

Mitigating Employer Reopening Liability Checklist

PRACTICAL LAW LABOR & EMPLOYMENT

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A Checklist of issues that pose potential litigation risks for private employers in the US as they plan and implement a business reopening after being ordered to close or reducing operations in response to the 2019 novel coronavirus disease (COVID-19) or other public health emergencies. This Checklist addresses potential liability under anti-discrimination laws, paid leave laws, the National Labor Relations Act (NLRA), workers' compensation laws, workplace safety and health laws, whistleblower protections, and more in a rapidly changing legal, economic, and social climate. It is based on federal law but highlights those issues where state or local law may impose different or additional requirements.

As the US makes progress in containing the spread of the 2019 novel coronavirus disease (COVID-19), states and local jurisdictions have begun easing stay-at-home restrictions and business closure orders in an effort to reopen the economy. During a pandemic or post-pandemic return-to-work period, employers are generally not excused from complying with existing workplace laws, though some requirements or enforcement mechanism may be relaxed during these times.

Employers must plan and act carefully to avoid potential liability under a variety of federal, state, and local laws and regulatory guidance regarding issues, such as:

- Discrimination and harassment (see Avoid Common Discrimination Claims).
- Paid and unpaid leave (see Provide Mandatory Paid Sick and Family Under Applicable Laws).

- Wage and hour requirements (see Comply with Applicable Wage and Hour Laws).
- Immigration (see Ensure Compliance with Immigration Laws).
- Whistleblower protections (Avoid Whistleblower Liability and Retaliation Claims).
- Health and safety recordkeeping and reporting requirements (see Understand OSH Act Reporting and Other Requirements).
- Workers' compensation and related claims (see Minimize Workers' Compensation and Wrongful Death Claims).
- Notice posting requirements, especially for new laws and regulations (see Post and Distribute Required Workplace Notices).

This Checklist identifies lurking liability under traditional labor and employment laws, many of which have not been directly tested or applied in this context.

Although this resource was created to address the COVID-19 pandemic, certain sections may be applicable to employers reopening a business after a temporary closure for other reasons, including natural disasters or economic downturns.

For more on employer protocols and other considerations for business reopening, see Business Reopening and Return to Work Checklist ([W-025-1407](#)).

For more on COVID-19 and employment generally, see COVID-19: Employment Law and Development Tracker ([W-024-5500](#)) and Employment Global Coronavirus Toolkit: United States ([W-024-8611](#)).

For more information and resources on COVID-19 generally, see Global Coronavirus Toolkit ([W-024-3138](#)).

AVOID COMMON DISCRIMINATION CLAIMS

Employers should be particularly sensitive to and avoid common discrimination claims that may arise during various phases of a pandemic and reopening, including discrimination claims based on an employee's:

- **National origin.** Where the outbreak is believed or reported to originate in another country (such as China, with the COVID-19 pandemic), employers **should not**:

