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**Returning to Work:  
Health, Employment, and Privacy  
Considerations and Constraints as  
Businesses Resume Post-Quarantine  
Operations**



AMERICAN COUNCIL OF ENGINEERING COMPANIES

Presented By:  
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# Presenters

## **Jessica Brown**



Jessica Brown, a partner in Gibson Dunn's Denver Office, specializes in employment law, including workplace investigations, as well as white collar government investigations. She has been ranked by Chambers USA for sixteen consecutive years as one of "America's Leading Lawyers for Labor & Employment." Contact at [jbrown@gibsondunn.com](mailto:jbrown@gibsondunn.com)

## **Karl G. Nelson**



Karl Nelson is a partner in the Dallas, TX office and represents employers across the country in connection with employment law compliance and litigation, including with respect to fair employment practices, benefits issues, worker health and safety, whistle-blower claims, and collective bargaining rights and obligations. Contact at [knelson@gibsondunn.com](mailto:knelson@gibsondunn.com)

# **Return to Work Employment Law Considerations**

# Recalling Workers From Furlough

Selecting workers for recall

What about employees who can't return to work immediately?

Adjusting pay or hours upon reinstatement

Benefits considerations

What if some furloughs become separations?

# Enhancing Workplace Safety: Potential Options

Strong, detailed, and well-publicized policies

Employee health screening

Temperature checks

Use of PPE and accommodations

Social distance monitoring

Operational changes: staggered shifts, expanded entrance and exit opportunities, etc.



The purpose of this tool is to assist employers in making (re)opening decisions during the COVID-19 pandemic, especially to protect vulnerable workers. It is important to check with state and local health officials and other partners to determine the most appropriate actions while adjusting to meet the unique needs and circumstances of the local community.

#### Should you consider opening?

- ✓ Will reopening be consistent with applicable state and local orders?
- ✓ Are you ready to protect employees at higher risk for severe illness?

ALL  
YES

#### Are recommended health and safety actions in place?

- ✓ Promote healthy hygiene practices such as hand washing and employees wearing a cloth face covering, as feasible
- ✓ Intensify cleaning, disinfection, and ventilation
- ✓ Encourage social distancing and enhance spacing between employees, including through physical barriers, changing layout of workspaces, encouraging telework, closing or limiting access to communal spaces, staggering shifts and breaks, and limiting large events, when and where feasible
- ✓ Consider modifying travel and commuting practices. Promote telework for employees who do not live in the local area, if feasible.
- ✓ Train all employees on health and safety protocols

ALL  
YES

#### Is ongoing monitoring in place?

- ✓ Develop and implement procedures to check for signs and symptoms of employees daily upon arrival, as feasible
- ✓ Encourage anyone who is sick to stay home
- ✓ Plan for if an employee gets sick
- ✓ Regularly communicate and monitor developments with local authorities and employees
- ✓ Monitor employee absences and have flexible leave policies and practices
- ✓ Be ready to consult with the local health authorities if there are cases in the facility or an increase in cases in the local area

ALL  
YES

OPEN AND MONITOR

ANY  
NO

DO NOT OPEN

ANY  
NO

MEET  
SAFEGUARDS  
FIRST

ANY  
NO

MEET  
SAFEGUARDS  
FIRST



# Screening

- Take temperature? ( $\geq 100.4$  F)
- Evaluate symptoms (per CDC)
  - Fever, cough, shortness of breath or difficulty breathing, chills, muscle pain, sore throat, new loss of taste or smell
  - Other reported symptoms have included nausea, vomiting, diarrhea
- Determine close contact with COVID-19 cases
- Ask about recent travel
- Undertake COVID-19 testing?
  - Nasal swab (PCR); blood (serology/antibody – IgM/IgG)
- Use a Self Assessment Program for workers before arriving to site?

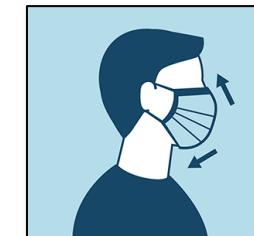
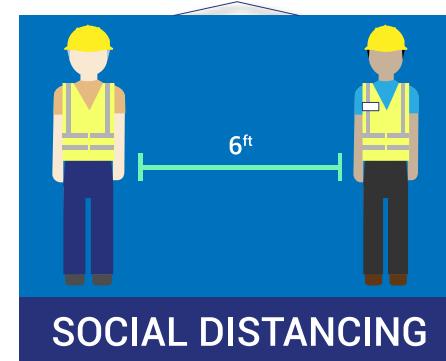
# Social Distancing

- Keep at least 6 feet distance
- Avoid direct contact (shaking hands)
- Adjust traffic flow of people
- Limit elevator passengers
- Close common areas
- Look at re-configuring office spaces



## Other Return to Work Practices / Policies

- Develop FAQs for employees
  - site-relevant
  - topical
  - updated (weekly)
- Disclose cleaning plans
- Post signage: hygiene, social distancing
- Use face coverings, esp. if social distancing cannot be maintained



# Enhancing Workplace Safety: Employment Law Considerations

OSHA standards and reporting

Employee screening and testing

ADA, Title VII, ADEA, and related considerations

Wage and hour considerations

# Responding to Employee Concerns

Employee resistance to screening or testing

Permitting employees to return to work from quarantine

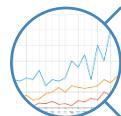
Responding to employee reluctance to return to work

Employee protests and walkouts

Workers' compensation for claimed workplace infections

# Privacy Considerations and Legal Constraints

# Examples of COVID-19 Management Programs Implicating Privacy Issues



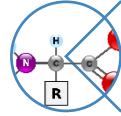
Internal modeling for reopening, prioritization of resources



Temperature screening



COVID-19 testing



Antibody (IgM/IgG) testing



Surveys, questionnaires, and other information gathering



Wearables, apps, and other contact tracing

## Brief Best Practices

- Consult with counsel, and encourage your business partners to consult with you.
  - Expanded definitions of PII, state-specific laws, and new collections and uses of data mean expanded risks
  - Pandemic context can lead to moving too quickly
- When in doubt, transparency and consent rule
  - Risk can almost always be mitigated by transparency and written consent
  - Certain laws require it; need to at least ensure compliance if business pushback
- Do not rely solely on public health, employment, or other guidance without balancing privacy considerations
  - Even steps sanctioned by government entities (e.g., from an employment perspective by the EEOC) require privacy review
  - On the other hand, if *required* by regulation or county orders, different analysis

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Questions?