspace layout, and/or redesigning the production facility.

2. **Employee shortage:**
    In some cases, employers may be faced with an employee shortage which will invariably impact production and productivity. Employers will have to rethink and restructure employee workloads ensuring that employees are first assigned to the most critical tasks and projects.

3. **Employee fatigue:**
    Employers should beware of employee burnout. For example, employers experiencing staffing shortages may increase workers' shift and forgo breaks. Loss experience data demonstrates that fatigued workers may result in greater losses and/or losses that may interrupt operations.

4. **Utilities and processes:**
    Employers that re-open their business without established re-opening and revised operational procedures may face a strain utilities and systems. In a sense of urgency, a reduction of regular maintenance is a risk for losses.

5. **Buildings:**
    Employers should conduct a complete walk through of the facility including the building and surrounding property to identify risk conditions and/or abnormal conditions. Employers should be sure not to compromise inspections despite a reduced staff and/or shifts. Employers should identify conditions that create risk before a loss occurs.

6. **Supplies and Inventory:**
    Shortages in the supply chain can compromise an organization's ability to meet production demands. Conversely, increased inventory can create significant fire hazards and/or damages. For example, inventory stored outside the facility but on the premises and too close to the building may create a fire hazard.

B. Guidance

Before re-opening, seek the expertise of legal, insurance and other professionals.

1. **Policies and Procedures**
    Prior to re-opening, employers should review current policies and procedures and identify changes responsive to the COVID-19 work environment. If the employer makes changes to its policies and procedures, it should likewise train its employees.

2. **Emergency response plans (ERP**)
    New rules and laws designed to mitigate the risk of spreading COVID-19 may impact the employer's ERP. For example, social distancing rules may impact an employers' ERP. At a minimum, employers should update the emergency procedures and contact list and train all employees. Egress plans may likewise need to be modified to include distance requirements and new facility layout.

3. **Housekeeping**
    One of the ways to mitigate risk is to ensure that employers maintain housekeeping and waste disposal standards. For example, housekeeping may be adversely affected if production, storage, and waste increase. Employers should consider increasing the frequency of cleaning to keep pace with increased production and/or facility needs. Specifically, employers should increase cleaning frequencies to maintain control over processes producing fugitive combustible dusts or oily residues.

4. **Hot Work Policy**

Do not allow hot work to be performed in a permit-required area without following all elements of a hot work permit system.

5. **Restarting utilities and processes**
Refreshing should be done to employees starting up the business or the production. Allow only qualified persons to turn on utilities or restart processes. Qualified persons may include electricians, plumbers/gasfitters (for fuels), or process equipment operators. The qualified person is more likely to detect and correct abnormal conditions before damage may occur.

6. **Maintenance**
Proper maintenance programs should be in place, even with reduced shift. Annual inspections including thermographic inspections for electrical systems should be in place. Inspection of the fire protection systems should be in place including the inspection of the sprinkler systems, the fire extinguishers, and standpipes.

Follow a deliberate start-up process that allows time to detect abnormal conditions that could lead to equipment breakdown. Keep in mind equipment breakdown could be accompanied by an ensuing fire.

7. **Fire protection and impairment procedures**
Avoid un-necessary shut down of fire protection systems. However, for those impairments which do occur, follow all elements of a fire protection impairment program and contact the insurance broker or insurer.

V. Job Aids, Checklists, and Guides

A. Health Screening Questionnaire

Name:

Facility Address:

Date:

Manager:

Section 1: Employee Health and Wellness Checklist	YES	NO	NA	Comments	How long have you experienced these symptoms?
Are you experiencing any of the following symptoms or combination of symptoms? CDC - COVID-19 Symptoms	☐	☐	☐		
• Cough	☐	☐	☐		
• Shortness of Breath	☐	☐	☐		
• Fever (100.4 or higher)/ Chills	☐	☐	☐		
• Nausea or Vomiting	☐	☐	☐		
• Congestion of runny nose	☐	☐	☐		
• Muscle Pain	☐	☐	☐		
• Headache	☐	☐	☐		
• Sore Throat	☐	☐	☐		
• New Loss of Taste/Smell	☐	☐	☐		
• Diarrhea	☐	☐	☐		
Are you currently waiting for COVID-19 test results?	☐	☐	☐		
Have you tested positive for COVID-19?	☐	☐	☐		

