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# **Reopening During the Pandemic: What Employers Need to Know**

May 13, 2020

**Bloomberg Law**

# Speakers with Photos



**Michaelle L. Baumert**  
Principal  
Jackson Lewis P.C.



**Doug Hass**  
Chair  
Association of Corporate Counsel's  
Employment and Labor Law Network



**Travis W. Vance**  
Partner  
Fisher & Phillips LLP



**Dori Goldstein (Moderator)**  
Legal Analyst  
Bloomberg Law

# **Contents**

**The Decision to Reopen**

**Keeping Workers Safe**

**Managing the Workforce**



# Part I

## The Decision to Reopen

# Return to Work Considerations: Just because you can...

- Check **state and local mandates** – who, when and how you can return employees back to the workplace
- Consider which positions, employees needed/possible to return to the workplace
- Consider remote work – just because you can return employees, does not mean you need to.
  - Look to state, localities for guidance, support for continuing remote work
- **Indiana Governor Holcomb, 5/1/20:**
  - *“Those who work in office settings are encouraged to continue to work remotely whenever possible. In fact, if anyone can work from home, we encourage you to continue to do so.”*



# Work from Home Policies and the ADA

## Coronavirus WFH policies can be temporary, not necessarily part of handbook

- Must address:
  - who can work from home, expected hours of work (start/end times, breaks, meals), productivity standards, technology/logistics, access to work documents/materials, confidentiality, data security
- If temporary, must clarify that
  - WFH policy is based solely on pandemic and subject to modification or termination
  - employee attendance at work is still considered an essential job function
- Potential disability considerations
  - Accommodations at work = accommodations at home?
  - Employees with health conditions negatively impacted by COVID-19
- **See EEOC's 2003 WFH/Telework guidance for more general details**
  - <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>

# Work From Home – Future Implications

## Decisions to Allow Employees to Continue Working from Home Should be Carefully Considered (when no longer required by local order)

- **Documentation of performance and production at home is necessary**
  - Clear expectations
  - Plans for each week should be documented by employee, with hours expected to be spent on each task
  - Follow-up/look back on completion of tasks, or explanation for not completing tasks
  - Continue to document performance issues as you would if employees were physically present
- **Document issues with working from home frequently**
  - Lack of collaboration, loss of production levels, disciplinary issues, general dissatisfaction
- **Impact in the future on potential requests for accommodation for other reasons**

# Federal WARN and State mini-WARN Act Considerations

- **WARN Act: Employers must provide at least 60 calendar days of notice prior to “plant closing” or “mass layoff” (as few as 50 employees under federal law)**
  - Non-compliance: 60 days of back pay and benefits; civil penalty up to \$500/day; private right of action
- **Are you covered?**
  - Federal WARN: 100+ employees (excluding part time) or 100+ employees collectively working 4,000 straight time hours/week
  - CA: 75 employees (excluding employees for less than 6 of past 12 months)
  - NY: 90 days’ notice, 50 employees in NY (excluding P/T) or 50+ working 2,000 hours/week (including OT)

# Federal WARN and State mini-WARN Act Considerations

- **WARN Triggers**
- *Employment Site Closing.* Permanent or temporary shutdown (plant, site, facility, operating unit) causing “Employment Loss” for 50+ FT employees during a 30-day period
- *Mass Layoff.* Any other RIF resulting in Employment Loss for:
  - 50+ comprising at least 33% of all active employees; or
  - 500+ employees
  - CA: 50+ employees, regardless of %
  - NY: 25+ employees comprising at least 33% or 250+ employees
- *Relocation* (NY/CA only). Move covered operations 100+ (CA)/50+ (NY) miles away
- Employers must look forward and backward 90 days from any Employment Loss to determine WARN duties

