

COVID-19 BRIEFING & CONVERSATION

USTA COMMUNITY: YOUR RETURN TO WORK
GUIDE

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05-05-20



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Agenda

- Practical Considerations for Formulating a Back-To-Work Plan
- Ensuring a Safe & Hygienic Workplace (CDC, OSHA, Local Guidance)
- Protocols for Identifying and Responding to Symptomatic or Sick Employees
- Temperature Check Protocols
- Other Workplace COVID-19 Testing Issues
- Refusals to Return to Work
- OSHA Recordkeeping and Reporting Obligations
- Employee & Manager Trainings & Related Policy & Practice Changes
- Key COVID-19 Privacy Concerns and How to Address Them

Q. I'm overwhelmed by this task, where should I start?

- **A. Appoint Your TP Czar & Try to Keep it Simple**





Q. So what is a TP Czar?

- A. The Return-to-Work Program Manager / Team
 - ❑ Understands the big picture
 - ❑ Sets strategy and oversees execution
 - ❑ Responsible for staying on top of ever-evolving guidance and laws
 - ❑ Oversees the policies & training
 - ❑ Ensures consistent messaging
 - ❑ Acts as escalation point
 - ❑ Collaborates with legal, leadership, operations, facilities, comms team & HR
 - ❑ Creates good evidence; mitigates against “bad” evidence



Q. When and how should we return to the workplace?

- **A. Sorry, no easy answer - it depends on your company and jurisdiction.**
- Options & Considerations
 - Return when the shelter orders lift, at a later date?
 - Make the return to work voluntary (for the time being)?
 - Who from your employee base should return to the workplace and who shouldn't?
 - Phased return to work? Rotating schedules (A team, B team)?
 - Even if the shelter orders lift, they may go back into effect, so....
 - Should we make location-specific decisions or a company-wide decision?
 - When will your company be ready with a thorough plan and safe workplace?



Ensuring a Safe & Hygienic Workplace

- Key sources of authority: OSHA, CDC and state and local guidance
- OSHA's general duty clause: employers must provide "*employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.*"
- OSHA: "Guidance on Preparing Workplaces for COVID-19"
- CDC: " Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses," "Interim Guidance for Businesses," "Guidance for Essential Workers" & Recommendation Re Use of Cloth Face Coverings
- State and local guidance, orders and ordinances.

Q. How do we create a safe workplace?

A. Follow guidance and modify the workplace (+ policies, planning & training)

- Consider reorganizing workspaces to provide appropriate distance and physical barriers
- Assess lounge/cafe/common area layouts—keep closed or limit access?
- No-touch doors & receptacles; automatic faucets; hand sanitizer; wipes
- Alter food and drink offerings
- Reduce shared touching of objects
- Increase regular cleaning and disinfection procedures
- Improve building ventilation system
- Safety signs
- Identify and purchase supplies—secure your supply chain
- How will these apply to customers and other visitors?



Q. Should our employees (and independent contractors) wear masks?

A. Yes, where they cannot maintain social distance (as of now)

CDC's Guidance

- Everyone should wear a face covering in public where social distancing is difficult to maintain



Q. Should we provide employees with masks?

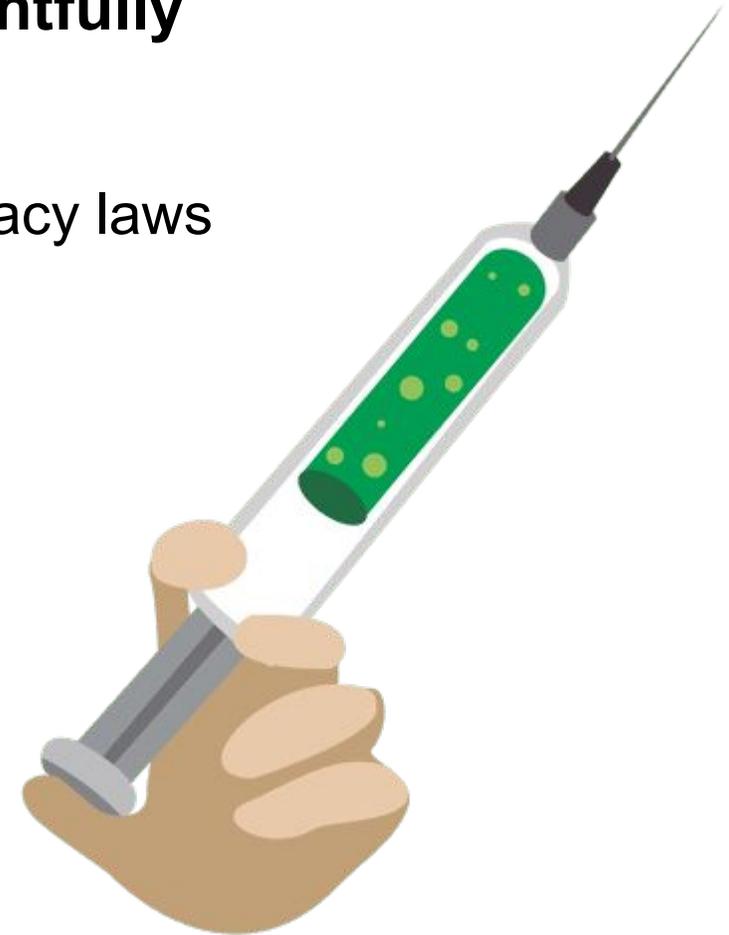
A. Yes.