DO NOT ASK ABOUT FAMILY MEMBER HEALTH CONDITIONS

Section 2: Social Distancing & Employee Exposure	YES	NO	NA	Comments	Additional Notes
Have you self-quarantined? If so, how many days and why? (remaining in your home and outdoor activities without coming closer than 6-feet from others)	☐	☐	☐		
Have you been exposed to anyone currently waiting for COVID-19 test results?	☐	☐	☐		
Have you been exposed to anyone who has tested positive for COVID-19?	☐	☐	☐		
Have you been exposed to anyone with any of the following symptoms or combinations of symptoms:					
• Cough	☐	☐	☐		
• Shortness of Breath	☐	☐	☐		
• Fever (100.4 or higher)/ Chills	☐	☐	☐		
• Nausea or Vomiting	☐	☐	☐		
• Congestion of runny nose	☐	☐	☐		
• Muscle Pain	☐	☐	☐		
• Headache	☐	☐	☐		
• Sore Throat	☐	☐	☐		
• New Loss of Taste/Smell	☐	☐	☐		
• Diarrhea	☐	☐	☐		
Have you traveled outside your state/province or regional area?	☐	☐	☐		

Additional information that is pertinent to you returning back to the facility

Human Resources Use Only

Notes:

B. Sample Employee Recall Letter

[Date]
[Name]
[Street]
[City, State, ZIP]

Dear [Employee name],

I am pleased to notify you that [Company name] would like you to return from furlough to [your previous position/the following position]. Please plan to report to work on [date]. This offer letter supersedes and replaces any previous offer letters or terms of employment. The terms of your position with the Company are:

- Job Title: [Job title]
- Supervisor: [Supervisor name]
- Responsibilities will include but not be limited to: [Responsibilities or see attached job description]
- Annualized Salary or Hourly Rate: $[amount]
- Employment Classification: [Full-time/Part-time] and [Exempt/Nonexempt]
- Location

[FOR EMPLOYEES ON COMPANY BENEFITS: address what happens with the employee benefits:
- Was the employee's group benefits coverage terminated? If yes – will their benefits coverage be fully reinstated? If yes, when will the coverage become effective?
- Will there be a waiting period? If you are an ACA employer please be sure to follow the rehire rules.
- For employees whose coverage remained, will you require any repayment of premiums? If so, be careful of affordability requirements and ensure you make repayment arrangements i.e. a repayment plan]

Your health and safety is of paramount importance. As a result, we have made significant changes in the workplace including our facilities and workspace arrangements. We've also implemented new safety policies and protocols (see attached)*. We expect our employees to learn these new policies and adhere to them each and every day. Employees should take these safety protocols very seriously - our safety is highly dependent on each employee's compliance with our safety protocols. Once you have completed your review of these policies please sign the Policy Acknowledgement and return to HR along with the signed copy of this letter.

Our safety program includes new employee obligations such as: [CUSTOMIZE FOR YOUR ACTUAL POLICIES AND PROTOCOLS]
- Social distancing requirements
- Cleaning and disinfecting common and shared areas
- Use of masks – especially when social distancing is not possible

- Limited in-person meetings and social distancing during these meetings – we encourage the continued use of virtual meetings
- One-way hallways
- Requirements for regular hand sanitizing (contains at least 60% alcohol) and hand washing (for at least 20 seconds)
- Reporting of any COVID-19 symptoms
- Reporting of a COVID-19 diagnosis
- Immediate Reporting of exposure to someone diagnosed with COVID-19
- Scheduling and shift changes to limit the number of people in an office
- Elimination of visitors and children in the workplace

Please contact [human resources] at _____ if you are experiencing circumstances that may interfere with your ability to return to work. A failure to accept a return to work may jeopardize your eligibility for unemployment benefits, therefore it's important that you work closely with HR throughout this process.

