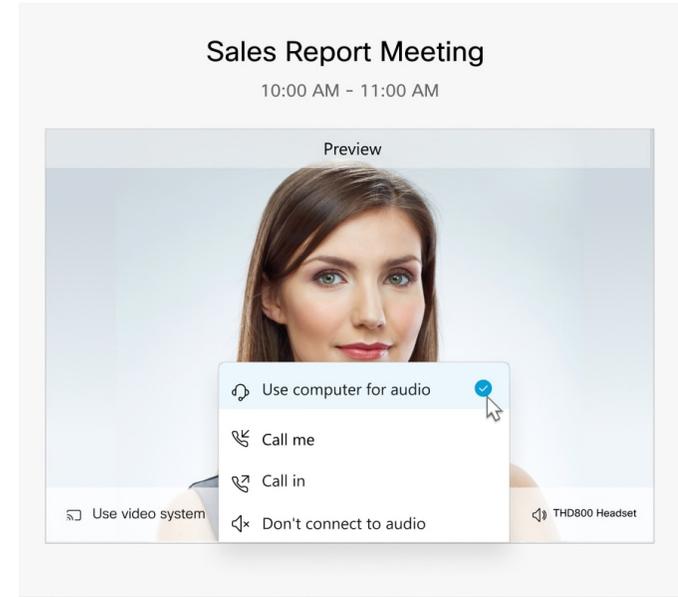
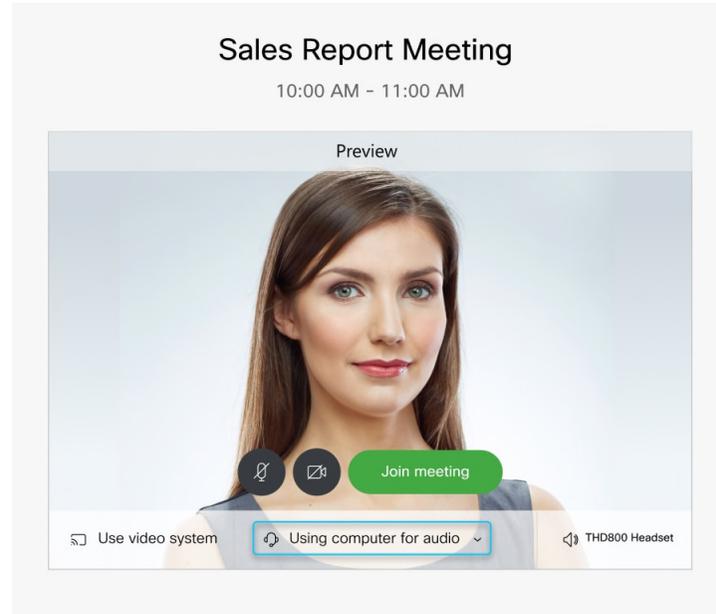


Welcome and thank you for joining us for today's presentation. Our topic is **“Protecting the Workplace: How to Reopen Safely and Address Employee Concerns.”**

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Protecting the Workplace: How to Reopen Safely and Address Employee Concerns

Presented by:
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Lucy Li

Agenda

- Abiding by OSHA/CDC guidelines for ensuring a safe workplace
- Updating existing policies and drafting new ones to address COVID-19 safety protocols
- Reviewing EEOC requirements
- Addressing employment terms and conditions and employee concerns (refusals to return, accommodations, FFCRA)



OSHA Background

- Under the *Occupational Safety and Health Act of 1970*, the Occupational Safety and Health Administration (“OSHA”) is authorized to conduct workplace inspections and investigations to determine whether employers are complying with standards issued by the agency for safe and healthy workplaces



General Duty Clause

- Each employer
 - Shall furnish to each of its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees
- Catchall – used when no specific standard applies
 - COVID-19



Workplace Health and Safety Standards

- Workplace Standards
 - General industry standards: Applicable to all workplaces (before, during and after COVID-19)
 - Hazard communication standard
 - Emergency action plan standard
 - Fire prevention plan
 - Exit routes
 - Walking/working surfaces
 - Medical first aid



Workplace Health and Safety Standards

- Worksite specific standards
 - Construction: Protective equipment, required certifications, safety training and education
 - Agriculture: Environmental controls, guarding farm field equipment and employee operating instruction
 - Maritime: Marine terminal operations, cargo handling and equipment



Workplace Health and Safety Standards

- During the pandemic, OSHA issued its own guidance and refers to and defers to the Centers for Disease Control (“CDC”) for guidance on various safety measures.



