

# Legal Considerations for Reopening Business in the Time of Coronavirus



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A great deal has been written (including by the authors of this article) about the immediate legal issues businesses faced at the outset of the COVID-19 pandemic. While the pandemic continues, now that much of the nation has turned its focus to the reopening of the economy, so too have we turned our focus to the legal issues that businesses need to be aware of and prepared to address as the economy begins to restart. While in Illinois, the shelter-in-place order has been extended until the end of May, numerous states are allowing at least some businesses to reopen. Deliberate advance planning is essential for the process to go smoothly.

This article addresses several broad categories of issues: employment, tort liability, privacy, insurance, and contract. Given the new issues that arise each day, there will undoubtedly be more. And, naturally, we can't possibly cover in an article (that is intentionally brief so as to be easily digestible) every issue that businesses should consider before reopening for business. We are hoping this will start getting the wheels in your heads turning and motivate you to think about the types of issues you will be facing, and proactively plan, before your business – and the rest of the world – reopens for business.

## Employment

## ***Develop Concrete Strategies and Implement Policies***

Before welcoming employees back to work, employers would be wise to develop concrete strategies for reopening. This is not a time to wing it and hope for the best. Examples of strategies employers might consider to remain compliant with the Centers for Disease Control and Prevention (CDC), the World Health Organization (WHO), and Occupational Safety and Health Administration (OSHA) guidelines (discussed below) include:

- Reviewing applicable federal, state, and local laws and orders (such as state and local shelter-in-place orders), as well as any collective bargaining agreements, to determine if/how they may impact the reopening process
- Phasing return to work, such as bringing back employees in stages (instead of all at once), and/or staggering schedules for different employees or groups of employees to limit the number of employees in the workplace at any given time
- Reconfiguring and/or reassigning workspaces to allow for social distancing
- Continuing to allow (or encourage) remote work for roles that are conducive to teleworking and for employees who have already proven they can be just as efficient and productive working from home as in the workplace
- Providing appropriate personal protective equipment (PPE) (the nature and extent of which, naturally, will depend on the employees' job duties and their exposure to customers, vendors, visitors, and/or members of the community), training employees on proper usage of PPE, and assessing related issues, such as who will be responsible for cleaning and maintaining PPE, whether to allow employees to utilize their own PPE, and how to handle an employee's refusal to utilize PPE
- Assessing whether to implement a screening process before employees enter the workplace, such as taking each employee's temperature and/or otherwise monitoring employees for symptoms (and, if so, considering the logistical and practical issues associated with this measure, such as who will conduct the screenings, how social distancing will be enforced while employees wait to be screened, and compliance with wage/hour laws), and whether to extend this practice to contractors, customers, vendors, and visitors
- Emphasizing and enforcing vigilant infection prevention measures published by the CDC and WHO, including frequent handwashing (especially before each employee enters the workplace), sanitizing frequently touched surfaces, wearing masks and other PPE, maintaining social distancing, and updating employees if/as guidelines change
- Limiting use of common and high-traffic areas in the workplace, such as cafeterias and other group meeting places, and requiring employees to wear masks at all times while on premises, except while in their own office or workspace
- Limiting face-to-face meetings and encouraging use of videoconferencing (such as Skype or Zoom), even when all parties are on premises
- Minimizing non-essential business travel and isolating employees following travel
- Reminding employees to stay home if they are sick

As mentioned above, employers should also remain mindful that OSHA requires employers to comply with existing safety and health standards and regulations.

While OSHA has only released non-binding [guidance](#) with respect to COVID-19, OSHA's General Duty Clause requires employers to "provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm."

Employers should also consider developing and implementing carefully written policies and/or updating existing policies regarding compliance strategies. These would include not only any of the measures described above that employers decide to implement, but also return-to-work policies and protocols for previously symptomatic or diagnosed employees. Because all of these will likely significantly deviate from those in place before the COVID-19 pandemic turned the world on its head, up-front and regular communication with employees is essential to a successful rollout of new rules and procedures.

### ***Study the FFCRA***

Employers with less than 500 employees will need to be aware of their obligations – and the limitations on employees' rights – under the Families First Coronavirus Response Act (FFCRA). There has been some confusion regarding the circumstances under which employees are entitled to paid leave under the FFCRA and how such leave is to be administered. Employers should familiarize themselves with the [requirements of the FFCRA and the USDOL's and IRS's guidance](#) regarding the FFCRA before employees return to work to avoid missteps, and consider implementing carefully written policies to educate employees and prevent misconceptions.