Jurisdictions Mandating Face Coverings (fast evolving, may vary by workplace type, e.g., tennis and other athletic facilities)

- Massachusetts, New York, New Jersey, Pennsylvania
- Several Florida, Illinois, Texas, and California cities and counties (including LA and SF)

Q. What about health screenings?

- **A. This is tricky, so tread carefully and thoughtfully**
- **Discussion points:**
 - Legal framework – disability, discrimination & privacy laws
 - Telling sick employees to stay home
 - Asking employees if they are sick
 - Temperature testing
 - COVID-19 testing
 - Antibody testing
 - Vaccinations
 - **Pro tip** – get legal advice!





Protocols for Identifying and Responding to Symptomatic or Sick Employees: EEOC Guidance

- Permissible to ask employees about symptoms associated with COVID-19 beyond fever or cough (e.g. nausea, diarrhea, vomiting, frequent chills, loss of smell/taste)
 - But beware singling out certain employees
 - If particular employee is asked medical questions, ADA requires employer to have a reasonable belief based on objective evidence that this person might have the disease
 - Any symptoms noticed should be consistent with COVID-19
- May screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as you do so for all entering employees in the same type of job
- Employees may refuse testing/answer questions
 - However, EEOC encourages asking the reasons for the employee's refusal and providing reassurance that employers are taking steps to ensure safety of everyone
- Keep all medical information separate, including any statements that an employee has or suspects having the disease and other documentation from questioning an employee about symptoms
- Consider potential accommodations and encourage self-monitoring



Temperature Check Protocols

- Temperature checks and questions about symptoms permitted under ADA exception
- Considerations for checks:
 - Some states require notice to employees (e.g. California Consumer Privacy Act)
 - Consistent application is key to avoiding potential claims
 - If feasible, perform the temperature scan either remotely by third party/medical personnel or in a private setting within your office, and ensure personnel have proper PPE
 - Maintain social distancing
 - Use non-contact temporal infrared thermometers (or similar non-contact equipment)
 - Ensure a threshold for a fever (e.g., 100.4 degrees)
 - Decide how often to test
 - Confidentiality and communication of results (e.g. need to know basis)
 - Ensure non-exempt employees are paid for time spent waiting for testing/submitted to testing