OSHA's Guidance on COVID-19

- Develop an infectious disease preparedness and response plan
- Implement basic infection prevention measures
- Develop policies and procedures for efficient identification and isolation of sick individuals
- Develop, implement and inform workers of workplace flexibilities and protections
- Implement workplace controls, specifically, engineering controls, administrative controls and use of personal protective equipment (“PPE”)



Threshold Questions

1. What industry are you in (health care, laboratories, critical infrastructure, retail, etc.)?
2. What is the employee's exposure risk level – low, medium, high or very high?
3. What federal, state, local laws or executive orders apply?

Your answers to the threshold questions will determine specific steps you may be required to follow.



Industry-Specific Guidance

| | |
|--|---|
| Hazard Recognition | > |
| Standards | > |
| Medical Information | > |
| Control and Prevention | > |
| Background | > |
| Additional Resources | > |
| Workers' Rights | |

Interim guidance for specific worker groups and their employers

This section provides information for specific worker groups and their employers who may have potential exposures to SARS-CoV-2. Guidance for each worker group generally follows the hierarchy of controls, including engineering controls, administrative controls, safe work practices, and PPE. However, not all types of controls are provided in each section; in those cases, employers and workers should consult the interim general guidance for U.S. workers and employers of workers with potential occupational exposures to SARS-CoV-2, above.

- [Healthcare](#)
- [Dentistry](#)
- [Emergency response and public safety](#)
- [Postmortem care](#)
- [Meat and poultry processing](#) (developed in partnership with CDC)
- [Laboratories](#)
- [Airline operations](#)
- [Retail operations](#)
- [Border protection and transportation security](#)
- [Correctional facility operations](#)
- [Solid waste and wastewater management](#)
- [Environmental \(i.e., janitorial\) services](#)
- [In-home repair services](#)
- [Business travelers](#)
- [Travel to areas](#) where the virus is spreading



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DEPARTMENT OF LABOR



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Industry-Specific Guidance

- The CDC also has industry-specific guidance (some states may have them as well)
- Refer to the CDC website



OSHA's Levels of Risk

- The level of controls to be implemented depends on the level of the workers' risk of exposure
 - *Low Risk* (workers who do not have frequent contact with the general public)
 - *Medium Risk* (workers with ongoing community contact such as high-volume retail in areas experiencing ongoing community transmission)
 - *High Risk and Very High Risk* (workers, such as those in the health care industries, with high potential exposure to known or suspected sources of COVID-19)
- Follow industry-specific guidance on how to mitigate the applicable level of risk



OSHA's Level of Risk

Employers should:

- Assess the hazards to which their workers may be exposed
- Evaluate the risk of exposure
- Elect, implement and ensure workers use controls to prevent exposure.



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Masks and Personal Protective Equipment

- Your response to the threshold questions discussed earlier determines the appropriate type of PPE
- Conduct an assessment of need for PPE
- Don't forget state law: In New Jersey, certain business must provide, at their expense, face coverings and gloves for their employees. E.O. 122



Training Required by OSHA

- Training required by OSHA:
 - When PPE is necessary
 - What PPE is necessary
 - How to properly don, doff, adjust and wear PPE
 - The limitations of the PPE
 - The proper care, maintenance, useful life and disposal of PPE
- Re-training required when any of the above changes or if employee cannot demonstrate an understanding of the above
- Document training sessions



Requirements to Wear PPE

- Employees may be required to wear PPE by OSHA and CDC guidelines, as well as applicable law
- Employees who refuse may be denied entry to the workplace or may be disciplined
- **CAUTION:** Employers cannot take any adverse action if refusal is due to need for reasonable accommodation (as discussed later)



Some Generally Applicable Safety Measures from the CDC

- Social distancing
- Limit in-person meetings
- Minimize physical contact
- Limit gatherings in lunch and break rooms
- Stagger shifts and break times



Some Generally Applicable Safety Standards (con't)

- Intensify sanitation efforts (use [EPA-registered disinfectants](#) with labels that claim to be effective against SARS-CoV-2, the virus that causes COVID-19)
- Educate employees about best practices regarding hygiene
- Respond to any safety concerns raised by EEs (be proactive; communicate with employees early and often)
- Temperature scans for employees (either at work or before reporting to work), if appropriate



Employees Returning to Work

- **Option 1: If an employee will not be tested** to determine if they are still contagious, the employee can leave home and return to work after these three conditions have been met:
 - The employee has had no fever for at least 72 hours (that is, three full days of no fever without the use of medicine that reduces fevers)
AND
 - respiratory symptoms have improved (for example, cough or shortness of breath have improved)
AND
 - at least 10 days have passed since their symptoms first appeared



Employees Returning to Work (con't)

- **Option 2: If the employee will be tested** to determine if the employee is still contagious, the employee can leave home after these three conditions have been met:
 - The employee no longer has a fever (without the use of medicine that reduces fevers)
AND
 - respiratory symptoms have improved (for example, cough or shortness of breath have improved)
AND
 - they received two negative tests in a row, at least 24 hours apart. Their doctor should follow [CDC guidelines](#).



