

COVID-19 Impact on the Workplace

An In-Depth Review of
Current OSHA Guidance

with Jill Albrecht, JD

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Webinar 101

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Poll Questions

Today's Presenter



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- Former shareholder at Littler, world's largest labor and employment law firm.
- Regularly conducts OSHA compliance trainings and seminars for employers .

Agenda

- An Introduction to OSHA
- Personal Protective Equipment Guidelines'
- Stages of Guidance
- Workplace Mandates
- FAQ
- Checking Temperatures
- Industry-Specific Guidelines
- OSHA-Approved State Plans
- How ThinkHR can Help

An Introduction to OSHA

Workplaces Subject to OSHA

- OSHA requires employers to provide a hazard-free workplace
- MOST private sector companies are subject to OSHA
- Exemptions are very specific
- Self-employed
 - Churches
 - Governments
 - Nuclear Power
 - Mining
 - Farms
 - Businesses that do not engage in interstate commerce

Employer Responsibilities Under OSHA

- Ensure safe working conditions
- Provide proper safety tools and equipment
- Warn employees of potential hazards (chemicals, contagious disease, etc.)
- Provide safety training
- Do not discriminate employees who exercise rights under OSHA

OSHA Recordkeeping Requirements

- Businesses with 10+ employees must maintain injury and illness records
- Businesses with less than 10 employees throughout the year do not need to keep the records
- Businesses can be partially exempt from requirements if low hazard
 - Retail
 - Finance
 - Real Estate
 - Service

When is COVID-19 a Recordable Illness?

- If an employee has a confirmed case of COVID-19, the employer would need to assess whether the case was “work-related” under the rule and, if so, whether it met the rule’s additional recordability criteria (i.e., resulted in a fatality, days away from work, restricted duty, or medical treatment beyond first aid).
- Given current protocols for treating COVID-19, it is likely that for any case that is confirmed, the additional severity criteria will be met, as affected persons are instructed to self-quarantine and stay home. The primary issue for employers therefore becomes whether a particular case is “work-related.”

OSHA COVID-19 Recording Requirements

- COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties.
- But WHEN did the employee contract COVID-19?
 - the case is a tested-positive confirmed case of COVID-19;
 - the case is “work-related,” i.e., an event or exposure that either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness; and
 - the case involves one or more of the following
 - days away from work
 - restricted work or transfer to another job
 - medical treatment beyond first aid
 - loss of consciousness
 - a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

OSHA COVID-19 Recording Requirements

Evolving Guidance from OSHA on this subject

- May 19, 2020: Revised Enforcement Guidance for Recording Cases
- Prior guidance eliminated most employers' obligation to analyze work-relatedness if certain conditions are met.
- Maintains prior test for work-relatedness under Section 1904
- OSHA stated it will exercise "enforcement discretion to assess employers' efforts in making work-related determinations," and included a list of factors

Key Takeaways from New Guidance

- One positive workplace case is likely not work-related
- The continued use of the phrase “no alternative explanation” may create confusion for an employer’s analysis -- particularly in areas with a spike in cases.
- Under the fifth “reasonable and good faith inquiry” factor regarding the work-relatedness of a COVID-19 diagnosis, apparently, if two coworkers are “close friends” and are in a social setting after work, OSHA’s guidance dissuades the employer from concluding the case is not work-related
- The new guidance expressly creates a “more likely than not,” preponderance-of-the-evidence (greater than 50 percent) requirement for a case to be considered work-related.

When is COVID-19 a Reportable Illness?

- As with the recordability analysis above, if an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees.
- It is important to note, however, that the reporting obligation is time-limited.
- Thus, if a fatality due to COVID-19 occurs after 30 days from the workplace incident leading to the illness, an employer is not required to report it.
- Similarly, if the in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, an employer is not required to report.
- Given the nature of COVID-19 and the disease progression, this may result in fewer reports to OSHA despite expected hospitalization of cases going forward.

