

Legal Considerations and Best Practices for Instilling Confidence During Return to Work

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Governor's Executive Orders GA-18 and GA-21 (effective through May 19)

- Texans should stay home/work home unless: 1) essential business or 2) accessing a “re-opened service.”
- Re-opened Services:
 - May 1– retail services, dine-in services, movie theaters, shopping malls, museums and libraries (up to 25% capacity), golf courses, local government operations (permitting, recordation, document-filing services), wedding venues/reception services (up to 25% capacity, if indoor).
 - May 8 - cosmetology/hair/nail salons, barber shops, tanning salons (provided 6 ft b/w stations); swimming pools (up to 25% capacity).
 - May 18 - services provided by workers in offices (up to 5 EEs or 25 % capacity whichever is greater); manufacturing services (up to 25% capacity); gyms and exercise facilities and classes (up to 25% capacity).
 - For Texas counties with five or fewer cases, many of these services may operate up to 50% capacity.
- EO preempts any conflicting order issued by local officials, only to extent local order restricts essential services or reopened services allowed by order.

Current State of Return to Work: City of Austin and Travis County Orders

City of Austin Order

- Continued to May 30, 2020.
- Stay at home, practice social distancing and face covering behaviors, may only leave residences for essential services or to work in/access essential businesses, reopened services, essential government services, and critical infrastructure.

Travis County Order:

- Continued to June 15, 2020.
- Same basic guidelines as Austin order.

May 12, 2020 Letter from Attorney General to City of Austin/Travis County re: concerns with local orders, particularly:

- Requiring Masks.
- Shelter-in-Place Language.

Texas Department of State Health Services: Guidelines for Reopening

Issued with Governor's Order No. 18 - Provides new safety protocols and checklists for employers –
DSHS minimum protocols

Employer Checklist:

- Train employees on cleaning, hand hygiene, cough etiquette
- Screen entering employees and send home if display COVID-19 symptoms or in known close contact with person w/ lab-confirmed virus.
- Don't let back until:
 - Seven days have passed since symptoms first appeared, improved respiratory symptoms (e.g. cough, shortness of breath); and 3 days since recovery, OR doctor's release indicating other diagnosis
 - 14 days after exposure to lab-confirmed person
- Employees must wash hands upon entering
- 6 feet social distancing
 - If not possible, rigorously practice other measures – plexiglass barriers, face coverings, hand hygiene, cough etiquette, cleanliness
- Don't provide meals unless individually packaged
- "Consider" requiring face coverings
- Regularly disinfect regularly touched surfaces and items outsiders touch
- Make hand sanitizer, wipes, soap and water readily available
- Place visible signage for everyone about hygiene practices

Temperature Testing Employees

EEOC says it's okay to temperature check (No ADA concern).

Best Practices for Temperature Testing

- Designate one management-level person to handle testing.
- Make sure individual understands how to use/sanitize equipment. No-touch thermometers preferred.
- Person administering test should be in PPE.
- If line forms, ensure employees are 6 ft. apart while waiting.

If employee has a fever, do not allow them to enter the workplace – should go home and being quarantining.

OSHA Recordkeeping Requirements

- Taking body temperatures qualifies as biological monitoring. Any documentation qualifies as a medical record, triggering confidentiality obligations and retention period of 30 years.
- Records should be kept separate from personnel file (ADA).
- Recommend only recording positive temperature test.

Best Practices to Manage Employee Concerns regarding Return to Work

- Develop plan for safely bringing back employees to office.
 - Follow DSHS Minimum Protocols.
 - Consider skeleton crew and phasing-in employees.
 - Create policies and procedures to ensure social distancing (e.g., implementing one-way traffic patterns in office, moving workstation to increase distance, staggered shifts/lunch/rest breaks, establishing customer/visitor protocols, limited work travel etc.).
 - Ensure prepared with all testing equipment, PPE, cleaning and sanitizing products (may be in short supply).
- Consistent and clear communication with employees explaining safety precautions and expectations.