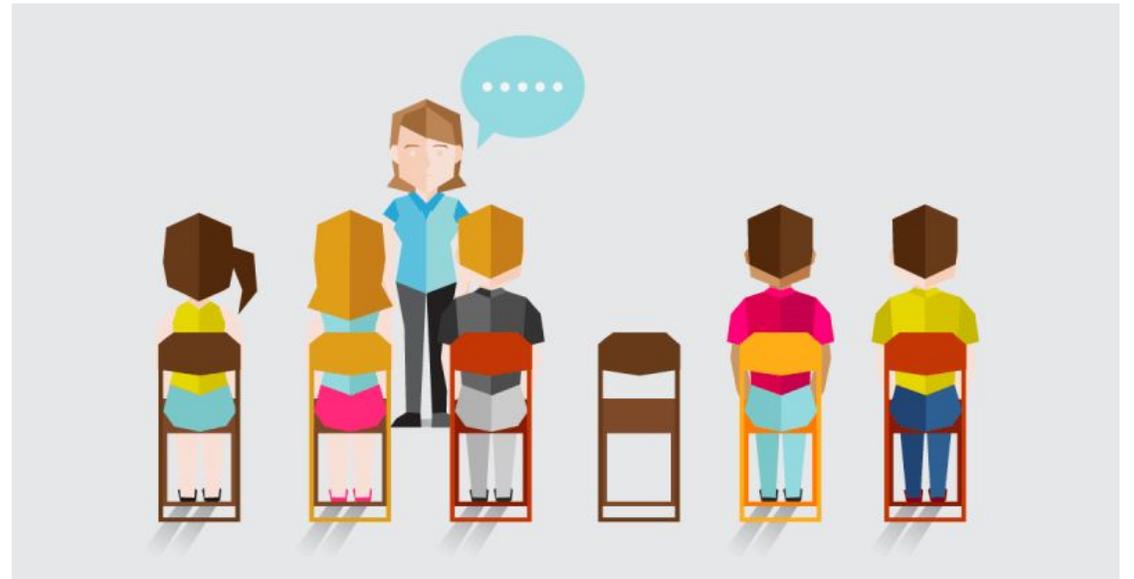


Other Workplace COVID-19 Testing

- Medical Testing
 - Nasal Swab testing – at work vs. at home
 - ADA and state law compliance issues
 - Invasiveness of COVID-19 tests
 - Privacy issues
 - Safety concerns
- Return to Work Certifications
 - Can require a fitness-for-duty certification to return to work
 - Consider accepting less time-intensive certifications (form, stamp or email certifications sanctioned by EEOC)
 - State laws may require an employers to pay (e.g. Vermont, 21 V.S.A. § 301)
- Antibody Testing
 - Considerations: differences from a temperature check; reliability issues; potential adverse impact issues; privacy risks
 - EEOC has advised that employers following guidance from the CDC or other public health authorities are “acting consistent with the ADA” as long as any screening implemented is consistent for their type of workplace at that time

Q. What if an employee refuses to return to work?

- **A. Handle it delicately, on a case-by-case basis.**
- **Discussion points**
 - Why is the employee refusing to return to workplace?
 - Can you assuage the employee's concerns? Accommodate concerns?
 - Can the employee work from home?
 - Sick leave, PTO & leaves of absence
 - Can you discipline or fire the employee?
 - What is the legal risk?



Refusals to Return to Work

- Generally, fear of contracting COVID-19 is not protected; not entitled to FMLA leave or accommodation under ADA.
- Some states have issued guidance clarifying that employees will lose unemployment benefits for failing to return-to-work if employer is open.
- National Labor Relations Act (NLRA) considerations
 - May have the right to refuse to work in conditions that employees reasonably and in good faith believe to be unsafe, even if mistaken.
 - May not retaliate against employees who engage in such protected concerted activity.
- OSHA, right to refuse protected if:
 - Where possible, employee has asked the employer to eliminate the danger, and the employer failed to do so; and
 - Employee refused to work in "good faith" – must genuinely believe an imminent danger exists; and
 - A reasonable person would agree that there is a real danger of death or serious injury; and
 - There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

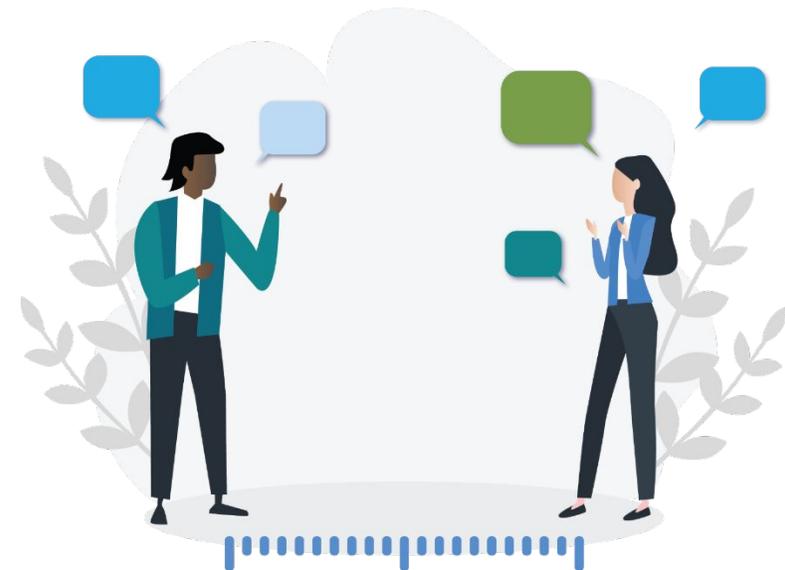
Q. What policies should we have?