Guidance on Social Distancing at Work

- OSHA published a one page guide to implementing social distancing protocols in the workplace
- Including maintaining 6 feet of distance wherever possible
- Establishing flexible sites and shifts where feasible
- Where customers are present, establish distancing protocol by marking floor
- Stagger breaks and rearrange common areas to limit crowding
- Move or reposition workplaces and install plexiglass barriers where possible
- Encourage workers to report illnesses and stay at home if experiencing symptoms

Personal Protective Equipment Guidelines

Personal Protective Equipment

- OSHA's Personal Protective Equipment (PPE) standards, which require using gloves, eye and face protection, and respiratory protection.
- When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard.
- Including: training employees on the proper use and care of respiratory protection equipment.

Use of Respirators: NXX Complexities

- In OSHA's first memorandum to Regional Administrators, issued on April 3, 2020, OSHA permits in limited situations the extended use and reuse of NIOSH-approved N95 FFRs and N95 FFRs with an expired shelf life.
- All employers whose employees are required to use or are permitted to use respiratory protection, must continue to manage their respiratory protection programs in accordance with the OSHA respirator standard.
- If respiratory protection must be used, employers should consider alternative types of respirators that provide equal or greater protection compared to an N95 FFR.

Face Coverings

- OSHA leaves it up to employers to decide whether their control plans or applicable local laws require face coverings.
- If face coverings are used, employers should ensure the coverings are made with appropriate material and designed to fit comfortably, yet snugly, without restricting breathing.
- OSHA suggests that meat and poultry processors use face shields to protect face coverings from process-related splashes and other contamination.
- Where face coverings are used, employers must provide clean, dry face coverings to replace wet, soiled or contaminated ones.

Stages of Guidance

Early March OSHA Guidance

- OSHA requires certain employers to record work-related injuries and illnesses that meet certain severity criteria on the OSHA 300 Log, as well as complete the OSHA Form 301 (or equivalent) upon the occurrence of these injuries, although flu is exempted, **COVID-19 is not.**
- For purposes of COVID-19, OSHA **also requires** employers to report to OSHA any work-related illness that (1) results in a fatality, or (2) results in the in-patient hospitalization of one or more employees.
- “In-patient” hospitalization is defined as a formal admission to the in-patient service of a hospital or clinic for care or treatment.

Early April OSHA Guidance

- Respirator use and training
- Addressing N95 shortage
- Guidance for fit-testing of PPE
- Enforcement for recording cases of coronavirus in the workplace



Mid-April: OSHA Issues COVID-19 Interim Enforcement Response Plan

- Major influx of complaint letters
- Focus on lack of PPE and training on how to avoid COVID exposure
- Priority for healthcare and emergency services complaints
- Non-healthcare and non-emergency services complaints are de-prioritized
- Inspections, Standards Reviews, Citations:
 - Employers should be prepared to provide: a written pandemic plan, infection control plan, protocols for PPE use, records of employee infections or exposures, and training records related to COVID-19 hazards.
- Plan focuses on the high/very high exposure sectors, employers in the medium and low exposure sectors should heed the Plan's procedures, and refer to it for guidance regarding how OSHA will process complaints and conduct investigations.

Late April Guidance - Discretion Memo

- Guidance related to non-COVID-19 compliance.
- Directs local field offices to take a “practical approach” to enforcement of “training, auditing, equipment inspections, testing, and other essential safety and industrial hygiene services” obligations.
- Good faith for compliance standard applies
- Directed to look to root cause of non-compliance: whether “employees were exposed to hazards from tasks, processes, or equipment for which they were not prepared or trained.”

Updated Interim Response Plan (May 26, 2020)

- Approach to response focuses on the level of infection in a particular geographic area
 - If decreasing infections, OSHA offices will return to pre-COVID protocol
 - If increasing infections, OSHA offices will continue prioritizing COVID-19 fatalities and imminent danger exposures for inspection. Particular attention for on-site inspections will be given to high-risk workplaces, as well as workplaces, with high numbers of complaints or known COVID-19 cases.
 - Where resources are insufficient to allow for on-site, the inspections for these types of reported events will be initiated remotely with an expectation that an on-site will follow
 - Where limitations on resources are such that neither an on-site nor remote inspection is possible, OSHA will investigate these types of reported events using a rapid response investigation (RRI) to identify any hazards, provide abatement assistance, and confirm abatement.