Contact Tracing

- Employers have an obligation to notify employees that there has been a confirmed case of COVID-19
- The name of the employee with the confirmed case must remain **confidential**
- Determine who may have been exposed or in close contact with the confirmed case
- Employees who have been exposed or in close contact should be sent home to monitor for symptoms (different rules for critical infrastructure employees)
- The rest of the workplace may continue working, but should self-monitor and report symptoms if they develop



Disinfect/Clean Common Areas and Items

- Determine which areas need to be cleaned, and how often — sometimes multiple times per day depending on how frequently the item is used
- Common areas such as lunch rooms and break rooms should be cleaned at least daily
- Follow CDC guidance on cleaning procedures



Disinfect/Clean Common Areas and Items

- Tables
- Doorknobs
- Light switches
- Countertops
- Handles
- Desks
- Phones
- Keyboards
- Toilets
- Faucets and sinks
- Gas pump handles
- Touch screens
- ATM machines
- **Time clocks**



Refusal to Work

- What if an employee refuses to work? Does OSHA apply?
 - An employer cannot discriminate against (discipline) an employee who:
 - (a) refuses, in good faith, to expose himself or herself to a dangerous condition in the workplace; and (b) believes they have no reasonable alternative but to avoid the workplace (or assignment)
 - The condition causing the employee's fear must be one that a *reasonable person in similar circumstances* would conclude possess a real danger of death or serious injury
 - Where possible the employee has asked his employer for, but not obtained, a correction of the dangerous condition



Refusal to Work

- If employee refuses to work:
 - Can use PTO for time away from work
 - Can take unpaid leave of absence (or take protected leave if certain leave laws are applicable)
- Contact counsel before disciplining an employee for refusing to work (potential OSHA violation, NLRA, whistleblower claim, retaliation claim, discrimination claim, etc.)



Update Employee Handbooks

When preparing to reopen, consider additional policies that may be necessary to communicate to your employees.

- COVID-19 specific policies:
 - Social distancing and PPE
 - Temperature checks
 - Testing, isolating and contact tracing
 - Sanitation
 - Use and disinfection of high traffic areas
 - Business travel



Update Employee Handbooks

- Other related policies:
 - Attendance
 - Leaves of absence (FFCRA)
 - Tele-working
 - Confidential information (including HIPAA protected information)
 - Breaks (location, timing, etc.)
 - Visitors



COVID-19 and Intersection of Laws



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COVID-19 and Intersection of Laws

- ADA-discrimination and accommodation issues
- Title VII, ADEA and state or local anti-discrimination laws
- FMLA and state or local leave laws
- FFCRA and CARES Act
- State or local paid sick leave laws
- OSHA retaliation (or other state or local whistleblower protections)
- NLRA (protected concerted activity)



FFCRA

- Which employers are required to provide paid sick and family leave?
 - Private employers with fewer than 500 employees (including not-for-profit employers) and governmental employers (regardless of the number of employees)
 - NOTE: This ***includes*** employers who are otherwise exempt from the FMLA that have fewer than 50 employees
- Are certain employees exempt?
 - The benefits do not apply to certain federal government employees. Employers also may exclude employees who are health care providers and emergency responders



Events That Trigger Paid Sick Leave

Unable to work or telework because employee:

1. Subject to a federal, state or local quarantine or isolation related to COVID-19
2. Advised by HCP to self-quarantine due to concerns related to COVID-19
3. Experiencing symptoms of COVID-19 and seeking medical diagnosis
4. Caring for an individual who is subject to (1) or (2) above
5. Caring for his/her child because school or place of care is closed or child care provider is unable to provide care due to COVID-19 precautions
6. Experiencing any other substantially similar condition specified by Secretary of Health and Human Services



Events That Trigger Extended Family Leave

Only one reason:

#5 — Caring for employee's child whose school or childcare provider is closed or unavailable for COVID-19 reasons



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Determining Who to Recall First

- In union context, the CBA likely addresses this
- In nonunion context, there are various considerations:
 1. Operational needs/ability to perform the work available
 2. Pre-existing criteria for determining order of recall, either in Employee Handbook or in notice of layoff or furlough
 3. Seniority
 4. Volunteers



Determining Who to Recall First

Illegal considerations

- Cannot make decisions based upon race, gender, age
 - Disparate impact considerations
 - Conducting disparate impact analysis?
- Disability?
 - Higher risk employees?



