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OSHA issues guidance on returning employees to work

On June 18, OSHA issued new return-to-work guidance for nonessential businesses. Supplementing earlier agency advice on the risk of workplace exposure to COVID-19, this guidance focuses on the need for employers to incorporate basic hygiene, social distancing, workplace controls and flexibilities, and employee training into their reopening and return-to-work strategies.

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Background

On March 9, the Occupational Safety & Health Administration (OSHA) published [Guidance on Preparing Workplaces for COVID-19](#). Developed in collaboration with the Department of Health & Human Services, the guidance included recommendations to help employers identify and reduce workplace exposure risks and COVID-19 spread. Drawing on traditional infection prevention and industrial hygiene practices, it focused on the need for employers to implement engineering, administrative, and work practice controls as well as the use of personal protective equipment (PPE), based on the potential risks. While advising employers and workers to use the guidance for planning purposes, OSHA acknowledged that additional guidance might be needed as conditions changed and new information about the virus, its transmission, and impact surfaced.

Reopening and return-to-work guidance

On June 18, OSHA issued [Guidance on Returning to Work](#) that recommends a framework for formulating and implementing plans to reopen businesses that were shuttered by state and local stay-at-home orders in response to the pandemic. The guidance, which also includes a set of FAQs, supplements earlier workplace guidance and builds on the White House's [Guidelines for Opening up America Again](#).

Three-phase reopening plan

OSHA's most recent guidance lays out a three-phase reopening plan that focuses on implementing basic hygiene, social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training.

Buck comment. Employers should be mindful that not all states and locales are using a three-phase approach. New York and Illinois, for example, have adopted four-phase reopening plans. Businesses that operate in multiple jurisdictions should prepare location-specific plans to ensure compliance.

In general, OSHA's reopening plan recommends during:

Phase 1. Businesses should continue to encourage telework whenever feasible, return employees to work in phases, limit the number of people in the workplace, close common areas or enforce proper social distancing protocols, limit nonessential business travel, accommodate high-risk individuals where feasible, and consider special accommodations for workers with household members at higher risk of severe illness.

Phase 2. Businesses should continue to encourage telework whenever feasible, continue to maintain moderate to strict social distancing practices while easing limitations on workplace staffing, resume nonessential business travel, and continue to accommodate vulnerable workers as in Phase 1.

Phase 3. Businesses may resume unrestricted staffing of worksites.

Buck comment. While OSHA recommends accommodating older workers during Phase 1 and 2, recent guidance from the Equal Employment Opportunity Commission (EEOC) makes clear that employers are not required to provide accommodations due to an employee's age and cannot unilaterally exclude older workers from the workplace. Similarly, employers are not obligated to provide accommodations based on an employee's vulnerable family member. Nonetheless, where feasible, they may wish to consider making accommodations for employee relations purposes. (See our [June 24, 2020 FYI](#).)

Guiding principles

OSHA identifies the following nine guiding principles that employers should consider in formulating plans for resuming operations and reopening facilities based on evolving conditions and provides examples of how each of these principles may be implemented.

- Hazard assessment: determine when, where, how, and to what sources of the virus workers are likely to be exposed in the course of their duties
- Hygiene: practices for hand hygiene, respiratory etiquette, and cleaning and disinfection

- Social distancing: practices for maximizing to the extent feasible and maintaining distance between all people, including workers, visitors, and customers (six feet as a general rule, subject to modification with changes in community transmission and reopening phase)
- Identification and isolation of sick employees: practices for worker self-monitoring or screening and for isolating and excluding from the workplace workers with any signs or symptoms of COVID-19
- Return to work after illness or exposure: after workers recover from COVID-19 or complete recommended self-quarantine after exposure to a person with COVID-19
- Controls: engineering and administrative controls, safe work practices, and PPE selected as a result of an employer's hazard assessment
- Workplace flexibilities: including remote work (i.e., telework) and sick leave
- Training: practices for ensuring employees receive training on the signs, symptoms, and risk factors associated with COVID-19; where, how, and to what sources of the virus employees might be exposed in the workplace; and how to prevent the spread
- Anti-retaliation: practices for ensuring that no adverse or retaliatory action is taken against an employee who adheres to these guidelines or raises workplace safety and health concerns

FAQs

In a question and answer section, the guidance confirms that employers may conduct onsite testing for the virus but advises they should not presume that individuals who test negative present no hazard to others. While cautioning that temperature screening alone may have limited utility because asymptomatic and pre-symptomatic individuals can spread the virus, the agency acknowledges that it may play a part in a more comprehensive health monitoring program.

The guidance clarifies an employer's recordkeeping responsibilities concerning employee health screenings and questionnaires, distinguishing between screenings conducted by health care personnel and those conducted by the employee themselves or by another employee. Temperature records or questionnaires made or maintained by a physician, nurse, or other health care personnel, or technician will qualify as medical records under OSHA standards and would have to be retained for the duration of each worker's employment plus an additional 30 years. However, a daily questionnaire completed by employees would only be subject to the ADA's confidential medical information retention requirement of one year. An employer that performs onsite temperature screening without recording results is not subject to recordkeeping requirements.

In closing

OSHA's Guidance on Returning to Work provides a useful framework for reopening but does not establish new standards or impose new legal obligations on employers. As employers plan to address workplace risks from COVID-19, they should be mindful of evolving CDC guidance, local

circumstances, and employee rights to raise workplace safety and health concerns without fear of retaliation, including concerns over the employer's COVID-19 policies and procedures.

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