Workplace Mandates

Preparing for Return

- Maintaining work from home for as long as feasible
- Worksite Cleaning - seating plans, high-touch surfaces, masks
- Engineering and Administrative Controls - split shifts, staggered meal breaks, limitations on in-person meetings, shields in open workspaces
- Face Coverings
- Re-Open, New Issues



Guidance for Reopening

In many instances, businesses can expect two types of guidance from their governors and public health officials:

(1) overarching framework materials, setting forth various phases of the anticipated reopening process and identifying criteria for advancement through the recovery period; and

(2) more specific orders that supersede prior closure directives and permit particular operations to resume on certain dates and under certain conditions.

What if..

- Circumstances where employers cannot comply with OSHA mandates?
- Training, auditing, assessment, inspection or testing requirements are all new to an employer?
- CDC guidance - instructional or mandatory?



FAQ

Frequently Asked Questions

1. What if an employee refuses to come to work out of fear of COVID-19?
2. What if an employee is diagnosed with COVID-19?
3. When is an employer required to provide respiratory protection?



To Check or Not to Check

Temperature Checks

- Consistent process
- Must screen everyone (including C-Suite)
- If conceivable, it should be done privately
- Checks should be performed by someone who has been trained
- Third-parties on-site to conduct checks



State Required Temperature Checks

- **Colorado** - Daily checks by employer required, 50+ EEs must follow additional protocol
- **Delaware** - Required for high-risk businesses
- **Kentucky** - Required for all businesses, option for employer or employee check
- **Michigan** - Required for food establishments and pharmacy employees who have indicated that they have had close contact with a person with COVID-19 during the previous 14 days.
- **Minnesota** - Required for meatpacking industry
- **Nebraska** - Required for restaurants reopening
- **New Hampshire** - Required before shift
- **New Jersey** - Required for certain industries - agriculture, restaurants, food and beverage
- **Pennsylvania** - Required for confirmed exposure
- **Texas** - Required for all businesses reopening
- **Utah** - Required for gyms and fitness establishments
- **Vermont** - Required upon entry to workplace
- **Washington** - Required on construction sites and non-essential establishments re-opening
- **West Virginia** - Required at high-risk businesses

State Recommended Temperature Checks

- **Alabama** - Employer checks upon arrival
- **Connecticut** - Employee checks recommended
- **Idaho** - Employee checks recommended for certain industries
- **Illinois** - Recommended for certain industries
- **Indiana** - Recommended for employers reopening businesses
- **Iowa** - Recommended for employers before and after shifts
- **Kansas** - Recommended
- **Maryland** - Recommended daily checks
- **Minnesota** - Recommended upon entry to workplace (meatpacking industry - required)
- **Nebraska** - Recommended for meatpacking facilities
- **New Mexico** - Recommended for food and food retail
- **New York** - Recommended daily
- **North Dakota** - Recommended upon entry to workplace
- **Ohio** - Recommended upon entry to workplace
- **Oregon** - Recommended daily before shift
- **Pennsylvania** - Recommended generally upon entry to workplace, required for confirmed exposure
- **South Carolina** - Recommended for restaurant employees
- **Tennessee** - Recommended upon entry to workplace
- **Virginia** - Recommended upon entry to workplace

Industry-Specific Guidelines

Industry Review - Guidance Fact Sheets

- Packaging Delivery: specific requirements for employers including flexible work hours, safety training, limiting cross-use of equipment, and more
- Meat and Poultry Processors: assessment and controls to limit exposure, air ventilation, sanitization
- Manufacturing: flex hours, physical distancing, hygiene
- Construction: allow face coverings, train employees on proper fit for PPE
- Retail: provide resources for hygiene and train for workplace controls
- Restaurants and Beverage: implement drive-thru or take-out, train on workplace controls

