



Reopening a Business Without Opening Employer Liability

Employers face a myriad of issues in thinking through whether and how to reopen for business, or how to thoughtfully phase out furloughs or teleworking models currently in place for ongoing enterprises. While federal, state, and local authorities haggle over who will decide which businesses can reopen and under what circumstances, employers should start preparing now. The Occupational Safety and Health Administration (“OSHA”) and the Equal Employment Opportunity Commission (“EEOC”) have both released updated guidance regarding COVID-19 and its effects on workplace practices.

OSHA Guidance

Federal law requires that all employees be given a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. OSHA makes clear that the guidance they have released “is not a standard or a regulation, and it neither creates new legal obligations nor alters existing obligations.”

OSHA identifies three classes of occupational exposure to COVID-19:

- **Low risk.** Positions that do not require contact with people suspected of being infected with COVID-19 or close contact with co-workers and the general public. OSHA does not recommend these employers require employees to wear personal protective equipment (PPE), like face masks; rather, OSHA recommends that these employers just monitor public health communications and communicate such with employees as needed.
- **Medium risk.** Positions that require frequent close contact with people who may be infected with COVID-19. These include jobs that have frequent contact with the general public, such as high population density work environments and high-volume retail settings. This category also includes employees who may have contact with travelers who return from international locations. OSHA recommends these employers require sick employees to wear face masks and develop strategies to minimize face-to-face contact; whether other forms of PPE (gloves, face shields, etc.) would be recommended is based on work tasks and types of exposure.
- **High risk.** Positions with a high potential for exposure to COVID-19, mostly through medical, postmortem, or laboratory procedures. Jobs in this category include employees in hospitals, medical facilities, nursing homes, settings that handle human remains, and biomedical labs. OSHA recommends these employers require all employees wear face masks; whether other forms of PPE would be recommended is based on work tasks and types of exposure.

NOTE: State or local law may require employees to wear face masks or other PPE.

EEOC Guidance

The EEOC has released guidance that first affirms that all of the laws it enforces are still in full effect during COVID-19. However, the guidance explains that these laws should not interfere or prevent employers from following health guidelines issued by the Centers for Disease Control (CDC) or other public health authorities. The EEOC also warned employers that CDC and public health guidance will continue to change

as the pandemic evolves, so employers should follow the most current information on maintaining workplace safety. The EEOC's guidance provides the following:

- **Health risk inquiries.** Employers may ask employees if they or anyone in their home have tested positive for COVID-19, have taken a test for the virus, or have symptoms associated with COVID-19. Employers are not permitted, however, to ask these questions to teleworking employees. Employers may also require employees to have their temperatures taken before entering the employer's premises.
- **Confidentiality.** All medical information gathered by employers about their employees regarding COVID-19, including information about symptoms and body temperatures, is confidential medical information. Therefore, this information should be stored separately in a medical file. An employer can tell a public health agency if it learns an employee has COVID-19. Employers must take measures to limit the dissemination of employee health information and limit the number of people who are told the name of an infected employee.
- **"High risk" employees.** Employers may not exclude from work employees who have been identified as high risk, such as pregnant women, who neither have symptoms of COVID-19 nor have tested positive for COVID-19.
- **Hiring and Onboarding.** Employers can screen job applicants for symptoms of COVID-19 after making a conditional offer of employment, as long as it does so for all applicants for that position. Employers can also delay the start date if an applicant has COVID-19 or withdraw the job offer if the employer needs the applicant to start immediately.
- **Reasonable Accommodations and PPE.** While an employer can always require its employees to wear PPE, employers should be prepared to make reasonable accommodations based on disabilities, such as breathing conditions or allergies to certain materials. Religious accommodations can also be raised by employees based on the requirement to wear PPE.

SESCO Management Consultants will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's [COVID-19 Resource Center](#) as additional information becomes available.

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