

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

Emily R. Linn

Lloyd Gosselink Rochelle & Townsend, P.C.

[www.lglawfirm.com](http://www.lglawfirm.com)

Austin Human Resource Management  
Association – May Webinar  
May 13, 2020

## 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.



**Emily R. Linn**

elinn@lglawfirm.com

512.322.5889

---

**Lloyd Gosselink Rochelle &  
Townsend, P.C.**

www.lglawfirm.com

**THANK YOU!**