If we do not hear back from you by _____, we will assume that you are resigning your position and we will terminate your employment with the company. We hope that this is not the case and we look forward to your return.

Sincerely,

[Company representative signature]

[Name]

Check one box below:

☐ I will return to work
☐ I am resigning my employment

Reason for Resignation or failure to return to work:
_____

I understand and acknowledge that I remain employed "at will" and this offer to return to work does not represent a contract or guarantee of employment. I understand that I may be terminated or I may resign my employment at any time with or without advanced notice.

Signature: _____

Name (please print): _____ **Date:** _____

*note: We recommend that employers provide employees with the new policies and procedures in advance of return and secure a signed acknowledgement

C. OSHA Recordable Decision Tree

1) Confirmed Case, under CDC guidelines?
Yes or No?

2) Has the Employee come into close contact with infected person in life outside of Work Environment?
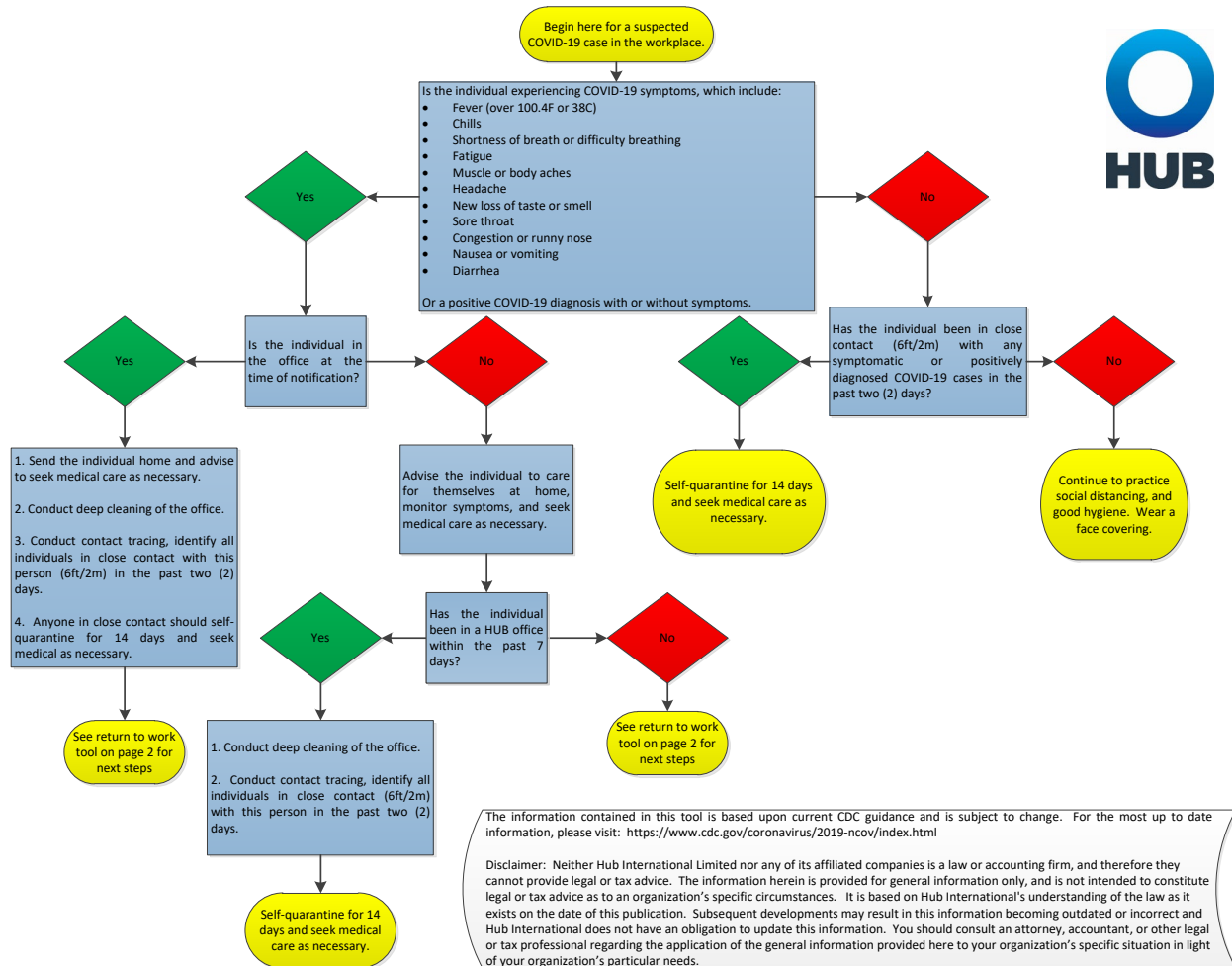Yes or No? — NO