- **A. So many policies, so little time.**

- Return to work plan
- Infectious disease preparedness and response plan
- C-19 safety measures
- Reporting “hotline”
- Visitors
- Group gatherings
- Travel
- Sick leave and leaves
- Expense reimbursement
- Privacy
- Vendors & contractors

Pro tips

- Create a one-stop-shop for C-19 policies
- Use posters for emphasis
- “We comply with all applicable laws.”
- Be prepared to revise your policies (often)



What about waivers of liability?

- Consider adding to your existing waiver for visitors/players
- For employees (and independent contractors), little benefit, but consider for medical test (COVID 19) administration





Q. You mentioned trainings... Can you tell me more?

- **Employee Training**

- Before return to work
- Upon return to work
- Signed acknowledgment
- Simple communications
- Reminders
- Health & Wellness Programs
- Specialized training for health screeners, disinfection team and HR

- **Manager Training**

- Expectations of managers
- Knowledgeable & supportive
- Training & FAQs
- Consistent messaging
- Enforcement of policies
- Employee requests
- Spotting and avoiding legal issues



OSHA Recordkeeping & Reporting Obligations

- COVID-19 is a recordable illness that requires reporting to OSHA, but only if it is work-related, meaning the employee contracted the virus at work.
- April 10, 2020 Guidance: with the exception of healthcare, emergency response, and correctional institution employers, employers do not need to make work-related determinations except where:
 - *There is objective evidence that a COVID-19 case may be work-related, and*
 - *The evidence was reasonably available to the employer.*
- All employers must report work-related cases of COVID-19 that result in in-patient hospitalization (within 24 hours) or death (within eight hours)
- Non-exempt employers also must report annually work-related cases of COVID-19 that are less severe



Privacy Considerations –Overview

- Consider treatment of employees versus non-employees
- Employees
 - Collection and storage of **employee health data**
 - **No overarching federal law** governing treatment of employee health data
 - In a typical workplace, HIPAA only applies where collection is pursuant to an **employer's group health plan** that is a “covered entity” under HIPAA
 - COVID-19 privacy issues facing employers generally **do not involve the claims-related health information** held by their group health plans
 - State health information privacy statutes, while regulating health care providers and health insurers, **rarely extend to employers**
 - There is a patchwork of COVID-19 privacy guidance from **various agencies**



Privacy Considerations – ADA, CDC and EEOC

- ADA
 - Health data gathered from employees, including temperature checks, **subject to ADA confidentiality requirements**
 - Information must be maintained in **separate medical files** and **disclosure must be limited**
- CDC’s Interim Guidance for Businesses and Employers provides:
 - “If an employee is confirmed to have COVID-19 infection, employers should **inform** fellow employees of their possible exposure to COVID-19 in the workplace **but maintain confidentiality** as required by the ADA”
- EEOC
 - Refers to ADA requirement that all medical information about an employee must be **stored separately** from the employee’s personnel file, and access to this confidential information must be limited
 - An employer may store all medical information related to COVID-19 in **existing medical files**
 - FAQs on COVID-19: If an employer requires all employees to have daily temperature check before entering the workplace, employer may **maintain a log** of results provided it maintains the confidentiality of the information



Privacy Considerations – State laws

- California Consumer Privacy Act (“**CCPA**”)
 - California resident **employees** of a business subject to the CCPA
 - Notice must be provided at or before the collection of personal information (1) the **categories** of personal information collected and (2) the **purposes** for which the information is used
 - Uses of the information must be **limited** to that which is specified in the notice
 - “Personal information” for purposes of this section of the law is **very broad**
 - Consider updating CA employee privacy notice or provide just-in-time notices on collection of health data
 - Consider whether to extend CA rights to all employees
 - California resident **non-employee** visitors or contractors to a business subject to the CCPA
 - Must provide **more robust notice** – consider building entrance and at point of collection
 - Must afford **consumer rights** of knowledge, deletion, and portability
 - If third parties have access to information consider issues of “**sale**” of information



Takeaways

- Form a plan for ensuring a safe and hygienic workplace consistent with OSHA, CDC and local guidelines
- Determine what you have, what you'll need, and how you will continue to restock needed supplies and equipment
- Consider staggered return-to-work plans, schedule adjustments, and develop social distancing protocols
- Carefully consider both whether to require medical testing on return to work and more importantly how to implement the testing and how the results are used.
- Get your house in order – appoint your TP Czar, set your plan, put together your policies and train, train, train.
- Consider treatment of employees versus non-employees
- Provide notice of health data collection practices
- Narrowly tailor information collection
- Ensure health data is kept in a separate file
- Limit sharing of employee health information
- Keep health data secure and delete when it's no longer needed
- Keep abreast of guidance from regulators and agencies in the US