



An employer must carefully consider when to reopen its business. While it is impossible to fully eliminate all risks associated with reopening in the COVID-19 setting, an employer may be able to significantly mitigate and reduce risks, such as workplace hazards and employment issues, by following some or all of the recommendations below. The decision of a business to reopen during the COVID-19 pandemic must be carefully managed to limit the risk of reputational damage related to your employees, customers, vendors, and the public. Communicating a clear, accurate, consistent message on a regular basis throughout and after your reopening will convey authority and competence to stakeholders and will help build lasting trust and confidence in your brand.

Workplace

- ❑ **Written Preparedness and Response Plan:** An employer may reduce COVID-19-related risk by developing a preparedness and response plan for the virus. OSHA provides a [helpful planning tool](#) that classifies jobs into four exposure categories and provides tailored mitigation precautions for each risk category.
- ❑ **Healthy Business Operations:** An employer can implement procedures and protocols, recommended by the [CDC](#) and [OSHA](#), to establish healthy business operations, such as staggered employee shifts, routine health checks, and communication with employees regarding new safety actions.
- ❑ **Healthy Work Environment:** An employer may also undertake environmental measures, including, according to the CDC and OSHA, increased air circulation, intensified disinfection practices, physical barriers, hand sanitizer, and informative posters communicating the measures.

Employment

Employee Status Changes:

- ❑ **Unemployment.** Employees currently collecting partial unemployment benefits, along with the federal enhancement, may lose those benefits when called back to work. An employer should be prepared to address situations where an employee is reluctant to return to work.
- ❑ **Graduated Returns/Other Employment Actions.** When implementing a graduated or rolling return to work, an employer should make considered decisions regarding when and how to return employees. If workers are returning from furlough or if layoffs are necessary, be wary of the increased risk of discrimination claims from employees who are subjected to allegations of an “adverse employment action.”
- ❑ **Leave.** Be aware that the new federal sick and family leave benefits will be available to employees for the remainder of 2020, and perhaps will be renewed/extended further.

Accommodations:

An employer may need to engage in a [reasonable accommodation analysis](#) to assess whether an underlying health condition, including a mental health condition, may prevent an employee’s return to work.

COVID-19 Issues:

- ❑ **Virus.** An employer may send an employee home if he/she is showing COVID-19 symptoms and, if a COVID-19 vaccine is developed, an employer [may require or encourage employees to receive the vaccine in response to the pandemic](#), subject to certain exceptions.
- ❑ **Testing.** An employer may [take employee temperatures prior to employees entering the workplace](#), though such temperature testing comes with [potential risks](#), and may require COVID-19 testing before employees enter the workplace, provided [ADA](#) and [FDA](#) criteria and standards are met.

- ❑ **Privacy.** When performing COVID-19 testing, [ensure employee privacy](#).
- ❑ **HIPAA.** HIPAA is generally not an issue in the employment context because it applies only to HIPAA-defined covered entities and business associates, not employers in general. Note, however, that HIPAA does apply to health care organizations and health plan sponsors.
- ❑ **Other considerations.** Review whether the organization has a Collective Bargaining Agreement that addresses testing. Address whether the FLSA requires time spent being tested is compensable. Keep in mind that a state fair employment practices agency may have stricter rules and not permit testing.

Employee Confidence:

- ❑ An employer must ensure that employees are confident enough to return to the office, which requires continuous communication regarding health and safety measures.

Operations

- ❑ **Emergency Response Team:** An employer should form a team that includes management and non-management personnel from all departments. Among other things, the team should analyze business priorities, assess compliance issues, and identify necessary resources for returning to work.
- ❑ **Key Employees:** An employer should identify any “key” employees, to ensure adequate insurance coverage and succession planning.
- ❑ **Business Relationships:** A business should identify critical suppliers, vendors, etc. to develop back-up resources, broader supply chains, and redundancies. Such measures may require consultation with anti-trust counsel.
- ❑ **Communication:** An employer/business must communicate internally with employees and externally with customers about its plans and capabilities. This involves mapping out the message(s), identifying appropriate spokespeople, and training externally facing employees.
- ❑ **Financial Relief:** Any business should analyze financial relief available from, for example, landlords, vendors/suppliers (including telecommunications suppliers), government sources (including [PPP loan forgiveness](#)), and tax authorities.
- ❑ **Contracts, Coverage, and Corporate Governance Documents:** A business should also analyze whether any contracts have been breached due to the emergency and analyze insurance coverage. Finally, review and revise corporate governance documents and applicable state laws to be certain that, for instance, the board of directors is authorized to meet and act remotely.