YES

3) Are there other employees infected in Work Environment?
Yes or No?

4) Did employee come into close contact with infected employee or customer?
Yes or No?

5) Review work duties and work environment to determine if employee came into contact with infected employee or customer. See. 1904.5
Yes or No?

6) Review Travel Status. Is there direct evidence that employee was exposed during travel. 1904.5(b)(6)
6) Yes or No?

YES

7) Is there an alternative explanation?
Yes or No?

NO

8) Are general recording criteria set forth in 29 CFR 1904.7 being met?
Yes or No?

Not likely a recordable case.

Likely recordable case

D. Workplace Case Decision Tool

Suspected COVID-19 Cases in the Workplace

Begin here for a suspected COVID-19 case in the workplace.

Is the individual experiencing COVID-19 symptoms, which include:
- Fever (over 100.4F or 38C)
- Chills
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

Or a positive COVID-19 diagnosis with or without symptoms.

Yes → Is the individual in the office at the time of notification?

No → Has the individual been in close contact (6ft/2m) with any symptomatic or positively diagnosed COVID-19 cases in the past two (2) days?

Yes (office) →
1. Send the individual home and advise to seek medical care as necessary.
2. Conduct deep cleaning of the office.
3. Conduct contact tracing, identify all individuals in close contact with this person (6ft/2m) in the past two (2) days.
4. Anyone in close contact should self-quarantine for 14 days and seek medical as necessary.

→ See return to work tool on page 2 for next steps

No (office) → Advise the individual to care for themselves at home, monitor symptoms, and seek medical care as necessary.

Has the individual been in a HUB office within the past 7 days?

Yes →
1. Conduct deep cleaning of the office.
2. Conduct contact tracing, identify all individuals in close contact (6ft/2m) with this person in the past two (2) days.

→ Self-quarantine for 14 days and seek medical care as necessary.

No → See return to work tool on page 2 for next steps

Yes (close contact) → Self-quarantine for 14 days and seek medical care as necessary.

No (close contact) → Continue to practice social distancing, and good hygiene. Wear a face covering.

The information contained in this tool is based upon current CDC guidance and is subject to change. For the most up to date information, please visit: https://www.cdc.gov/coronavirus/2019-ncov/index.html

Returning to the Workplace Following a Suspected or Confirmed COVID-19 Case

Begin here for returning to the office following a suspected or confirmed COVID-19 case.

Has the individual met the following criteria?

- At least 10 days* have passed since symptom onset or positive diagnosis, AND
- At least 24 hours have passed since resolution of fever without the use of fever-reducing medications (changed from "at least 72 hours" to "at least 24 hours" have passed since last fever without the use of fever-reducing medications); and
- Other symptoms have improved (changed from "improvement in respiratory symptoms" to "improvement in symptoms" to address expanding list of symptoms associated with COVID-19).

Yes

The individual may discontinue isolation and return to work.

No

Continue to stay at home and seek medical care as needed.

* Note: A limited number of persons with severe illness may produce replication-competent virus beyond 10 days, that may warrant extending duration of isolation for up to 20 days after symptom onset. The CDC recommends that the individual consider consultation with infection control experts.