# Federal WARN and State mini-WARN Act Considerations

- **Relevant WARN Trigger Exceptions**
- ***Short-term layoffs up to 6 months***
  - In CA: even short-term stoppages can qualify as a layoff
- ***Natural disasters (floods, earthquakes, droughts)***
  - No precedent to suggest coronavirus, pandemics are “natural disasters”
- ***“Unforeseeable business circumstances”***
  - Little clear case law, but exception likely to apply to coronavirus-related situations
  - Must give written notice as soon as practical, with justification for reduced notice
  - CA 3/17/20 Executive Order:
    - Creates explicit exception for coronavirus, consistent with same federal exception
    - Also requires notice of UI availability
  - NY 4/17/20 Executive Order:
    - Partially suspends some requirements for small businesses

# Before Heading Back

- Have a plan
- Communicate with employees



## Review Existing Policies

- Sick leave
- Telework
- Childcare
- Travel
- Social media
- Reasonable accommodation
- Visitor

## Create and Communicate New Policies

- Social Distancing
- Handwashing
- Temperature Check
- Meetings/gatherings
- Return to work after Covid-19 infection

# Part 2

## Keeping Workers Safe

# Safety and Health Issues/OSHA

- **COMMON REGULATIONS TO CONSIDER**
  - Hazard Communications – Cleaning Chemicals
  - PPE – Assessments, Training
  - Refusal to Work
  - General Duty Clause – CDC Recommendations
  - Recordkeeping/Reporting
- **TAKING TEMPERATURES - REQUIRED BY SOME STATE/LOCAL ORDERS**
  - Protect the Screener with PPE/barriers
  - Consider Contracting out to Medical Providers
- **FACEMASKS – REQUIRED BY SOME STATE/LOCAL ORDERS; CDC RECOMMENDED**
  - Is it PPE? Who Pays?
  - Provide Training on Use, Care and Limitations
- **LABOR RELATIONS ISSUES**
  - Expect Scrutiny from Union, Don't Ignore | Organizing Opportunities
  - Review CBA
  - Safety Complaints/Refusal to Work

# Personal Protective Equipment

- **Chemicals/HazComm Issues**
- **Face Coverings/Gloves/Goggles/Respirators**
- **OSHA Requirements**
  - Provide, use, and maintain appropriate PPE “wherever it is necessary by reason of” workplace hazards. 29 C.F.R. § 1910.132(a).
  - Assess their workplaces “to determine if hazards are present, or are likely to be present, which necessitate the use of” PPE, which assessment must be certified in writing. 29 C.F.R. § 1910.132(d)(1), (d)(2). Two model PPE certifications are attached.
  - If hazards requiring PPE use are found based upon the hazard assessment, the employer is required to have its employees use appropriate PPE. 29 C.F.R. § 1910.132(d)(1)(i)-(iii).
  - Train employees regarding use of the PPE (including donning and doffing), proper care, maintenance, and useful life of the PPE, and the limitations of the PPE, among other things. 29 C.F.R. § 1910.132(f)(1). The employer must retrain employees when there are changes in the workplace that affect the prior training, changes to the PPE to be used, and inadequacies to the employee’s knowledge or use of the PPE. 29 C.F.R. § 1910.132(f)(3)
  - Provide PPE to employees at no cost to the employees. 29 C.F.R. § 1910.132(h). Exceptions to this include, among other things, non-specialty safety-toe footwear and non-specialty prescription safety eyewear, as well as everyday clothing, “such as long-sleeve shirts, long pants, street shoes, and normal work boots.” 29 C.F.R. § 1910.132(h)(2).

# Social Distancing in the Workplace/ Spatial Considerations

- Easier Said Than Done
- Every Facility Is An Assembly Line or Warehouse
- Non-Spatial Considerations
- Consider Public Areas, such as Hallways, Restrooms, and Elevators



# Lawsuits/Workers' Compensation Issues

- **OSHA/MSHA COMPLAINTS/INSPECTIONS**
  - Rapid Response Investigations
  - Remote Inspections
  - Initiated by Employees, Family Members, General Public, Etc.
- **OSHA/MSHA WHISTLEBLOWER CLAIMS**
  - Safety Complainants Protected
- **WORKERS' COMPENSATION**
  - Coverage/Burdens
  - Exclusive Remedy, Generally
  - Expect Denials From Insurers
- **GENERAL LIABILITY**
  - Employees, Non-Employees

## Health Screening

What can  
you ask  
employees  
about their  
health?