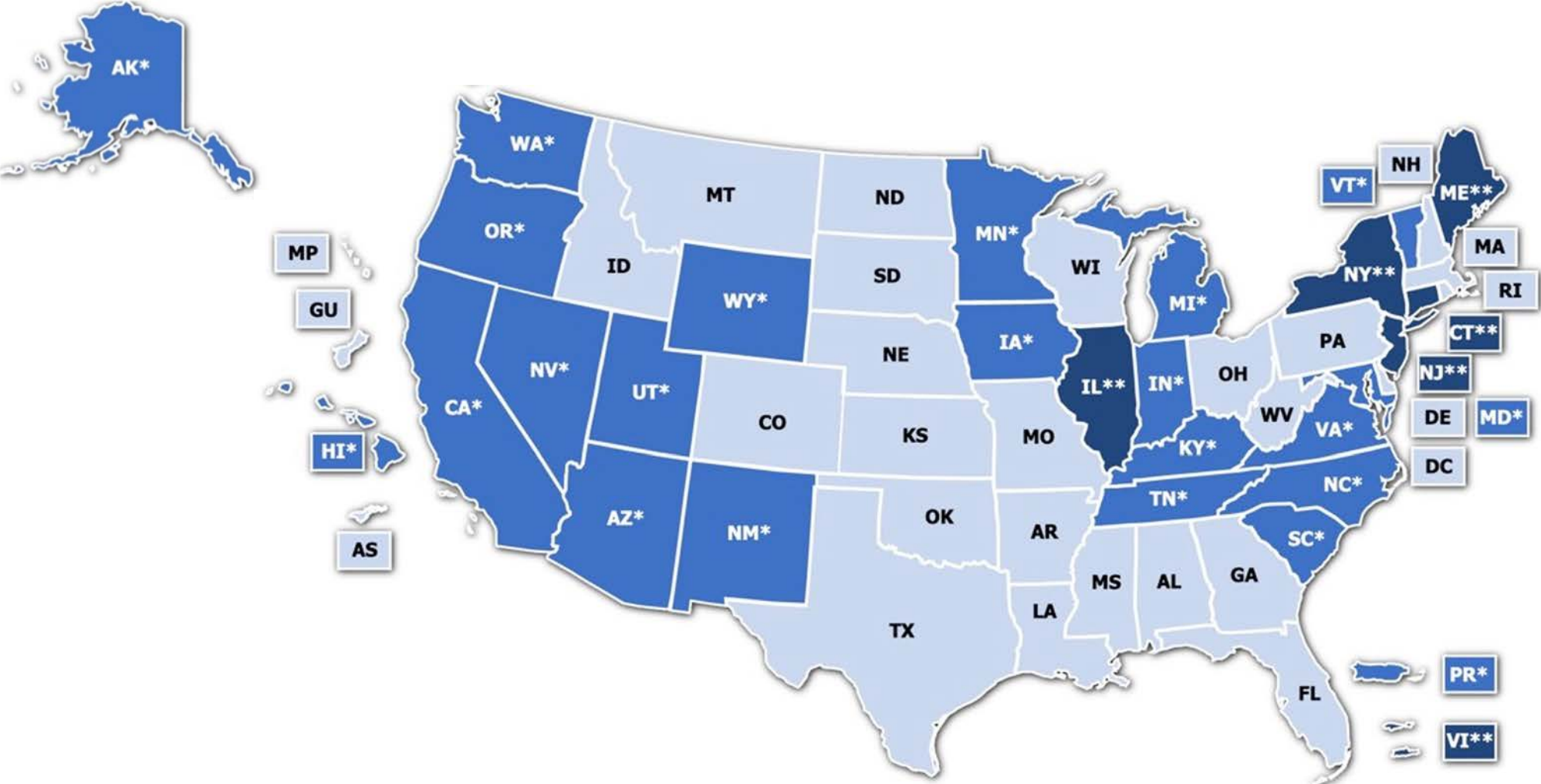
Healthcare Industry - Respiratory Protection

When an employer does not have a supply of current N95 FFRs, the employer must:

- Make a good-faith effort to obtain other alternative FFRs, reusable elastomeric respirators, or powered, air-purifying respirators (PAPRs) appropriate to protect workers;
- Monitor their supply of N95s and prioritize their use according to CDC guidance;
- Provide surgical masks and eye protection to protect against splashes and large droplets; and
- Implement other feasible measures, such as using partitions or using other engineering controls, work practices, or administrative controls that reduce the need for respiratory protection.