EXPOSURE: CDC recommends 14 days of quarantine after exposure based on the time it takes to develop illness if infected. Thus, it is possible that a person known to be infected could leave isolation earlier than a person who is quarantined because of the possibility they are infected.

The information contained in this tool is based upon current CDC guidance and is subject to change. For the most up to date information, please visit: https://www.cdc.gov/coronavirus/2019-ncov/index.html

E. Office Re-opening Safety Checklist

Company Division:		Assessor's Name:	
Building Address:		Date:	
Floor / Suite #		Time:	

Instructions:
In safety engineering, there is what is known as a hierarchy of controls (Engineering, Administrative, Personal Protective Equipment), which are preferred in that order. When a higher level control is not feasible, the assessor should then review alternative options at the lower levels. For example: if it is not feasible to install a barrier between desks or move desks (engineering), attempt to modify schedules or develop other rules (administrative), followed by requiring employees to use masks (personal protective equipment) as a last resort. That process should be applied throughout this assessment process. Note: Social distancing is considered to be 6ft or 2m.

Category:	Elements:	Control Measures:	(Yes/No/NA)	Comments:
Engineering Controls				
Access Points	Building doors (landlord controlled)	Review plans or changes which landlord has implemented to address exposures for common building elements. Are risks adequately addressed through engineering design / redesign?		
	Lobby (landlord controlled)			
	Elevators (landlord controlled)			
	Public bathrooms (landlord controlled)			
	Doors (within company's space)	Are there any economical options to provide for automatic / no touch door opening devices? Consider disposable wipes at doors or hands free openers.		
Desk Configurations	Cubicle wall heights	For any cubicles or desks with low partitions or open desk plans, are there barriers that could be installed economically?		
	Staggered desk locations	Is it feasible to relocate desks or take desks out of service to ensure adequate social distancing?		
Reception Area	Reception desk	Are there feasible options for physical barriers such as clear plastic / glass screens, or painted / taped spacing guidelines on floors?		
	Restrooms (within company's space)	Evaluate size and layout of restrooms, sinks and/or stalls with limited partitions. Can we feasibly take some fixtures out of service or add barriers?		
	Seating	Is it feasible to remove chairs or mark with caution tape in to maintain social distancing?		
Conference Rooms	Seating	Is it feasible to remove chairs or mark with caution tape in to maintain social distancing?		
Break Rooms	Seating	Is it feasible to remove tables / chairs or mark with caution tape in to maintain social distancing?		
Reduce Occupancy	Staggered work schedules	Is it feasible to have employees arrive at and leave the office on staggered schedules to avoid high foot traffic conditions?		

Category:	Elements:	Control Measures:	(Yes/No/NA)	Comments:
	Alternating work days or weeks	Is it feasible to have employees alternate days Or weeks in / out of the office. (MWF / TTH) or (2 weeks in and 2 weeks home), etc.?		
	Remote work	Encourage all that can work from home to con do so. Reserve office capacity for critical b functions and those employees with home limitations or technology issues. Can all employees who wish to return to the office do so while continuously maintaining social distancing?		
Visitor & Vendor Management	Visitors	Can visitors be restricted to essential client business meetings?		
	Vendors	Can we reduce non-essential pick-ups / deliveries? Have we provided vendors with rules on social distancing and obtained acknowledgement from vendors?		
Social Distancing	Meetings	Is it feasible to limit in-person meetings to the revised and socially distanced capacity of our conference rooms?		
	Restrooms (public)	Have employees been instructed to practice social distancing? (Do not use sinks immediately next to others, do not overcrowd, etc.)		
	Mailroom	Is it feasible to limit to 1 employee? Can we encourage pick-up /delivery within established drop-off points to limit physical contact?		
Signage	Office signage posted as required	Procurement will develop and provide signs addressing social distancing and PPE requirements. Locations: main entrance(s), common alternate entrances, reception, break rooms. Will all required signs be posted by the opening date?		
Employee Education	Awareness training	Company to record an employee awareness training module. Will all employees be required to complete It prior to returning to the office?		