Best Practices to Manage Employee Concerns regarding Return to Work

- What happens if an employee is unable or refuses to return to office?
 - First determine why the employee is unable to return to the office.
 - Fearful of returning to work? General anxiety vs. anxiety disorder or other mental health conditions (anxiety disorders, obsessive compulsive disorder, or post-traumatic stress disorder).
 - High Risk Employee – 65+ years old or medically-documented health condition.
 - Family obligations that interfere with return to work?
 - Employee under quarantine due to COVID-19 infection or exposure?
 - Legal Considerations:
 - FFCRA coverage?
 - ADA reasonable accommodations?
 - Unemployment coverage?

High Risk Employees?

- Don't force employees 65+ or with medically documented vulnerable health issues back to work.
 - Governor's Order still states that "people over the age of 65 are strongly encouraged to stay at home as much as possible."
 - For otherwise vulnerable employees, medical documentation supporting need to stay home.
 - Recommendation- Either provide work from home, or place on unpaid leave status after PTO/any available FFCRA leave is exhausted.

Eligibility for Leave under FFCRA?

- An employee qualifies for two weeks of emergency paid sick leave if unable to work because:
 - the employee is **subject to a quarantine or isolation order**;
 - the employee has been **advised by a health care provider to self-quarantine** due to concerns related to COVID-19 (belief that employee has or may have COVID-19 or is particularly vulnerable to COVID-19 (i.e. over 65 yrs of age, immunocompromised, etc.));
 - the employee is **experiencing symptoms of COVID-19 and is seeking medical diagnosis**;
 - the employee is **caring for an individual who is either subject to a quarantine or isolation order** or has been **advised to self-quarantine** due to COVID-19;
 - The employee is **caring for his or her son or daughter whose school or place of care has been closed due to COVID-19, or whose child care provider is unavailable** because of COVID-19
- An employee qualifies for expanded FMLA leave (12 weeks of leave total, 10 paid at 66% of regular rate of pay) if unable to work because of child care needs.

Employers can chose to either pay out benefits under FFCRA OR allow employee to continue to work from home.

Americans with Disabilities Act Accommodations

- Remote Work as a Reasonable Accommodation
 - Engage in interactive process under ADA to determine if employee's disability warrants an accommodation. Can ask questions/request medical documentation.
 - If undue hardship to allow the employee to continue remote work, do not have to allow.
 - Possible Alternative Reasonable Accommodations
 - Temporary altering of job tasks/assignments to reduce contact with other employees/customers
 - Installation of plexiglass barriers to ensure minimum distances
 - Additional or enhanced PPE.
- Employer cannot affirmatively exclude employees from return to work solely because they have an underlying medical condition that the CDC says may pose a higher risk of severe illness if they contract COVID-19.
 - Exception- employee's disability is a "direct threat" to his or her health that cannot be eliminated/reduced by reasonable accommodation.
- Accommodations to COVID-19 related Employer Policies requiring PPE
 - An employee with a disability may need a related reasonable accommodation under ADA (e.g. non-latex gloves, modified face mask for interpreters or others who communicate via lip reading, gowns for individuals using wheelchairs).
 - An employee could also seek a religious accommodation under Title VII (e.g., modified equipment due to religious garb).
 - Employer should provide alternatives when feasible and not an undue hardship.

TWC Guidance on Eligibility for Unemployment Benefits (Issued April 30, 2020)

The following are reasons benefits would be granted if the individual refused suitable work:

- **At High Risk or Household Member at high risk:** People 65 years or older are at a higher risk for getting very sick from COVID-19.
- **Diagnosed with COVID-19 or Household member with COVID-19:** The individual has tested positive for COVID-19 by a source authorized by the State of Texas and is not recovered or anybody in the employee's household has tested positive for COVID-19 by a source authorized by the State of Texas and is not recovered and 14 days have not yet passed.
- **Quarantined:** Individual is currently in 14-day quarantine due to close contact exposure to COVID-19.
- **Child care:** Child's school or daycare closed and no alternatives are available.

If an employee refuses to return to the office for any of these reasons, a reimbursing employer would be better off to allow remote work rather than paying unemployment.



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THANK YOU!