Do you have a fever, chills, cough, shortness of breath, or a sore throat? Have you recently lost the ability to smell or taste?



Do you need a reasonable accommodation?



Do you have an underlying condition that puts you at greater risk of serious complication if you become infected with Covid-19?

# Implementing Temperature Checks



Under the Americans with Disabilities Act, temperature checks are considered **medical examinations**. Although the ADA restricts the use of medical examinations, it does allow them if the employer has a reasonable belief that the employee poses a “**direct threat**” to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

**The EEOC’s position is that the coronavirus pandemic qualifies as a direct threat.**

[Pandemic Preparedness in the Workplace  
and the Americans with Disabilities Act.](#)

# Caution!

- As with all medical information, employees' temperatures must be kept confidential
- Employers must take precautions to protected workers performing screenings and those being screened
- A temperature check alone is not enough to keep workers safe
- Employers may be required to pay workers for time spent waiting to enter their worksite



# Confidentiality

**The Americans with Disabilities Act** requires employers to keep employees' medical information confidential. That includes body temperature and Covid-19 infection status and history.

In addition, the ADA prohibits employers from keeping medical information in employee personnel files.

**The California Consumer Privacy Act** requires employers to inform employees of the categories of personal information they collect.

CCPA does exempt employment-related information from most of its requirements; however, that exemption is set to expire on Jan. 1, 2021. If it does, all of the laws provisions will apply in the employment context -- including the 12-month "look-back" provision..

**The Health Insurance Portability and Accountability Act** doesn't apply to most employers. Even when an employer is subject to HIPAA privacy requirements, those requirements don't apply to information obtained in the employment context.

# Safety and Security



## The worker performing the screening should:

- Be medical professionals
- Be properly trained,
- Have appropriate PPE, as
- Have as limited contact with workers as possible

## Workers being screened should:

- Be out of view of other workers,
- Stay a safe distance from other workers, and
- Should be informed of the screening results privately

# Wage and Hour Implications of Onsite Temperature Checks

## Time Spent Waiting in Line and Taking Temperature

- **Compensable**: Conservative and common employer position. Take steps to minimize this time.
- **Noncompensable**: *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 515 (2014) (time spent by employees in security screenings prior to leaving at the end of the day, of up to 25 minutes, was not compensable under the FLSA and PPA, as postliminary and not integral to the performance of their principal activities for Amazon).
  - Security Screenings were not the “principal activity or activities which [the] employee is employed to perform.” Employees were employed to retrieve and package products.
  - Security Screenings were not “integral and indispensable” to the performance of their work activities. Sotomayor/Kagan concurring opinion: screenings were part of the process by which “employees egressed their place of work, akin to checking in and out and waiting in line to do so—activities that Congress clearly deemed to be preliminary or postliminary.”
  - Ninth Circuit’s focus on “whether the particular activity was required by the employer rather than whether it was tied to the productive work that the employee was employed to perform” “would sweep into ‘principal activities’ the very activities the Portal-to-Portal Act was designed to exclude from compensation”
  - **BEWARE of State Law, also Union bargaining obligations.**

# Is There Another Option?

YES →

- Contactless screening
- Contactless temperature checks
- Home temperature checks

# Can Tech Save the Day?



Two types of tech solutions are emerging: contact tracing applications and proximity alert technology. **Contact tracing applications** work by combining public health information and unique Bluetooth identifiers associated with a device to notify people when they've been close to someone with the virus. **Proximity alert technology** notifies people when they come within a certain distance of each other. Both can help keep workers safe, but come with compliance risks.