- screen or monitor employees from that country more rigorously than other employees;
 - apply different standards for ordering them to leave the workplace or quarantine if they display symptoms; or
 - use their national origin to justify excluding them from the workplace or not selecting them for return to work opportunities.
- **National origin discrimination.** For more on national origin discrimination, see Practice Note, Race, Color, and National Origin Discrimination Under Title VII and Section 1981 ([6-534-8945](#)).
- **Age.** Although older individuals are often at higher risk for developing more serious complications from certain diseases (as with COVID-19), employers cannot bar them from the workplace on that basis alone. However:
- if there is a shelter in place order that specifically applies to certain categories of individuals (such as individuals above a certain age), those employees may be excused from workplace duties. If they cannot telework, they may be entitled to paid sick leave under federal, state, or local law (see Practice Note, COVID-19: Paid Sick and Family Leave Under the FFCRA: Shelter in Place or Stay at Home Orders ([W-024-7536](#)));
 - employers may need to accommodate older workers, such as by allowing work from home, especially if the individual has an underlying medical condition; and
 - while a generalized fear of contracting a disease is not a recognized disability or grounds for an employee's refusal to come to work, the employer should explore the employee's concerns and determine whether any reasonable workaround is available.
- For more on age discrimination, see Practice Note, Age Discrimination ([0-507-0926](#)).
- **Pregnancy.** As with older workers, pregnant women may be more at risk and express more concern about contracting the virus when returning to the physical workplace. However, employers should not:
- send them home or refuse to allow them to work because of their pregnancy; or
 - deny a leave or other accommodation request when leave or accommodation is granted to other at risk individuals needing leave or the accommodation for other reasons.
- For more on pregnancy discrimination, see Practice Note, Pregnancy Discrimination ([5-581-0605](#)).
- **Disability or perceived disability.** The EEOC has provided guidance on discrimination and accommodations under the Americans with Disabilities Act (ADA) (see EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws). Certain disability-related inquiries and medical examinations that are normally prohibited are now allowed because the EEOC has determined that COVID-19 poses a "direct threat" to employees and other individuals. However, employers should be aware that:
- they must continue to provide reasonable accommodations to qualified individuals with a disability unless doing so creates an undue hardship or the individual poses a direct threat (see Business Reopening and Return to Work Checklist: Respond to Accommodation Requests ([W-025-1407](#)));
 - the failure to engage in the interactive process with an employee may create liability for an employer even if no reasonable accommodation is available (see Practice Note, Disability Accommodation Under the ADA ([9-503-9007](#)));
 - employers cannot exclude an employee from the workplace solely because of the employer's concerns that the employee has a condition creating a higher risk for severe illness from the disease unless doing so creates a direct threat to the employee, as determined by an individualized assessment, and no reasonable accommodation exists (see EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Questions G3 to G5);
 - certain state laws specifically prohibit discrimination against COVID-19 patients or individuals wearing masks (see COVID-19: Employment Law and Development Tracker ([W-024-5500](#))); and
 - some state disability laws provide greater employee protections than the ADA (see Anti-Discrimination Laws: State Q&A Tool: Question 2).
- For more on disability discrimination, see Practice Note, Disability Discrimination Under the ADA ([4-508-1008](#)).
- **Parental or caregiver status.** Although not specifically protected under federal law, employees often seek protection based on parental or caregiver status based on federal anti-discrimination and accommodation statutes. Many state and local anti-discrimination laws more directly protect against discrimination based on an employee's parental or caregiver status. As some businesses are likely to reopen before schools do, employers:
- should not assume that employees with school age children cannot or are unavailable to come to work;
 - should not select employees to come back to work on their parental status; and
 - should be aware that in certain circumstances, if the employer has work for those employees but they cannot work or telework because of child care responsibilities, they may be entitled to paid sick or expanded family leave under the FFCRA.
- For more on parental discrimination, see Practice Note, Family Responsibilities Discrimination ([W-008-4888](#)).
- **Religion.** Employers must appropriately respond to employees refusing to have their temperatures taken or be vaccinated, once a vaccine is available, if the employer requires these protocols. Some employees have asserted that their religious beliefs prevent them from engaging in these practices and that the employer must accommodate their sincerely held religious beliefs. As with any other accommodation request, employers should engage in the interactive process to determine whether a reasonable accommodation exists that sufficiently protects the health and safety of its workers. Employers in the health care industry may be subject to different requirements.
- Employers should not judge the validity of the employee's claimed religious practice, but rather must determine whether:
- there is reason to believe that the employee's religious beliefs are not sincerely held;
 - there is a reasonable accommodation available that does not pose an undue hardship; and

- the employer has granted a similar accommodation for other reasons, such as for a disability.

For more religious discrimination, see Practice Note, Religious Discrimination and Accommodation Under Title VII ([0-518-2467](#)).

- **Selection for layoff or furlough when they are a member of any protected class.** Be prepared for claims by employees who have been selected for layoff or furlough claiming that COVID-19 is not the real reason for the decision, but rather a pretext for discrimination based on their membership in one or more protected classes. Clearly document the legitimate business reasons and selection criteria underlying these decisions.