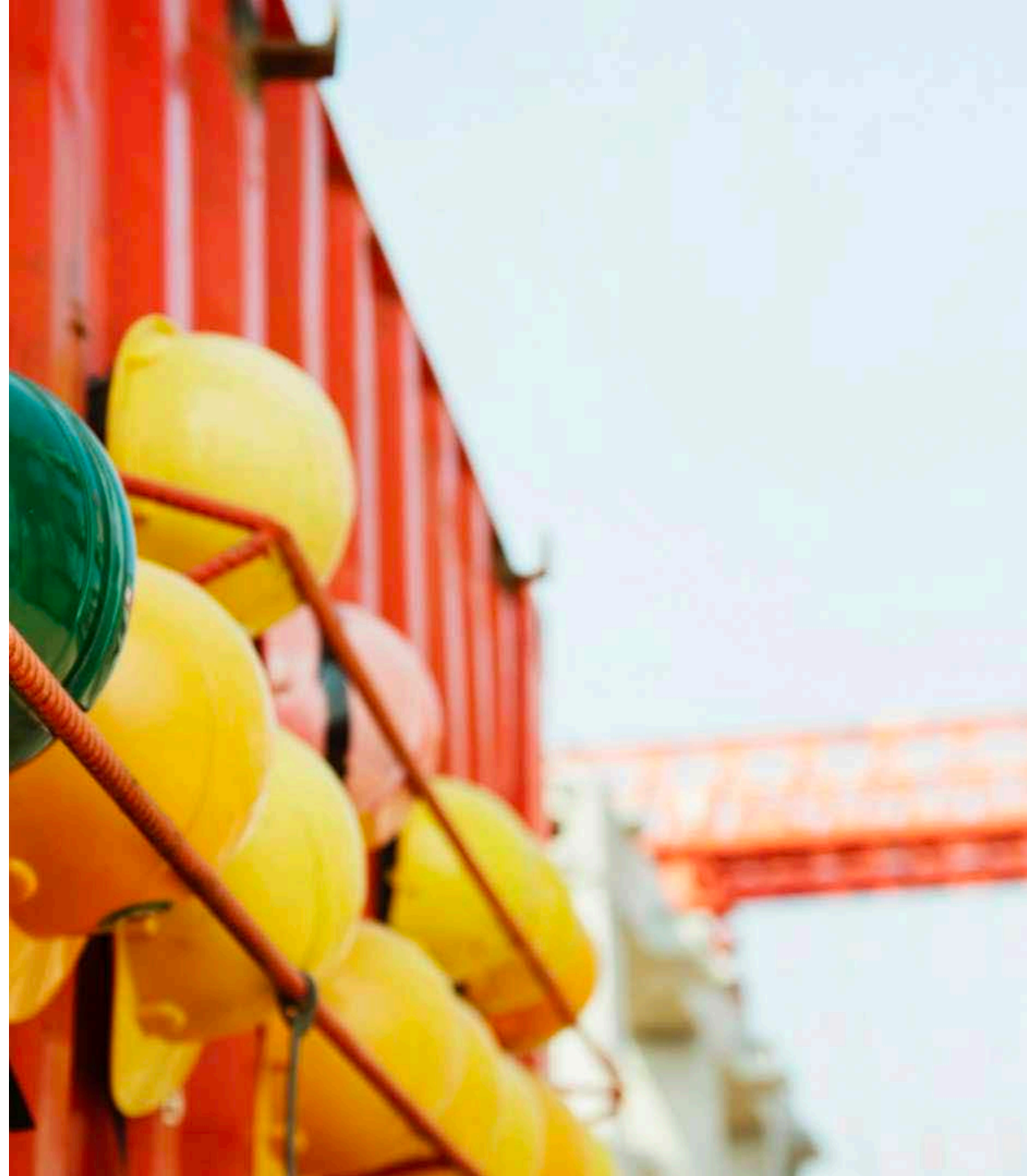
OSHA-Approved State Plans

State-by-State



State-by-State

- Refer to OSHA site to be directed to state plan
- OSHA-approved programs
- Currently 22 state plans covering both private sector and local government
- Six state plans covering only state and local government workers
- Monitored by OSHA and must be at least as effective as federal OSHA plan