# Contact Tracing Lessons

- **Contact Tracing, Particularly Tech Options, can be onerous and very expensive**
  - Ongoing data retention issues
  - Implications for Keeping Workplace going (casting a wide net)
- **Short of Contact Tracing – Use the Lessons Other Employers Have Learned**
  - Staggering Start/End Times for Shifts
  - Cluster Workgroups together in smaller groups
  - Social Distancing
  - Employees should not be using community breakrooms, coffee pots
  - No visitors in the workplace



# Part 3

## Managing the Workforce

# Can Employees Refuse to Come to Work?

**OSHA Retaliation Protection:** Employees can refuse to come to work if they believe they are in imminent danger. Imminent danger is, “...any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

**NLRA Protected Concerted Activity:** Under the NLRA, employees who engage in “protected concerted activity for mutual aid or protection” can’t be fired or disciplined for doing so.

**ADA Reasonable Accommodation Requests:** Employees who have disabilities or conditions that make them susceptible to serious complications from Covid-19 can request reasonable accommodations before returning to work. RAs can include telework, additional PPE, changes to their work schedule, etc.

# Hazard Pay

## Additional Pay for Dangerous or Physically Taxing Work

- DOL's Definition of Hazardous Work: "Work duty that causes extreme physical discomfort and distress which is not adequately alleviated by protective devices [and] is deemed to impose a physical hardship."
- Also considered "forward looking pay" to provide additional compensation in advance to mitigate the impact of potential future harm (as opposed to worker's compensation as post-harm mitigation measures after harm)
- Hazard Pay is not currently legally required.
- Offered in different ways
  - Flat Dollar Amount, Cash Incentives Tied to Hours and Shifts, % of Salary, Tied to Overtime Only
  - Implications on Regular Rate for Overtime Calculation Purposes
- If Hazard Pay has been provided, there must be careful consideration regarding when it will end. Best practice is to provide it for a specified period, with notice that it will end at a certain point, to avoid state-mandated notice requirements, which vary.
- Potential PR Implications later on.

# Childcare Issues



If schools are closed, expect that workers will have child care issues.

Consider the following:

- Are workers entitled leave?
- Can you allow workers to telework?
- Is work sharing an option?

Remember, discrimination based on family responsibilities is prohibited in some cities and states. Even if it isn't in your state, be careful to avoid gender discrimination.

# Scheduling and Unemployment

Closures or partial closures, social distancing/risk mitigation lead to reduction in work demand lead to reduced hours, furloughs, layoffs

- CARES Act “Federal Pandemic Unemployment Compensation”
  - Flat \$600/week, regardless of previous earnings (until July)
  - All or nothing (no reduction for work/wages earned): eligible for UI: 100%, not eligible 0%
- Consider how scheduling can impact ultimate compensation
- Most states provide:
  - weekly benefit based on highest recent earnings
  - additional benefits for dependents
- Illinois example:
  - Employees eligible for up to \$484/week or up to \$667/week with dependents (47% of weekly average wages from highest 2 eligible quarters)

# Scheduling Impact on UI: Pre-CARES Act Scenarios

- **Example Illinois employee earns \$1,000/week average**
  - Weekly benefit: \$470, subject to reduction for earnings over \$235
- *Schedule 1: Employee reduced to 16 hours/2 days of work*
  - Wages: \$400
  - Weekly benefit reduced to \$305
  - *Earnings: \$705 (\$1410 for two weeks)*
- *Schedule 2: Employee reduced to 20 hours (half schedule)*
  - Wages: \$500
  - Weekly benefit reduced to \$205
  - *Earnings: \$705 (\$1410 for two weeks), even working 4 extra hours*

# Scheduling Impact on UI: CARES Act Scenarios

- *Schedule 3: Unemployed*
  - Weekly benefit: \$470, plus \$600 CARES Act supplement
  - *Earnings: \$1,070 (\$2,140 for two weeks)*
- *Schedule 4: 16 hours/2 days of work*
  - Wages: \$400
  - Weekly benefit reduced to \$305, plus \$600 CARES Act supplement
  - *Earnings: \$1,305 (\$2,610 for two weeks)*
- *Schedule 5: Employee works one week on, one week off*
  - Wages (week 1): \$1000 (week 1)
  - Weekly benefit (week 2): \$470 + \$600 = \$1,070
  - *Earnings: \$2,070 for two weeks*
- ***Employee working the most hours earns the least***
  - *Impact more pronounced with employees making less*