Category:	Elements:	Control Measures:	(Yes/No/NA)	Comments:
Personal Protective Equipment				
Face Coverings	Cloth masks (non-medical)	Have options been provided for employees and to wear cloth masks or face coverings? CDC provided guidelines: Cloth Face Coverings Note: We do not currently recommend N95 or surgical masks, as these should be reserved for high – risk professions and would require respiratory protection program per OSHA.		
Gloves	Nitrile or other non-porous, disposable gloves	Have options been provided for employees and to wear disposable gloves when using common office equipment?		

Category:	Elements:	Control Measures:	Complete? (Yes/No)	Comments:
Cleaning Protocols				
Products to Stock	Hand sanitizer	Refer to US EPA guidelines for approved products for killing the virus If building provides, review supplies to determine appropriateness (consult safety team).		
	Disinfectant sprays / wipes			
	Paper towels	NA		
	Nitrile gloves	NA		
Office equipment being returned	Computers, monitors, printers, headsets, etc.	Request that employee wipe down (with disinfectant wipes) all equipment which was brought home.		
Initial "Deep" Cleaning	Refer to CDC guidance Cleaning and Disinfecting Your Facility	Contract with cleaning firm to conduct "deep" cleaning and disinfection per CDC guidelines.		
High Touch Areas (must be Disinfected at least daily)	Door handles Elevator controls Bathroom sinks and stalls Coffee makers Water dispensers Microwaves / toasters Vending machines Refrigerator door handles Copiers / scanners Break room tables / chairs Equipment for proposal binding Mail room surfaces Reception areas surfaces Conference / board room surfaces	Contract with 3rd party services (if employees are expected to do it, issue with training, and lack of proper HazCom, SDS, etc.)		

F. Property Checklist

Several businesses have been shut down and vacant (or minimally supervised) during the COVID-19 pandemic. As businesses begin to slowly re-open, it is important to review the condition of the property to ensure damage has not occurred and the property is able to function as desired as employees and operations begin to resume.

Any worker(s) performing the task of preparing the building for occupation after a period of inactivity should be provided with appropriate training, PPE, and sanitizing equipment in order to adequately protect themselves from potential exposure or spread of COVID-19. If new chemicals or disinfectants are brought onto the premise, ensure proper safety data sheets and training is supplied. Verify that the chemicals do not post a fire hazard that could overwhelm the property's fire suppression system(s).

Note, this document only is intended to address potential property exposures and is not intended to be a comprehensive return to work document.

General Overview

Business Name:	
Address:	

Description of Operations

Number of Employees:	
Hours of Operation:	

Property and Premise Inspections (exterior)

Are access gates intact and operating properly?	☐Yes ☐No ☐N/A
Is perimeter fencing intact?	☐Yes ☐No ☐N/A
Are there any noticeable natural hazards (downed/damaged trees, excess standing water, other)?	☐Yes ☐No ☐N/A
Is there damage to the exterior of building (broken windows, doors, graffiti, other)?	☐Yes ☐No ☐N/A
Are security cameras intact?	☐Yes ☐No ☐N/A
Perform roof inspection (standing water, vegetation, exposed areas, other)	☐Yes ☐No ☐N/A

Property and Premise Inspections (Interior)

Are there any signs of intrusion	☐Yes ☐No ☐N/A
Are there noticeable roof leaks?	☐Yes ☐No ☐N/A
Is adequate lighting available?	☐Yes ☐No ☐N/A
Is emergency lighting operational?	☐Yes ☐No ☐N/A
Is emergency egress unobstructed?	☐Yes ☐No ☐N/A
Is fire safety plan posted?	☐Yes ☐No ☐N/A
Are HVAC systems tested and operational? Do filters require replacement?	☐Yes ☐No ☐N/A
Are any modifications required to the building prior to re-opening (shielding, barriers, signage, etc.)	☐Yes ☐No ☐N/A
Are there any changes to the operations performed within the building?	☐Yes ☐No ☐N/A
Has electrical equipment (breaker panels, light fixtures, others) been inspected?	☐Yes ☐No ☐N/A
Are there any required jurisdictional inspections required on the boilers / pressure vessels?	☐Yes ☐No ☐N/A