COVID-Related State Plans

- California- FAQ, worker-protection, respirator guidelines
- Connecticut - Respirator guidelines
- Hawaii - Classification of high, mid and low-risk workplaces
- Maine - Fit, training and testing guidelines for respirators
- Maryland - Fact sheet re: voluntary vs. required face coverings
- Michigan - Guidelines for essential workers and qualifications
- Minnesota - Worker protections, essential worker guidelines
- Nevada - Guidelines for essential businesses and worker protection
- New Jersey - Guidelines for N95 use and reuse

COVID-Related State Plans

- New Mexico - Employer FAQs on opening and operating
- North Carolina - Employer guidelines for essential workers
- Oregon - FAQs, training and control monitoring
- Puerto Rico - Exposure control plan for employers and risk identification
- South Carolina - FAQ for employers and specific guidance for dentists
- Vermont - FAQs
- Virginia - Guidelines for respirator use
- Washington - Detailed guidance for businesses and employers
- Wyoming - Guidelines for grocery stores



Comply

Resource library to navigate HR, compliance, safety, and people risk management issues.

Dozens of COVID-19 resources like FAQs, policy templates, commentaries, quick guides, and more.



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Access to senior, certified advisors for your HR and compliance questions.

Experts standing by to answer your questions. Submit from within the platform or simply call.



Learn

Learning management system to deliver training on a variety of topics.

Hundreds of employee training courses, including our Pandemic Response Course Catalog.



Insight

Communications providing compliance news, analysis, and legislative updates.

Review law alerts library and access webinar replays and presentation slides.

Pandemic Response Training Course Catalog



The **Pandemic Response Training Course Catalog** includes nine courses designed to help you navigate uncertainty and crisis can set you, and get you on up for success.

Managing in a Crisis

Duration: 20 minutes | **Target Audience:** HR, Managers
Effective leadership is needed during the difficult times of a company crisis. Discover ways of managing in a crisis, including how to manage difficult conversations and crisis communications.

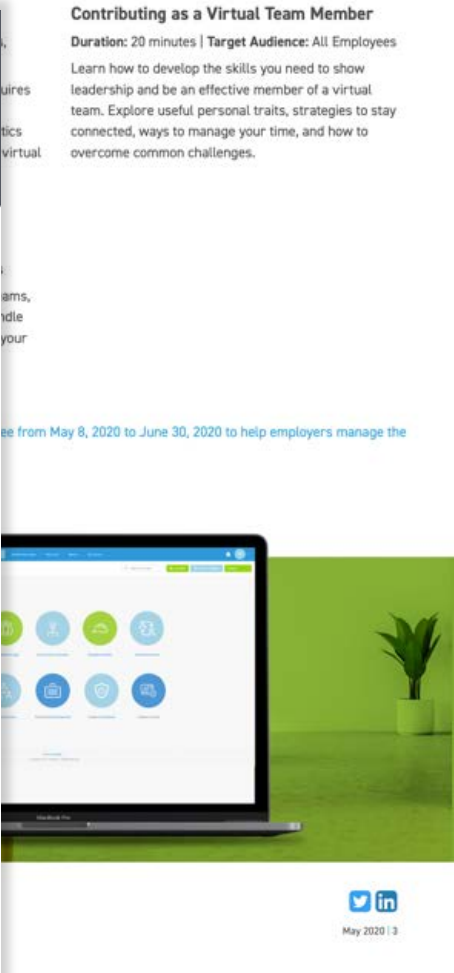
Becoming a Successful Collaborator

Duration: 30 minutes | **Target Audience:** All Employees
Collaboration is a necessary skill in today's labor market. Learn about the meaning of collaboration, teamwork, and best practices for being a successful collaborator. You will also examine conflict management styles that work for you and your team.

