

Issues for Return to the Workplace

As businesses prepare for a return to the workplace (RTW) following COVID-19 closures, our team has created this high-level summary list of current and anticipated issues related to reopening. For additional guidance, please visit our [COVID-19 Legal and Business Toolkit](#) or reach out to us at COVID19@cov.com.

Links to sections with more information about these issues:

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Employment and Employee Benefits

Current Issues

- Evolving governmental mandates and guidance, and their impact on employer health and safety obligations.
 - United States: federal, state, and local governmental public health orders and agency guidance, including from the [Centers for Disease Control and Prevention](#) (CDC), the [Occupational Safety and Health Administration](#) (OSHA), the [Equal Employment Opportunity Commission](#) (EEOC), and U.S. Department of Labor (DOL).
 - Global: regularly updated guidance for employers, including from the governments of [Australia](#), [Dubai \(DIFC\)](#), [France](#), [Germany](#), [Italy](#), [Spain](#), [the UK](#), and many others. Guidance varies by country and often by regions within a country.
- Systematic planning for the return to the workplace.
 - Decisions on when and how employees will be recalled to the workplace, and assessment of employee logistical challenges and needs on issues such as medical accommodations, child or elder care, and commutes.
 - Screening measures for employees entering the workplace, and implementation of social-distancing measures tailored to the employer's facilities and specific



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workplace issues. This necessarily includes compliance with applicable governmental orders and any regulatory, privacy, and notice requirements.

- Development of workplace and facilities safety precautions applicable to the employer's workforce, worksite, nature of the work, and industry, including what protective equipment must be provided to employees (including but not limited to face coverings), comprehensive hygiene and infection-control practices, and protocols for addressing exposure to COVID-19 in the workplace.
- Assessment of workplace policies that may need to be updated or prepared, including for employee medical accommodations, telework, commuting, business travel, child care, business expense reimbursements, vacation leave, sick leave, anti-discrimination, and anti-harassment.
- Communications to employees regarding the return-to-workplace plan and workplace health and safety measures.

Anticipated Issues:

- Evaluate how the business will be able to respond and remain flexible in the event of a second wave of infection after the reopening, and carefully document processes developed for returning to the workplace.

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Data Privacy and Cybersecurity

Current Issues:

- Regulatory guidance and new rules promulgated by data privacy authorities governing return-to-work screening and return-to-work measures.
- Return-to-work screening procedures.
 - Legal bases for and proportionality of employee screening measures, such as mandatory temperature checks and COVID-specific apps.
 - To the extent health care providers are involved in screenings, consider the application of medical privacy laws in some jurisdictions.
 - Conduct privacy impact assessments prior to deploying any screening procedures, where necessary or appropriate.
- Policies and procedures for collecting, sharing, and retaining employee health data.
 - Appropriate notices for staff and third parties whose data may be collected and processed pursuant to return-to-work procedures.
 - Internal controls limiting the sharing of data arising from screening measures with co-workers and public health authorities.
 - Appropriate security measures and data retention times for data relating to employee COVID status, including and anonymizing data where possible.
 - Contractual and confidentiality controls for vendors processing any data in the deployment of return-to-work procedures.
- Policies and procedures for collecting, sharing, and retaining visitor health data.



Anticipated Issues:

- Balancing the privacy concerns of visitors to company property with the need to ensure the safety of facilities, employees, and other visitors.
- Privacy implications of deploying mobile applications for contact tracing and self-reporting diagnosis, immunity, or other health information within workplaces, particularly where there is tracking of geolocation, use of facial recognition for authentication, and/or processing of health information.
- Privacy implications of use of COVID-19 data for “big data” type programs and initiatives.

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Policy

Current Issues:

- U.S. companies that employ immigrants face a high risk of losing that employment stream and should craft policy strategies in response, including how to address restrictions on federal loans.
- Ongoing developments at both the federal and state/local level.
- Schools planning for the return of students, faculty, and staff need to adopt policies for classroom, social, and residential settings; testing and contact tracing; and quarantining of students, faculty, and staff.
 - Schools should also consider the sufficiency of mental health counseling available to students, faculty, and staff.

Anticipated Issues:

- Upcoming legislation, such as the next Congressional stimulus package “4.0” or CARES 2.0. Various industries may be specifically addressed in these various packages.
- State decisions on returning to the workplace and associated travel guidance on traveling between states that have returned to the workplace vs. states still under forms of quarantine.
- Impact of new or continued disruptions to supply chains.
- Legislation for liability protections to businesses and employees.
- A series of oversight hearings will be held by the Congressional Oversight Commission, which may impact various industries.



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Consumer Protection

Current Issues:

- Ensuring that any required disclosures are clear and conspicuous, particularly those regarding limitations on products or services necessitated by COVID-19.
- For prior purchases (such as tickets and packages), address risks of engaging in unfair practices by considering whether modifications to the products or services provided would be considered material, how best to communicate those modifications, and how to make consumers whole as warranted by the circumstances.

- Ensuring that communications with consumers comply with applicable laws, such as the Telephone Consumer Protection Act (TCPA), the Telemarketing Sales Rule/Do Not Call, and the CAN-SPAM Act.

Anticipated Issues:

- Potential class action lawsuits relating to refusal to refund tickets for live entertainment and other events canceled due to COVID-19.
- Regulatory enforcement and class action lawsuits relating to reduced or modified provision of goods or services for previously purchased packages and/or tickets.