EEOC and Permissible Inquiries

- EEOC enforces federal discrimination laws, including ADA
- Under ADA, medical examinations or inquiries of employees must be “job related and consistent with business necessity”
- BUT EEOC has guidance for pandemics that applies to COVID-19 that are detailed in its “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act” that relax the normal protocols and allow employers to navigate COVID-19



EEOC and Permissible Inquiries

- Employers may ask employees if they are experiencing symptoms of COVID-19. Symptoms may include:
 - Fever
 - Chills
 - Cough
 - Shortness of breath
 - Sore throat
 - Muscle pain
 - Loss of taste or smell
- Employer can ask about any symptoms that are identified by CDC
- Employer must maintain confidentiality in compliance with ADA



EEOC and Permissible Inquiries

- Taking body temperature would be a medical examination under the ADA, BUT employers may do so in response to COVID-19:
 - 100.4 degrees is current CDC-recommended threshold
 - Set up procedures
 - Maintain confidentiality
 - Be aware that not all infected people have a temperature so continue other precautions
 - If documenting, be aware of privacy concerns and store separately/limit access
 - Likely will be considered compensable time (FLSA)
 - Apply uniformly unless there is a reasonable belief based on objective evidence that a particular person might have COVID-19



EEOC and Permissible Inquiries

- Employers may require COVID-19 testing before returning to work
BUT
 - Set up procedures
 - Maintain confidentiality
 - Tests may be hard to come by and therefore, difficult to wait for availability
 - Confirm with group health plan regarding expenses
 - If documenting, be aware of privacy concerns and store separately/limit access
 - Maintain all other precautions because someone who tests negative could become infected after testing
 - Likely compensable time (FLSA)



EEOC and Permissible Inquiries

- What if employee refuses any of these procedures?
- The ADA allows an employer to bar an employee from physical presence in the workplace who:
 - Refuses to answer questions about whether he/she has COVID-19 or symptoms associated with COVID-19
 - Whether he/she has been tested for COVID-19
 - If he/she refuses to have temperature taken or get tested
- Consider unpaid leave – likely not entitled to any paid benefit



EEOC and Permissible Inquiries

- If employee is sick or exhibiting symptoms, send them home
- If employee tests positive:
 - Advise them of their rights under available leave (FMLA, FFCRA, disability insurance, other paid sick leave)
 - Do contact tracing – follow CDC guidelines regarding quarantine
- For employees who are/were sick, you may require a doctor's note for return
- **NO RETALIATION**



EEOC and Permissible Inquiries for Hiring/Onboarding

- Employers may screen applicants for COVID-19
- Conditional offers of employment for testing/screening
- Employers may delay start dates
- Employers may withdraw offers of employment to candidates who test positive because they cannot safely enter workplace
- Employers **MAY NOT** withdraw offers of employment based purely on employee's status as higher-risk



Other ADA Issues

- Normal ADA considerations will still apply
 - Definition of disability – including “perceived as”
 - Request for accommodation – there are no magic words
 - Engage in the interactive process
 - What are the essential functions of the job?
 - Is there a job description?
 - Will providing an accommodation cause “undue hardship”?



EEOC and Accommodations

- For higher risk employees, still required to accommodate where possible. Some considerations include:
 - Alternative or additional PPE
 - Moving workspace
 - Temporary restructuring of non-essential duties
 - Staggering attendance
 - Unpaid leaves of absence may be considered an accommodation if it does not create an undue hardship
- Mental illness as a disability (i.e., anxiety)
 - Still engage in interactive process
 - May request medical documentation



EEOC and Accommodations

- When employer is aware of employee's higher risk medical condition, but the employee DOES NOT request an accommodation
 - ADA **does not** require employer to do anything
 - ADA **does** prohibit adverse action against this employee, even if you think you are helping
 - **EXCEPT** ADA **does** allow employer to take action if employee's disability poses a "direct threat" to his/her health that cannot be eliminated by reasonable accommodation. This is a high and difficult standard to meet.