Forging Ahead with Perseverance and Resilience

Duration: 30 minutes | **Target Audience:** All Employees
Distractions, information overload, demanding pace, and accompanying stresses can often pull us off task. Developing personal resilience, adaptability, and perseverance can help. Discover how to build a work-life balance, sharpen your focus, and face and overcome setbacks.

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Return to Work Checklist

Return to Work Checklist



Posting and Policies

- Post the Families First Coronavirus Response Act (FFCRA) poster in a visible place. Where employees will remain working from home, send by email or post to Company intranet or employee website.
- Review and revise hiring practices and policies:
 - Have staffing needs changed?
 - Do you need to change benefits or pay to become more competitive?
 - Use remote interviewing techniques as much as possible.
 - Update onboarding practices.
 - If you are recalling only some workers that were laid-off or furloughed, ensure your practices for determining who to recall do not discriminate against any group of employees.
- Review and revise leave policies:
 - Know how the FFCRA affects your previous policies and practices.
 - Consider implementing PTO/vacation rollovers, grace periods, and revise guidelines for usage if vacation is forfeited if not used by year end.
 - Consider implementing or revising bereavement leave policies.
 - Ensure that all employees have access to and an understanding of all leave policies that may apply to them.
- Review and revise work from home and child care policies.
- Update work travel policies in light of any new orders in your state and any new practices being implemented in the workplace to keep employees/customers safe.
- Review rehire/reinstate provisions for your benefit policies (eligibility/waiting periods).
- Distribute all new or revised policies to all employees.

Health and Safety

- Explain company policies and procedures related to illness, cleaning and disinfecting, and work meetings and travel.
- Educate employees on how to reduce the spread of COVID-19 at home and at work (follow Centers for Disease Control and Prevention recommendations).
- For employees returning to a worksite, make sure they understand what's expected of them in the workplace. For example, must they wear masks? Will masks, gloves, hand sanitizer and other items be provided? Are workplace hours different? Will you be taking employees' temperatures each day when they arrive? Is teleworking or staggered shift work allowed/encouraged?

- Ensure that all employees who are currently ill or have contact with an ill family member stay home (follow CDC recommendations for length of time):
 - Do not return to work with symptoms.
 - Quarantine for 14 days.
- If an employee becomes sick at work, send them home.
- Promote safe social distancing in the workplace by encouraging employees to:
 - Remain at least 6 feet away from each other.
 - Email, message, call, or video call rather than meeting face to face.
 - Clean computer equipment, desktops, phones, and workstations often.
- Provide hand sanitizer, cleaning supplies, and masks (where appropriate/necessary) and no-touch disposal receptacles.
- Discourage handshaking.
- Place posters throughout the business to encourage social distancing and hand hygiene.

Best Practices

- Ensure your workplace cleaning company is up to date on current methods of safely removing COVID-19 hazards.
- Communicate frequently and as transparently as possible with employees:
 - Provide expected timelines for recalling/rehiring employees.
 - Provide returning employees with recall or offer letters.
- Train managers on dealing with employees that may face increased personal challenges during this time, such as bereavement and loss, childcare and school-cancellation challenges, financial stress, and other dependent care and support needs.
- Offer flexibility wherever possible and adjust workloads to be reasonable.
- Be prepared to quickly investigate and stop discriminatory speech or acts in the workplace.
- Consider contracting with an employee assistance program (EAP) if you do not currently have one.
- Designate a workplace coordinator who will be responsible for COVID-19 issues and their impact at the workplace.
- Develop a plan to operate if absenteeism spikes or if another lockdown occurs in the future:
 - Implement a plan to continue essential business functions.
 - Implement flexible work schedules and leave policies.
 - Cross-train employees on performing essential business functions.
- Develop emergency communications plans, including a way to answer workers' concerns.
- Communicate your appreciation and welcome employees back to work.

Quick Start Guide: Deciding Who to Recall from Furlough or Layoff

Quick Start Guide

DECIDING WHO TO RECALL FROM FURLOUGH OR LAYOFF

Deciding which employees to return to the workplace following a furlough or temporary layoff, and in what order you'll call them back, will require an individualized analysis for each organization. For those who aren't sure where to start, we provide this as a starting point.