### ***Be Mindful of Worker Anxiety***

Employers should also be mindful of the health, safety, and security issues that employees and employees' family members may be experiencing, and consider exercising flexibility to accommodate these issues. For example, vulnerable employees and employees with vulnerable family members may not feel comfortable coming to work due to fear of infection. And employees who suffer from mental health disorders may be experiencing heightened anxiety about the health and safety of themselves and/or their family members, particularly in light of endless news stories regarding the increasing number of diagnosed COVID-19 cases and deaths from the virus. In the wake of so many businesses' workforce reductions, furloughs, and compensation reductions, employees also may be concerned about job security and the future of their employer's business.

To manage these types of intangible issues, employers may want to assess whether a work-from-home arrangement is feasible for a particular employee even after the workplace reopens (which, naturally, may depend on whether the employee can perform required job duties remotely and remain efficient and productive) and, if not, whether a leave of absence would be more appropriate. Of course, these may not be the only available options, and employers should consider exercising creativity in determining reasonable and appropriate solutions. In any event, employers who offer an Employee Assistance Program (EAP) should remind employees that this resource is available to them. And employers who haven't historically offered an EAP may want to consider adding this to their employee

benefits package, at least during these trying times.

## **Tort Liability**

Many businesses already have voiced concerns about legal liability if a customer, vendor, or visitor claims to have become infected while on the businesses' premises, or due to contact with a company representative. Tort liability, particularly negligence, requires the plaintiff claiming injury to prove that it is more likely than not that the defendant was the proximate cause of his or her injury or illness. In many instances, proving that someone contracted COVID-19 at a specific location will be a difficult burden, given that COVID-19 is almost omnipresent, and it can be difficult to trace the source of infection (if this were not the case, perhaps we would not find ourselves in the midst of this pandemic).

If, however, a business disregards federal or state guidelines, and a significant number of its customers, vendors, or visitors become infected, this could in theory give rise to a potential claim. This might also be true if a non-essential business prematurely opens while a stay-at-home order remains in effect. Ordinarily, negligence is defined as a failure to exercise the standard of care that a reasonably prudent person would provide. Therefore, businesses would be wise to adhere to and implement all applicable federal, state, and local guidelines. In fact, the U.S. Chamber of Commerce and others are lobbying legislatures to give legal protection to businesses that follow these guidelines. Indeed, some states, [including Illinois](#), have already passed measures granting immunity to "health care providers" from civil liability for any injury or death that occurs while they provide health care services in response to the COVID-19 outbreak, unless the provider acts in a grossly negligent manner or engages in willful misconduct.

When an employee is infected (as opposed to a customer, vendor, or visitor), the employer's liability will likely be guided by state workers' compensation law. Thus, employees who are infected in the course of their employment may be eligible for workers' compensation benefits. Generally speaking, an employee, must establish that their illness is work-related. However, some states, including Illinois, have passed new [rules](#) providing that if a "first responder" or other "essential" worker is diagnosed with COVID-19, there is a rebuttable presumption that the individual acquired the infection while working (although these rules already are facing a legal challenge from two of the state's top business groups).

Of course, businesses should continue to monitor all applicable federal, state, and local laws, regulations, and guidelines. As a practical matter, workplaces may need to revise their office layouts to permit for ongoing social distancing. Businesses may need to also update visitor and vendor policies and procedures, including those regarding deliveries. At some point, certain business may even need to consider having visitors and vendors sign waivers with respect to COVID-19, although this would seem to be a more extreme measure, and there are questions as to whether such waivers would be enforceable in any event. Businesses may also want to review leases to assess responsibilities for third parties visiting the premises, and where obligations may lie for controlling or restricting access to the premises.

## **Privacy**

With social distancing now the norm, there are legitimate concerns regarding who is carrying the virus, and who may be infected (including those who may be asymptomatic). As a result, many employers have taken to testing employees, or otherwise monitoring their health. The same may be true with respect to customers or vendors who visit a business, whether a grocery store, a retail outlet, a medical facility, or a law firm.