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Contracts and Commercial

Current Issues:

- Procurement processes and delivery deadlines for necessary materials for re-opening (e.g., timing and quantity of necessary materials such as hand sanitizer, masks, and wipes).
- Ensuring that outsourced service providers (e.g., cleaning, office services, catering) have taken appropriate steps for their personnel and services.
- Functionality of supply chain and downstream purchasers.
- Addressing potential disruption to storage, distribution, and delivery, and potential changes to existing contracts.
- Considering new systems for monitoring inventory levels, supplies, and customer demand.
- Potential impact of contractual clauses dealing with *force majeure*/frustration/impossibility, ensuring rights are preserved and that actions are consistent with those clauses.
- Addressing unresolved issues around supply-chain disruption and determining which disputes are capable of swift, commercial resolution and which require more detailed legal consideration.
- Review risk factors and other public disclosures to determine whether they need updating or revising in light of the pandemic to mitigate securities litigation risk.



Anticipated Issues:

- New branding, digital advertising, and PR associated with developing or rebuilding trust with consumers.
- External data sources to help understand consumer sentiment towards your business post-crisis.
- Addressing internal barriers to data sharing between departments and business divisions to facilitate better and more informed decision making.
- Potential deployment of new technologies, such as rapid testing and biometrics, when developing new or modifying existing contractual agreements.
- Time will likely diminish opportunities for amicable commercial resolutions with counterparties, leading to more disputes and litigation risk.

Insurance

- Potential class actions issues in connection with the pandemic on various theories, including nuisance and product liability (e.g., from contamination caused by returning to operations).
- Potential contingency planning steps for possible financial distress of suppliers.
- Possibilities for triggering source code escrow releases and standing up new information technology systems.

Current Issues:

- If the “return to work” process results in claims against the employer by employees (perhaps due to the renewed risk of, or actual, exposure to the Coronavirus), three types of insurance may come into play:
 - A. **Workers Comp** (“WC”) - compensates most claims by employees alleging work place injury.
 - B. **Employment Practices Liability** (“EPL”) - covers workplace claims by employees such as discrimination, harassment, infliction of emotional distress, or wrongful termination.
 - C. **General Liability** - covers certain workplace injury claims that are not covered by WC, particularly where the employee alleges that the employer was grossly negligent or engaged in intentional misconduct.
- Prior to returning to work (and continuing thereafter), an employer may need to incur significant extra expenses to address safety concerns related to COVID-19. These may include reconfiguring the work place, extra cleaning, providing protective gear, testing, etc.
 - Such costs may well be covered by the “Extra Expense” coverage in your Property policy.
 - For purposes of exhausting the policy deductible, such expenses may, in many cases, be added to any other COVID-19 related “business interruption” or property damage losses that the company has already incurred.
- Before returning to work, an insurance “best practice” would be to review all of the policies noted above to make sure they are in place and up to date.
- If COVID-19-related losses or claims do arise, prompt notice to the insurer is often a prudent course of action to preserve coverage.

Anticipated Issues:

- Insurance renewal and alternative risk strategies to maximize further coverage for public health/pandemic events.
- Potential structural changes in health insurance programs driven by post-COVID-19 market forces.

Antitrust

Current Issues:

- Vigilance around antitrust compliance extends to even well-meaning competitor information sharing (including benchmarking) and collaborations on best practices around reopening operations:
 - Discussions should be limited to topics that are likely to benefit the health and safety of workers and the community.
 - Discussions should be structured to avoid even the appearance of agreements that were not intended or spillover into more competitively sensitive topics.
 - The mere participation of a government official or agency typically does not provide a defense against antitrust claims that might arise later.
- Consult with antitrust counsel prior to any communications among competing companies over the criteria or timing for employees returning to work, when and how to serve customers, or other topics relating to reopening that could be competitively sensitive.



Anticipated Issues:

- Likely uptick in federal and/or state competition-related investigations and enforcement actions globally.
- Possible private treble-damage antitrust litigation, including class actions.
- Public policy discussions, particularly in Congress, regarding potential investigations and modifications to antitrust laws to enable greater enforcement authority.

Food, Drug, and Device

Current Issues:

- Provision of face coverings as necessary and appropriate for the work environment and as required by state or local public health authorities;
 - Ensuring regulatory compliance for respirators or face masks necessary for the work environment;
 - Training to ensure correct use of respirators or face masks, depending on the type of face covering provided;
 - Clear communication to employees about face-covering requirements and intended benefits;
- Use of regulated medical devices for screening, such as telethermographic cameras, no-touch thermometers, or other screening devices.
- If diagnostic testing will be performed on-site at the workplace for employees or visitors, consider:
 - Which type of diagnostic test will be used (molecular/antigen and/serological) and the necessary national or local laboratory licensure and certification requirements required to administer tests on-site.



- Compliance with:
 - Health data privacy laws that apply to your business
 - Medical device and health regulations, such as:
 - In the United States, use of a test that is authorized by FDA or otherwise lawfully distributed;
 - Equivalent rules outside of the U.S., such as CE-marking requirements; and
 - Reporting requirements of local health authorities.
 - Contact-tracing and reporting initiatives should be implemented in coordination with any internal privacy officers, human resources (HR), compliance teams, and unions.
 - Businesses should consider adopting a separate COVID-19-influenced health and safety policy.
 - A process should be implemented for responding to government authority requests for reports on and access to testing results.

Anticipated Issues:

- Ongoing recommendations from local, state, and national public health authorities on requirements and/or best practices to reduce COVID-19 transmission in the workplace.

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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