Company Needs

First, think about overall operations in the future. How busy do you expect to be? It's best to slightly underestimate need; if employees stop their unemployment insurance (UI) claims only to be sent home again after a few days, their continuity of income may suffer. It's also easier administratively if you only need to furlough and then recall an employee once. And, you can always recall more employees once you're certain the need exists.

Think about whether there are parts of the products and services you offer that will be more or less important in the future. For instance, a bakery might have very little event catering in the next few months, but may need more delivery drivers. If your company went through the Great Recession, how were you impacted by the economic downturn at that time? Which departments and types of jobs were most essential as business resumed? Which were least essential?

Forecasting future staffing needs will likely require a lengthy discussion amongst the organization's leaders as well as a willingness to change course as business — and the economy itself — fluctuates.

Individual Employee Selection

Once you've settled on a general staffing plan, you'll need to decide which employees you want to return first. Establish one or more criteria for return. You don't have to adhere perfectly to the criteria you choose, but the more closely you follow your system the easier it will be to explain decisions to employees (or government agencies or lawyers) who may be unhappy with your approach. If you deviate from your system, be sure to take good notes on why you did so. Some potential criteria for employee selection include:

- **Unique or difficult-to-replace skill sets.** Business needs will likely dictate when you bring back individuals with special skills, but you may also want to make a point to reach out to these people sooner than later to ensure that they will be available when you need them.
- **Overall performance.** Preferably, performance-based decisions will be based on written documentation you already have, such as performance reviews, production metrics, disciplinary actions, or a history of attendance/tardiness issues. If performance — whether good or bad — has not been previously documented but will still be the basis of your decision, you should take the time to create that documentation now.



layoff decision is a simple, objective reason that can be documented. If not, this is not always in the employer's best interest as the decision may not correlate with the skills you need most in the future.

Tasks performed outside of their usual assignments. These are uncertain tasks such as cleaning their sleeves and clean the bathroom or make a delivery. Quality based on past actions or by asking employees to perform tasks significantly outside their job description.

A mix of strengths but are not standouts in any area. Document your reasoning. All criteria used should be documented.

Violating federally protected classes is illegal: race, color, religion, sex, age, national origin, citizenship, ancestry, marital status, pregnancy or immigration status, military status, and disability. Be sure to check state law.

Discrimination in particular that employers may fall into.

Age discrimination protects employees who are 40 or older. Older employees may be disproportionately impacted by the recession. If you are considering layoffs, be sure to finalize your decisions.

Employees returning from the virus by not inviting them back. This should be based on the employee of any age tells you that they need an accommodation. Consider that request. Failing to bring an employee back with the best intentions — will be a clear case of age discrimination.

For more employees, a similar state law may apply and cover the employee.

Employers trying to protect their employees. But it is not based on their known or perceived disabilities and accommodations you use to offer employees a return to work. If they want to discuss safety issues or accommodations, you should do so based on their health — that decision is between you and the employee.

you should engage in the Americans with Disabilities Act. The decision also must not affect your decision about whether to hire.

For more employees, a similar state law may apply and cover the employee.

Protected leave, whether recently or in the distant past, does not constitute a reliability problem (for instance, if you have protected leave with a reliability problem (for instance, if you would have otherwise, will constitute retaliation). Protected leaves to state-mandated sick leaves, leaves under the Family and Medical Leave Act (FMLA) and Emergency FMLA under the Family and Medical Leave Act (FMLA) and the number of leaves that are protected by state law, such as paid sick leave.

Though it may feel like a mass furlough is the perfect solution, don't assume that their motives won't be questioned. Document why you chose each employee, as well as why each employee was chosen before.

Take your time to communicate that plan to everyone as they go. If you don't communicate with the other half, they'll hear about it, and emailing you frantically for more information. Send a message from the outset and put people's mind at ease.

In all, you should communicate that decision to each of your employees about their next job opportunity. Stringing someone along by not bringing them back will result in ill-will. In the era of COVID-19, when many businesses will be fighting to rebuild their workforce, especially toward those who will no longer be available.





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