



# CONSIDERATIONS FOR EMPLOYERS IN THE BRAVE NEW COVID-19 WORLD

## INTRODUCTION

With Covid-19, and the need to re-open business, many employers are finding themselves without a compass in uncharted waters in making decisions on how to continue to operations while protecting not only customers but their workforce. To complicate matters even more there are potential new threats of governmental fines, and a new wave of litigation with unique claims against companies. For example, although long considered, OSHA does not currently have any standards pertaining to infectious diseases outside of the healthcare setting. Moreover, in most cases it is virtually impossible to determine how and where an individual may have been exposed to an infectious disease.

However, with increased pressure, OSHA may be looking at possible avenues of issuing citations under the 5A1 general duty clause. Without a doubt, plaintiffs' counsel around the US have already been looking at possible theories for new litigation. With that said it is incumbent upon every employer to take steps to ensure the safety of every employee. Employers should be proactive in their implementation of standards and protocols for their employees.

The number one question is "how do we keep our workers safe from infection?" In reality, there is no way to guarantee that an employee will not become infected while at work. Rather, the focus should be on minimizing the risk of infection not only from COVID-19, but from other infectious diseases as well. An effective Safe Return to Work protocol can enable HR, Legal, and Risk teams to ensure the right procedures, for the right workers, at the right time.

There are multiple considerations in creating and implementing a new Safe Return to Work protocol. Protocols may be different for different industries. There is no "one size fits all." However, the following are just a few considerations for employers in determining new protocols for their business in this brave new Covid-19 world.

# RETURN TO WORK CONSIDERATIONS

## IDENTIFY YOUR EMPLOYEE EXPOSURE RISK.

This may help in determining what level of protection your workers need. OSHA has provided some guidance on how to identify those workers who are at higher risk for exposure. Ultimately occupational exposure risk may largely depend on the industry type and the need for contact within 6 feet of people. Additionally, home and community environments as well as an individual's preexisting health condition may play a factor in the risk exposure levels. OSHA has identified four levels of exposure risk for workers: Low, Medium, High, and Very High.<sup>1</sup> Unsurprisingly, the High and Very High risk category includes primarily healthcare workers. Most businesses will fall into the Medium and Low categories. Low exposure risk workers include office workers who do not have frequent close contact with coworkers, customers, or the public; and manufacturing and industrial facility workers who do not have frequent close contact with coworkers, customers, or the public. Medium exposure risk workers included those who may have contact with the general public (e.g., in schools, high population density work environments, and some high-volume retail settings); and those who may have frequent contact with travelers who return from international locations with widespread COVID-19 transmission.

## WHO'S IN CHARGE?

Identify a workplace coordinator who will be responsible for COVID-19 issues and their impact at the workplace.

## JUST ASK.

Protocols may begin with a "Certification to Return to Work." A "Certification to Return to Work" will not only provide peace of mind to workers, allowing them to continue to perform their job responsibilities in an effective and productive manner, but it will also provide some safeguard against any potential claims that may arise in the event that a worker does become infected. At a minimum the "Certification to Return to Work" should include an employee's acknowledgment that he or she is not exhibiting any signs or symptoms of infectious disease. The U.S. Equal Employment Opportunity Commission (EEOC) has stated that during the pandemic employers may inquire whether employees are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat.<sup>2</sup> Many businesses are also requiring workers, vendors and other visitors to submit to a temperature screening before entering the premises. Note that such requirements are not a violation of HIPPA. Likewise, on April 23, 2020, the EEOC affirmed that employers may lawfully administer COVID-19 testing to employees without violating the Americans with Disabilities Act.

## KEEP IT CONFIDENTIAL.

While an employer may require temperature screenings, administer COVID-19 tests, or inquire as to the presence of known symptoms, the employer must keep this information confidential. The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

- 1 <https://www.osha.gov/SLTC/covid-19/hazardrecognition.html>
- 2 New symptoms are frequently identified as more is learned about the virus. These are just some of the more common symptoms of COVID-19.
- 3 It is not yet clear, however, whether the EEOC will make a distinction for antibody tests, which may indicate that the employee has previously been infected with the COVID-19 virus and, as a result, may be immune from its effects in the future.



## HYGIENE TRAINING.

Employers don't think twice about safety training when it comes to the use of fall protection, and the use of PPE. Many employers may even provide training on signs of heat exhaustion and the need for water consumption. In our new COVID-19 world, employers may consider incorporating hygiene training such as the proper way to wash your hands, not touching your face, frequent cleaning of visibly dirty and high touch. While this may appear like common sense, how many break rooms contain refrigerators and microwaves used by all employees? How often are these appliances disinfected?

## CONTINUE TO KEEP YOUR DISTANCE.

It is likely that social distancing requirements will continue long after businesses begin re-opening. These social distancing requirements should continue both inside of the office as well. For example, limit the number of people who may occupy a common area, elevator, or bathroom at the same time. The monthly potluck dinner, or tasty treats left in the breakroom for all to enjoy? Maybe, try a recipe exchange instead.

## DOCUMENTATION IS KEY.

Employers should aim to create a record that can be used defensively by the business in the event it is challenged on a workman's compensation claim, an alleged OSHA violation, or even a civil lawsuit for personal injury. Documentation includes such things as sign-in sheets for training, acknowledgment forms confirming receipt of protocols, and documentation to go in employee personnel files in the event an employee is sent home because of illness or accelerated temperature. In addition, documentation reflecting a cleaning schedule of equipment or common areas. Make sure that any documentation provided to an employee is written in a language that the employee understands. If an employee only speaks Spanish, then all training and documentation also need to be in Spanish.

## ENFORCEMENT AND FOLLOW THROUGH.

Often times employers will have beautifully written policies and procedures. However, when asked to produce documentation showing that those policies and procedures have been enforced, they come up short. An unenforced policy is no policy at all. Likewise, enforcement must be uniform and consistent.

### ABOUT THE AUTHOR



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Ms. Flanagan has successfully defended numerous individuals and companies across Texas in a wide range of cases involving wrongful death, personal injury, premises liability, residential and commercial construction defect. In addition she has significant experience in assisting companies following catastrophic events leading to serious bodily injury or death. This includes coordination with OSHA during its investigation and defense of the employer during OSHA investigation, and subsequent litigation, if necessary. Ms. Flanagan's representation of employers during the OSHA investigation has led to citations being deleted or vacated in their entirety, or reclassified to a lesser often, and significant reductions in penalty fines.

For more information you can click [here](#) to view her profile or visit our website at [www.sheehyware.com](http://www.sheehyware.com)

## RESOURCES

New information and guidance from the U.S. Centers for Disease Control and Prevention (CDC), OSHA, and other federal, state, and local government officials continues to unfold as the situation evolves. It is important to keep with any updates and changes that may emerge. There are numerous resources for employers and the public in general. Some of those resources include the following:

- <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)
- <https://www.osha.gov/SLTC/covid-19/>
- <https://www.twc.texas.gov/news/covid-19-resources-employers>

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