While many immediately think of the Health Insurance Portability and Accountability Act (HIPAA) as governing these issues, HIPAA only applies to a narrowly defined class of "Covered Entities." Although HIPAA may not apply to most employers, there are still privacy considerations of which employers must be mindful.

First, to best avoid claims regarding potential discrimination, invasion of privacy, or otherwise, business should be consistent in assessing employees' health status before allowing them to return to work, and going forward for the duration of the pandemic.

Businesses may also want to enact new policies to address the potential spread of COVID-19. For example, employers should require that employees report if they or any household member has been diagnosed with or is experiencing symptoms of COVID-19, or has been in close contact with anyone who has been diagnosed with or is experiencing symptoms of the disease. In that case, employers will likely want to prohibit the return to work of a reporting employee for at least 14 days. Moreover, if such a report is received, employers should notify the rest of the workforce (particularly those who may have been in contact with any such individual), but should refrain from disclosing the diagnosed or symptomatic individual's name unless the employee expressly authorizes such disclosure.

Additionally, businesses may find it prudent to enact travel restrictions, or at a minimum, reporting requirements regarding employee travel to at-risk areas. If an employee does travel to such an area, or does not wish to share such travel information, employers may request that employee to work from home.

Another potential area of concern is contact tracing via cell phones. While it is not yet clear whether the U.S. government will implement such protocols, to the extent employers are considering the use of cell phone data to track employees' whereabouts or for other purposes, they should be mindful of any applicable privacy laws, particularly those that might require employee consent.

## **Insurance Coverage**

Many businesses have [turned to insurance](#) to try to recover business interruption or other losses. These disputes present challenges of their own, and many will continue to be litigated for years to come. When it comes to insurance, however, businesses now need to turn their focus forward to upcoming policy renewals. Businesses will need to pay close attention to what their policies cover. This includes looking at third-liability policies (e.g., commercial general liability) with respect to potential claims (such as those described above) brought by individuals affected with COVID-19 at the place of business, or even potential claims for violations of a right to privacy, if the business is screening visitors or others.

Similarly, the pandemic is expected to continue, and likely so too will periodic shutdowns in certain communities, as the spread of the virus ebbs and flows. Future interruptions to business should be anticipated, and businesses would be wise to at least know whether their policies expressly exclude coverage for losses due to a virus or pandemic. Businesses (and their insurance brokers) should also be on the lookout to changes in their policies that insurance companies may make in response to the pandemic. In most jurisdictions, insurance companies are required to notify policyholders of new exclusions, but a careful policy review may be important now more than ever.

More on this, and further recommendations, are [available here](#).

## **Contracts**

As business activity resumes, the way we conduct our businesses will change. Our social contract is already changing as physical distancing, working from home, and travel restrictions require new ways to connect. If and when people resume meeting in person, the experience will be different for those who wear face masks, sit at opposite ends of a conference room, and avoid shaking hands. A return to social events at restaurants and sporting events may still be far off.

Business owners will also need to consider whether their written contracts adequately address the consequences of a pandemic like COVID-19. As businesses reopen, many will negotiate new contracts or look for reasons to terminate existing contracts or excuse a lack of performance. A careful review of all existing and future contracts will be necessary to evaluate the level of protection they provide.

Many companies are already invoking "force majeure" - or "Act of God" - clauses to suspend or terminate performance under a variety of contracts, arguing that the COVID-19 crisis makes it impossible for them to perform. As discussed in a [previous article](#), such clauses are not one-size-fits-all. A typical force majeure clause may permit a party to extend, suspend, or even terminate its performance when an event occurs that is beyond that party's control. But whether that event will excuse performance depends on a careful reading of the contract and applicable law. Courts will look to the actual wording of a contract to determine if the parties intended for a provision to apply to a specific event such as COVID-19.

Since the consequences of the pandemic likely will be felt for some time, business owners should think carefully about issues that may affect their contractual relationships and provisions needed to protect themselves. A force majeure clause is only one way to protect against future crises.

The world is navigating uncharted territory. But this doesn't mean businesses cannot prepare and position themselves to limit risk as they reopen. Focusing now on these preventative measures will help you and your business focus on your core mission going forward, and avoiding the myriad legal issues likely to arise in these unprecedented times. Of course, the landscape continues to change, so be sure to stay informed about changes to existing regulations and guidance, and be prepared to adapt quickly.

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