PROVIDE MANDATORY PAID SICK AND FAMILY LEAVE UNDER APPLICABLE LAWS

- Recognize that a patchwork of applicable federal, state, and local law may entitle employees to paid sick and family leave and failure to comply with these laws carry regulatory and litigation risks.
- The FFCRA requires private employers with fewer than 500 employees to provide paid sick and expanded family leave for several COVID-19-related reasons, with limited potential exemptions (see Practice Note, COVID-19: Paid Sick and Family Leave Under the FFCRA: Qualifying Reasons for Leave ([W-024-7536](#))).
- Recognize that:
 - employees have no minimum work requirement to qualify for paid sick leave (see Practice Note, COVID-19: Paid Sick and Family Leave Under the FFCRA: Covered Employees ([W-024-7536](#)));
 - failure to provide leave for a qualifying reason carries significant penalties under the FMLA and the FLSA, including liquidated damages in an amount equal to what is owed in lost wages for willful violations and attorneys' fees (see Practice Note, COVID-19: Paid Sick and Family Leave Under the FFCRA: Prohibited Acts and Enforcement Under the FFCRA ([W-024-7536](#)));
 - because the FFCRA adopts the FMLA and FLSA enforcement schemes, managers and supervisors may be subject to individual liability;
 - employers should not retaliate against employees for taking or requesting FFCRA leave; however, employers that are not covered by the traditional FMLA are not subject to private lawsuits for interference or retaliation involving extended family medical leave (see Practice Note, Family and Medical Leave Act (FMLA) Basics: Coverage of Employers ([9-505-1339](#)));
 - the initial temporary non-enforcement period under the FFCRA has ended and the DOL has begun enforcing the FFCRA (see DOL: News Release No. 20-664-SAN (Apr. 23, 2020)); and
 - plaintiffs have begun filing civil lawsuits for the denial of FFCRA leave and can do so without exhausting administrative remedies, as is required for many other discrimination and retaliation claims (see Practice Note, Exhaustion of Administrative Remedies and Statutes of Limitations Under Employment Discrimination Laws ([9-521-7561](#))).
- Employees not entitled to leave under the FFCRA (either because the employer is not covered or the employee's reason does not

qualify) may be entitled to leave under the FMLA. For example, employees may claim entitlement to FMLA leave because of an underlying medical condition that creates a higher risk factor from contracting COVID-19. Employers in these cases should:

- conduct an analysis to determine if they are entitled to leave under the FMLA; and
- use caution if an individual who has requested FMLA leave is selected for layoff or furlough.
- Employers must be aware of and comply with applicable state and local leave laws, including emergency legislation passed in some jurisdictions that:
 - provide for COVID-19-related leave; and
 - cover larger employers not covered by the FFCRA.
 (See COVID-19: Employment Law and Development Tracker([W-024-5500](#))).
- Employers must comply with existing paid sick leave laws, some of which provide leave for school or workplace closures due to a public health emergency (see Paid Sick Leave State and Local Laws Chart: Overview ([4-597-3867](#))).

For more on the FFCRA, see:

- Practice Note, COVID-19: Paid Sick and Family Leave Under the FFCRA ([W-024-7536](#)).
- COVID-19: FFCRA Paid Sick and Family Leave FAQs ([W-024-8645](#)).

For more on paid sick and family leave under state and local law, see:

- Paid Sick Leave State and Local Laws Chart: Overview ([4-597-3867](#)).
- Paid Family and Medical Leave State and Local Laws Chart: Overview ([W-022-3037](#)).

For more on state leave laws generally, see Leave Laws: State Q&A Tool.

COMPLY WITH APPLICABLE WAGE AND HOUR LAWS

- If reducing employees' salaries or other compensation during reopening, ensure that:
 - all exempt employees are paid at least the minimum salary threshold and meet salary basis requirements for their exemption under federal and state law, as applicable (see Practice Note, Wage and Hour Law: Overview: Minimum Wage and Overtime Pay Exemptions ([2-506-0530](#))); and
 - employees receive any notices required under state or local law informing them of changes to their compensation (see State Wage Statement Laws Chart: Overview ([W-003-6426](#))).
- For sales personnel, review applicable commission sales plans, consider whether to prospectively modify thresholds or overall plan (if plan allows) to account for decreased sales that are not the employees' fault (see Drafting a Commission Sales Plan Checklist ([9-585-8445](#))).
- If allowing teleworking on a more regular basis, impose and strictly enforce rules for nonexempt employees requiring that they:
 - record all working time and do not engage in activities that may be considered "off-the-clock" work (see Practice Note, Compensable Time Under the FLSA: Overview: Off-the-Clock Work ([9-508-0191](#)));