EEOC and Accommodations

- Factors to consider for “direct threat” analysis:
 - Duration of the risk
 - The nature and severity of the potential harm
 - The likelihood that the potential harm will occur
 - The imminence of the potential harm
- Even if “direct threat” standard is met, employee can only be excluded from workplace if no accommodation is available



Other EEOC Considerations

- Try to avoid asking about family members' conditions because of the Genetic Information Nondiscrimination Act
 - Instead ask generally if employee has been exposed to virus
- No national origin discrimination
 - Ensure you have a robust anti-discrimination policy and enforce it



Other Legal Risks

- Be aware of employee complaints/concerns
- Whistleblower laws generally require a reasonable belief of violation of the law or public policy
- Document concerns and responses



Refusal to Work

- Afraid of COVID-19 with no further explanation
 - Assuming it is not a result of the condition of the workplace, employee is not entitled to leave under federal and state law and will not collect unemployment or other paid benefit because work is available
 - Talk to this employee and try to be flexible/understanding
 - Consider an unpaid “personal leave” if that is feasible



Refusal to Work

- Afraid of COVID-19 because higher risk age group
 - Encourage those in higher risk groups to continue to work from home if possible BUT cannot mandate that they work from home – ADEA
 - Otherwise, employee is not entitled to any leave entitlement or paid benefit



Refusal to Work

- Afraid of COVID-19 because of underlying medical issue
 - FMLA may be available with medical certification
 - Possible FFCRA paid sick leave if advised to quarantine
 - ADA interactive process for potential accommodation



Refusal to Work

- Afraid because they live with a higher risk individual
 - Potential FMLA or other state or local leave law
 - Potential FFCRA or state or local paid sick leave
 - No requirement to accommodate because it is not employee's disability



Additional Resources

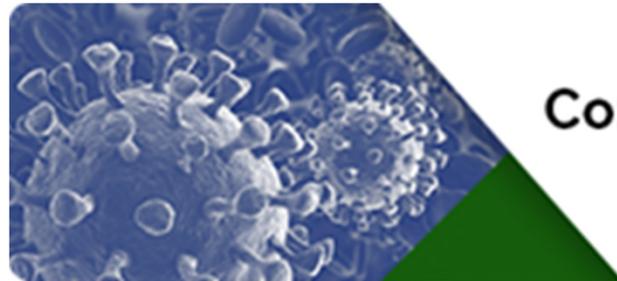
- Resources:
 - U.S. DOL - <https://www.dol.gov/agencies/whd/pandemic>
 - OSHA coronavirus guidance:
www.osha.gov/SLTC/covid-19/www.Congress.gov
 - CDC Guidance for business and workplaces:
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
 - EEOC - <https://www.eeoc.gov/coronavirus/>



Additional Resources

Fox Rothschild Coronavirus Resource Page:

<https://www.foxrothschild.com/coronavirus-resources/>



Coronavirus (COVID-19)
Resource Center



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EMPLOYER TIPS FOR RETURNING TO WORK IN THE COVID-19 ERA

Presented by



1. DETERMINING WHEN TO REOPEN PHYSICAL WORKPLACES

Determining when to permit employees to return to your physical workplace is a difficult decision that involves many considerations, including government restrictions, health and safety concerns and economic implications. Many state and local governments have imposed (and likely will continue to impose) restrictions on when you may return to your physical workplace, in what form you may reopen and how you can operate. To inform your decision and ensure that employees return to safe work conditions, you should monitor and review:

- State and local government orders
- Guidance issued by state and local health departments
- Guidance issued by the Centers for Disease Control and Prevention (CDC) for businesses and workplaces (<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>)
- Guidance issued by the Occupational Safety and Health Administration (<https://www.osha.gov/SLTC/covid-19/>)
- Resources posted by applicable business and industry associations

2. DECIDING WHO TO REHIRE OR RECALL AND IN WHAT CAPACITY

- Consider requiring employees to take on additional job duties or cross-training employees in different tasks
- Consider the impact of rehiring or recalling employees on your receipt of government benefits or loans (e.g., analyze loan forgiveness requirements if you received a Paycheck Protection Program loan)

3. ONBOARDING REHIRED OR RECALLED EMPLOYEES

- Prepare and send offer letter or reinstatement memorandum to returning employees
 - ▶ Provide deadline for accepting offer of reemployment or reinstatement and consider confirming in writing if employees do not respond to offer
 - ▶ Advise that declining offer of reemployment or reinstatement may result in forfeiture of continuing eligibility for unemployment compensation benefits
- Complete a new hire process, including any pre-employment screening (mandatory for employees who were terminated; recommended for employees who were temporarily laid off or furloughed)
- Obtain employees' updated contact information, including personal email address and cell phone number, to ensure effective communications during the pandemic
- Consider making a conditional job offer and then screening all applicants for symptoms of COVID-19 and taking all



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