Fire Protection Systems

Was the fire protection systems maintained / inspected while building was vacant?	☐Yes ☐No ☐N/A
If No, is an inspection required?	☐Yes ☐No ☐N/A
Was an automatic sprinkler system shut?	☐Yes ☐No ☐N/A
If yes, was an automatic Impairment notification sent to Broker/Insurers?	☐Yes ☐No ☐N/A
Was the fire protection system restored?	☐Yes ☐No ☐N/A
Does fire protection equipment (fire extinguishers, hoses, risers, fire pumps, other) appear to be in good condition?	☐Yes ☐No ☐N/A
Are fire extinguisher inspections up to date?	☐Yes ☐No ☐N/A

Human Element Programs

Is the emergency response program up to date?	☐Yes ☐No ☐N/A
Is the fire safety plan up to date?	☐Yes ☐No ☐N/A
Are employees trained on smoking policy / locations?	☐Yes ☐No ☐N/A
Does emergency egress plan require social distancing requirements?	☐Yes ☐No ☐N/A
If elevators on site, are there provisions for social distancing?	☐Yes ☐No ☐N/A
Contractor management program revision (amendment) to review social distancing requirement?	☐Yes ☐No ☐N/A
New ways (e.g. video) to review maintenance issues?	☐Yes ☐No ☐N/A
Review permissible occupancy requirements?	☐Yes ☐No ☐N/A

Training

Have all personnel been retrained with the safe operation procedures including equipment operation following an extended shut down or idle period?	☐Yes ☐No ☐N/A
Have newly hired employees been trained with the company safety policy and operation procedures?	☐Yes ☐No ☐N/A
Have all personnel involved with Hot Works been retrained with the company Hot Work Policy?	☐Yes ☐No ☐N/A
Have necessary maintenance employees been retrained with the automatic sprinkler impairment procedures?	☐Yes ☐No ☐N/A
Have all employees be trained with the new Emergency Response Plan?	☐Yes ☐No ☐N/A

G. Employee Benefits: Potential Plan Amendments and Timing

Change (Section of Workbook)	Confirm with Insurance Carrier / Stop-Loss Carrier / TPA beforehand?	Amendment Required	Amendment Deadline	Communicate to Employees / Dependents?
Required Changes				
Extended deadlines for special enrollment elections, filing claims, COBRA, etc. (V.C.3; V.J.)	No need to confirm, but you will want to coordinate	Not necessarily	N/a	Yes
Added coverage for COVID-19 testing (V.J.)	No need to confirm, but you will want to coordinate	Yes	By the end of 2020.	Yes
Optional Changes				
Waiving ACA Employer Mandate Break in Service Rules (V.A.3.)	Yes	Likely yes, but consult plan documents	Ideally, prior to waiving the rules for rehires, but consult with counsel.	Yes
Waiving waiting period rules (V.B.)	Yes	Likely yes, but consult plan documents	Ideally, prior to waiving the waiting period rules, but consult with counsel.	Yes
Additional cafeteria plan, health FSA, and dependent care FSA election flexibility (V.C.1.; V.E.; V.F.)	Yes	Yes	By the end of 2021.	Yes
Waiving evidence of insurability for life and disability plans (V.H.)	Yes	At carrier's discretion	Ideally, before the provisions are waived, but consult with carrier	Yes
Permitted coverage of telemedicine prior to the HDHP deductible (V.J.)	Yes	Yes	By the end of 2020.	Yes
Health FSAs covering OTC medications / menstrual products (V.J.)	Yes	Yes	By the end of 2020.	Yes

Get the latest information, guidance and resources on Coronavirus (COVID-19) to help you protect what matters most at hubinternational.com/coronavirus.

For additional support, please reach out to your local HUB office.