- get permission before working overtime hours (though employees must be paid for overtime hours if they work violate the rule and work overtime without permission); and
- take meal and rest breaks, to the extent required (see State Meal Period and Rest Break Laws Chart: Overview ([9-618-0745](#))).
- Review job descriptions in light of teleworking experience and:
 - revise descriptions to indicate whether an employee's physical presence in the workplace is an essential function of the job (see Practice Note, Importance of Job Descriptions ([2-616-6045](#))); and
 - document any instances where teleworking was not productive or feasible for a particular position or individual.
- Review employees' duties and responsibilities as changed, if at all, in light of COVID-19 and ensure they are consistent with their current job classifications as exempt or nonexempt.
- For nonexempt employees, determine whether any screening or social distancing measures require payment for additional compensable time, such as:
 - taking temperatures before entering the workplace (see Standard Document, Employee Temperature Check and Health Screening Questionnaire ([W-025-5293](#)));
 - donning and doffing PPE; or
 - longer wait times for elevators or commute times to accomplish social distancing (see Standard Document, Social Distancing Policy ([W-025-3320](#))).

For more information on compensable time, see Practice Note, Compensable Time Under the FLSA: Overview ([9-508-0191](#)).

- Ensure that independent contractors are properly classified before denying paid sick or family leave under applicable law based on their non-employee status.
- If laying off or terminating employees, ensure that they are properly and timely paid for all hours worked before the termination under applicable law (see Commissions Owed on Termination State Laws Chart: Overview ([9-525-7302](#)) and Vacation Pay State Laws Chart: Overview ([1-584-6885](#))).

For more on wage and hour issues raised by the COVID-19 pandemic, see Article, COVID-19 Wage and Hour FAQs ([W-024-5402](#)).

For more on wage and hour laws generally, see Practice Note, Wage and Hour Law: Overview ([2-506-0530](#)) and Wage and Hour Laws: State Q&A Tool.

UNDERSTAND APPLICABLE PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT (NLRA)

- Replacing unionized workers with nonunionized workers when recalling employees from layoff or furlough creates potential liability for employees under the National Labor Relations Act (NLRA).
- Recognize that employees in nonunionized workplaces enjoy Section 7 rights to engage in protected concerted activity under the NLRA.
- Employees may be protected under the NLRA if they collectively:
 - express concerns or complain about workplace health or safety conditions; or
 - refuse to return to work because of those concerns.

For more on employee rights under the NLRA, see Practice Note, Employee Rights and Unfair Labor Practices Under the National Labor Relations Act ([1-502-5354](#)).

ENSURE COMPLIANCE WITH IMMIGRATION LAWS

- Determine whether new Forms I-9s are required for workers rehired after a temporary layoff or recalled from furlough. For workers rehired within three years of layoff, employers have the option to either:
 - rely on the employee's previous Form I-9, though reverification is required if the original documents showing employment authorization have expired; or
 - complete a new form.
- If completing a new form, ensure to use the most current version available.
- If the employer participates in E-Verify, it must create a new case in E-Verify when it completes a new Form I-9. It otherwise may rely on previous E-Verify confirmation, even when the employer must reverify employment authorization. For more information on E-Verify, see DHS/ISCIS: E-Verify User Manual, Section 2.1.2: Rehires and Practice Note, E-Verify for Employers: Best Practices ([5-505-5872](#)).
- Recognize the Department of Homeland Security (DHS) is temporarily allowing some flexibility in the physical document inspection requirements for Form I-9 compliance during workplace closures or remote onboarding arrangements due to COVID-19 (see ICE News Release, March 20, 2020). For more on I-9 requirements, see Completing Form I-9 for Employees Checklist: Completing Section 2: The Employer's Responsibility ([1-521-7065](#)).

For more information on immigration issues and COVID-19, see Practice Note, Expert Q&A: COVID-19 and Immigration ([W-024-5004](#)).