# Scheduling Impact on UI: CARES Act Scenarios

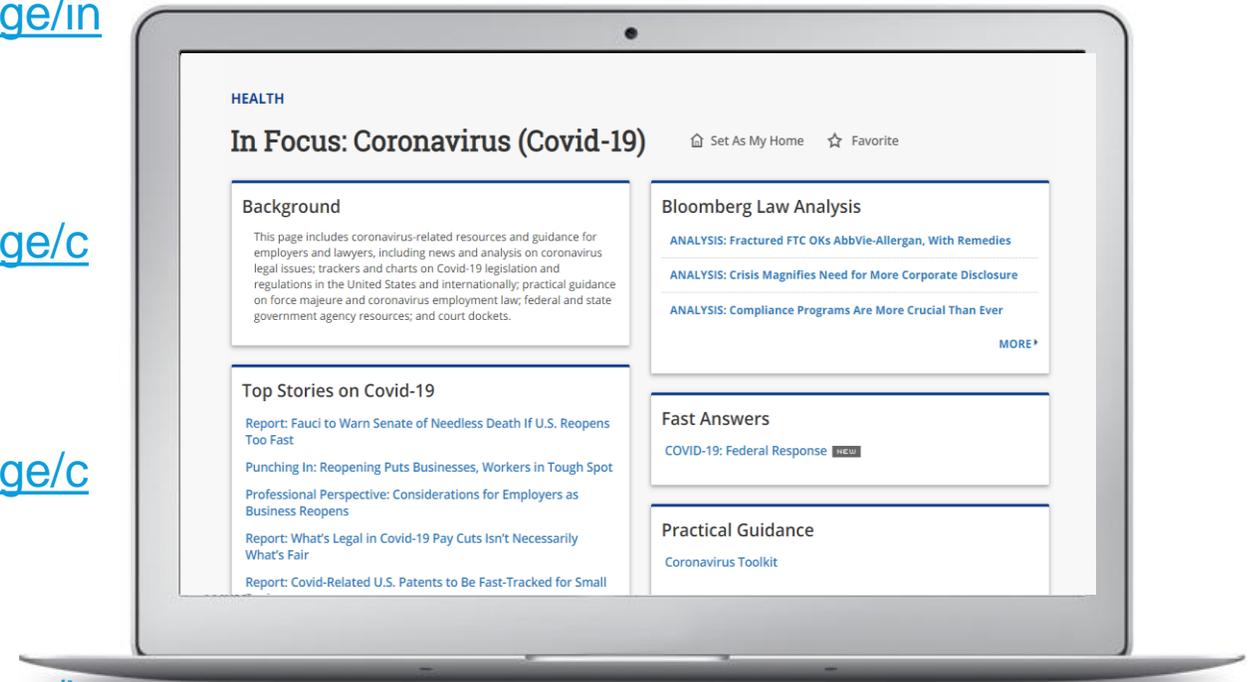
- Schedule 6: Employee works 75%
  - Wages: \$750
  - Weekly benefit: None (therefore, no CARES Act supplement)
  - *Earnings: \$1,500 for two weeks*
- Employee earning 75% of wages in this scenario earning *half* what someone working 2 days/week would earn.
- *Other considerations*
- Check with benefits carriers about eligibility for reduced hours
- Consider state, local laws regarding scheduling, reductions in pay
- Cutting hours, pay can be good cause for UI benefits

## Useful Links

- EEOC's Pandemic Preparedness in the Workplace and the Americans with Disabilities Act: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- EEOC's What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- OSHA's Guidance on Preparing Workplaces for COVID-19: <https://www.osha.gov/Publications/OSHA3990.pdf>
- CDC's Coronavirus Information: <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>
- WHO's Coronavirus (Covid-19) Disease Outbreak: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

# Bloomberg Law Resources (FREE)

- In Focus: Coronavirus  
[https://www.bloomberglaw.com/product/health/page/infocus\\_coronavirus](https://www.bloomberglaw.com/product/health/page/infocus_coronavirus)
- In Focus: Remaining Operational  
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