For more information on immigration requirements generally, see Immigration Compliance Toolkit ([8-509-1326](#)).

AVOID WHISTLEBLOWER LIABILITY AND RETALIATION CLAIMS

- Employees complaining about an employer's violation of certain federal laws, including workplace health and safety requirements, may be entitled to whistleblower protections and subject the employer to significant liability.
- Be prepared for an increase in employee complaints about health and safety issues regarding:
 - exposure to COVID-19 from other employees, customers, or contractors;
 - the quality or availability of personal protective equipment (PPE) (if required), gloves or masks;
 - the frequency or quality of cleaning or sanitation in the workplace; and
 - violations of social distancing protocols.
- Employers should take employee complaints about workplace health and safety seriously, investigate all complaints, and take prompt remedial action as appropriate.

- Communicate with employees about steps taken to investigate and remediate in response to employee complaints.
- Do not retaliate against employees who complain about workplace conditions.
- Ensure any discipline of an employee who has raised any complaints is documented and tied to the offending conduct, not the employee's complaint.
- Be aware of the potential for retaliation claims if reporting unemployment insurance fraud based on an employee's refusal to return to work after a rehire offer or recall from furlough. Although some states have encouraged reporting of these incidences, recognize that:
 - the employee's refusal may be protected because the employee has a disability or is entitled to a reasonable accommodation; and
 - the employer may have an obligation to engage in the interactive process.

For more on whistleblower protections under the OSH Act, see Practice Note, Whistleblower Complaints Under the Occupational Safety and Health Act ([8-612-0573](#)). For more on retaliation claims generally, see Practice Note, Retaliation ([5-501-1430](#)).

UNDERSTAND OSH ACT REPORTING AND OTHER REQUIREMENTS

- Under the Occupational Safety and Health Act (OSH Act), employers must:
 - provide a workplace free from serious recognized hazards and comply with standards, rules, and regulations issued under the OSH Act, consistent with the OSH Act's general duty clause and other specific safety standards (see Practice Note, Health and Safety in the Workplace: Overview: Safety Requirements and Obligations Under the OSH Act ([9-500-9859](#))); and
 - record certain instances of workplace illnesses (see Practice Note, OSHA Injury and Illness Recordkeeping: Which Injuries and Illnesses Must Be Recorded? ([6-516-2895](#))).

MAINTAIN A HEALTHY AND SAFE WORKPLACE

- Comply with state and local reopening orders and latest guidance regarding social distancing, hygiene, and other measures to prevent the spread of the disease (see Standard Document, Social Distancing Policy ([W-025-3320](#))).
- Do not prevent employees from wearing face masks or cloth face coverings if CDC or other state or local guidance has recommended these measures to prevent the spread of COVID-19 (see CDC: Recommendation Regarding the Use of Cloth Face Coverings; see also Standard Document, Employee Face Mask Policy ([W-025-5250](#))).
- Employees refusing to come to work where the workplace poses an imminent danger, such as those in a high-risk population, or in a healthcare setting without adequate PPE, may be entitled to protections under the OSH Act. The OSH Act defines imminent danger as any condition where there is reasonable certainty that a danger exists that can be expected to cause death or serious physical harm:

- immediately; or
- before the danger can be eliminated using normal enforcement procedures.

(See Practice Note, Handling an OSHA Inspection: Imminent Danger ([8-502-3422](#))).

DETERMINE THE EMPLOYER'S RECORDING OR REPORTING OBLIGATIONS

- COVID-19 is a recordable illness, and employers must record any COVID-19 case that:
 - is confirmed as a COVID-19 illness (as defined by the CDC);
 - is work-related (as defined in 29 C.F.R. § 1904.5); and
 - involves death, days away from work, or medical treatment beyond first aid or days away from work (or meets other general recording criteria) (29 C.F.R. § 1904.7).
- Recognize that in guidance effective until May 26, 2020, OSHA has reported that it does not intend to enforce recordkeeping requirements regarding COVID-19 cases against employers unless:
 - there is objective evidence that a COVID-19 case may be work-related; and
 - the evidence was reasonably available to the employer.

(See OSHA: Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19) (Apr. 10, 2020).)
- OSHA has recognized that it remains difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace. Under OSHA's revised interim guidance effective May 26, 2020, OSHA will evaluate an employer's good faith efforts in determining whether a COVID-19 illness is work-related, considering:
 - the reasonableness of the employer's investigation into work-relatedness;
 - the evidence available to the employer; and
 - the evidence that a COVID-19 illness was contracted at work.

Employers do not need to report an illness if after a reasonable and good inquiry they cannot determine whether it is more likely than not that an employee's case of COVID-19 was work-related. (Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19) (May 19, 2020).)
- Under the May 2020 revised OSHA guidance, an illness is generally work-related if there is no other explanation and:
 - several cases develop among workers who work closely together;
 - the employee develops the illness after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19; and
 - the employee's duties include frequent, close exposure to the general public where there is ongoing community transmission.
- Under the May 2020 revised OSHA guidance, an illness is generally work-related if:
 - the employee is the only worker in the physical vicinity to contract the disease and the employee's job does not involve frequent contact with the general public; and

- outside of work the employee has a close and frequent association with someone who has COVID-19, is not a coworker closely, and exposes the employee to COVID-19 when they are likely infectious.
- In many cases, the first known COVID-19 case in their workforce may not be recordable. However, if other employees contract the disease after exposure in the workplace to the first COVID-19 employee, it may be a recordable illness.
- Recognize that employers with ten or fewer employees and certain employers in low hazard industries have no recording obligations regarding COVID-19 work-related illnesses unless the illness results in:
 - a fatality;
 - an employee's in-patient hospitalization; or
 - an employee's amputation or loss of an eye. (29 C.F.R. §§ 1904.1(a)(1), 1904.2.)
- Determine whether any proposed or enacted laws in the applicable jurisdiction shield or limit liability of employers from claims by employees that they contracted COVID-19 in the workplace, such as in North Carolina (see N.C.G.S. § 66-460, added by S.B. 704). Recognize that limited liability statutes generally do not cover claims of gross negligence, reckless misconduct, or an intentional infliction of harm.
- To prevent claims that they acted with gross negligence, employers should:
 - comply with state and local orders;
 - document the steps they have taken to protect worker safety; and
 - take other recommended measures to protect employees from contracting the virus (see, for example, *Evans v. Walmart, Inc.*, 2020 WL 1697022, Case No. 2020L003938 (Cook Cty. Cir. Ct., Apr. 6, 2020) (wrongful death complaint based on an employer's failure to protect employees)).

MINIMIZE WORKERS' COMPENSATION AND WRONGFUL DEATH CLAIMS

- Be aware of potential liability if employees or customers contract the virus in the workplace after reopening.
- Employees are generally eligible for workers' compensation for injuries or occupational illnesses, such as black lung disease or asbestosis, that arise out of and in the course of employment (compensable injuries) (see Practice Note, Workers' Compensation: Common Questions: Compensable Injuries ([O-504-9497](#))).
- Workers' compensation is generally the exclusive remedy for employees' compensable injuries and is a bar to traditional tort remedies for negligence claims, including punitive damages, with exceptions for claims based on gross negligence and other exceptions that vary by state (see Practice Note, Workers' Compensation: Common Questions: Workers' Compensation Benefits ([O-504-9497](#))).
- It may be difficult to know whether the employee contracted the virus at the workplace. However, some states have issued executive orders (though there have been legal challenges) creating a rebuttable presumption that certain health care or other essential workers who contract COVID-19 are presumed to have contracted it at work.

POST AND DISTRIBUTE REQUIRED WORKPLACE NOTICES

- Comply with workplace posting requirements under newly enacted laws, such as:
 - the FFCRA;
 - statewide and local emergency paid leave laws;
 - amendments to existing laws, such as state mini-WARN acts or anti-discrimination laws, passed in response to the pandemic; and
 - state and local reopening protocols, including health and safety measures.
- Provide any required and updated notices regarding unemployment insurance availability.
- For employees working remotely, provide notices either or both:
 - electronically; or
 - on the employer's intranet.
 (For more on working with remote employees, see Practice Note, Remote Employees: Best Practices ([W-001-3935](#))).

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