

Co-hosted by



**KLEHR HARRISON
HARVEY BRANZBURG LLP**



Understanding and Effectively Implementing the Required and Best Practices Associated With Reopening Your Business

Lee D. Moylan

Klehr Harrison Harvey Branzburg LLP

(215) 569-4140

lmoylan@klehr.com

-and-

Bryan Schwartz

Odell Studner Group

(484) 582-6072

Bschwartz@OdellStudner.com

June 12, 2020

Risk Management. Solved.®

Disclaimer

Nothing in this presentation should be interpreted as legal advice. This presentation is intended to be informational only and to help you identify certain legal issues that may arise due to COVID-19. You should consult with your attorney to understand the specific legal issues and potential solutions for your circumstances.



Agenda

- Initial Thoughts
- Considerations for Opening Up
- Permissible and Advisable Workplace Rules
- Medical Information Lawfully May Obtain from Employees
- Temperature Taking Checklist
- What to Do When you Have an Ill, Infected or Potentially Infected Employee
- Non-Compliant Employees



**KLEHR HARRISON
HARVEY BRANZBURG LLP**



Initial Thoughts



- **Presentation assumes employers are lawfully permitted to open and to bring employees back to work under state and local law**
 - If in PA, know the phases to reopening: Red, Yellow and Green, which can be found here: <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>
 - On May 18, Governor Phil Murphy unveiled a multi-stage approach to re-opening. Phase 2 planned for June 15.
 - On June 1, Delaware began Phase 1 which lifted a ban on short-term rentals and mandatory 14-day quarantine for out-of-state travelers. On June 15, DE will go into Phase 2. Guidance on Phase 2 can be found here: <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/06/Delaware-Economic-Reopening-PHASE-2.pdf>
 - In Maryland, Stage 2 began on June 5, allowing most non-essential businesses to reopen to the general public, with some exceptions. Best practices depending on the industry can be found here: <https://open.maryland.gov/backtobusiness/>
- **Presentation is based on federal guidance but we do mention certain state and local laws to provide examples (PA, NJ, DE, MD)**
- **To keep up-to-date, employers must visit at least the websites of the CDC, OSHA, and the EEOC to remain up-to-date, as well as the pertinent state's Department of Health websites**





Workplace Requirements

- CDC offers different guidance depending on type of business, but many practices apply to all
- Collaborate with building owner to ensure social distancing (i.e., elevator usage) and encourage any other entities sharing the same workspace also follow the pertinent guidance
- Require social distancing when in office



- Require face coverings unless employee needs accommodation (more on this later)
 - Ex. DE: employees required to wear masks
 - Ex. MD: required for certain businesses when face interaction occurs
- Make hand sanitizer and soap and water available





Workplace Requirements (cont'd)

- Prohibit congregating and socializing in groups
- Limit access to or close off common areas, such as employee kitchens and break rooms
- Limit sharing of workplace tools, technology, and other equipment
- In some industries, barriers, gloves, masks, and marking 6 feet are required (i.e., grocery stores)
- Consider reconfiguring workspace
- Require infection control practices (i.e., covering sneeze with elbow)
- **Conspicuously** display signs detailing above mandates
- Frequently sanitize common areas and high-touch areas
 - DE requires employers to disinfect surfaces touched by customers every 15 minutes to 2 hours
- Minimize exposing employees to a sick coworker (more to come on how to do this)



Opening Up - Key considerations for Implementing Workplace Policies

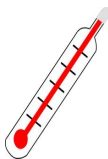


- New workplace policies should be in writing
- Designate individual(s) who will be responsible for overseeing and for ensuring employees are complying with plan but important that leadership is fully invested
- Communicate with employees
- Continually evaluate practices

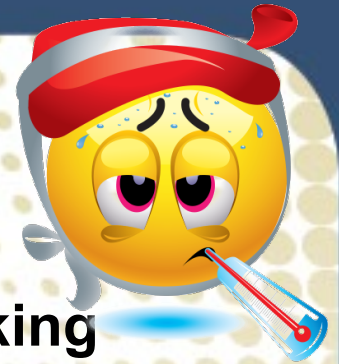


Gathering Medical Information from Employees

- Permissible questions
 - if employee is experiencing symptoms of COVID-19, if have test result pending, or if tested positive for virus
 - if employee has been exposed to person who, within 48 hours of employee's interaction, tested positive for COVID-19 or has a presumptive case of it
- How to obtain information?
 - Form questionnaires
 - Clocking in
 - Taking temperatures
 - Delaware requires employers to ask employees about temperatures and require reporting if elevated
 - MD requires for certain industries
 - According to EEOC, employers may test employees for the virus
 - Must be accurate and reliable
 - Consult the FDA for referral to accurate and reliable tests



Temperatures Taking State and Local Laws



- **State or local law(s) may require temperature taking**
 - Pennsylvania - if an employee tests positive for COVID-19 or the workplace is otherwise exposed, all other employees must be screened with temperature taking
 - Delaware - required for high-risk businesses and recommended for all others.
- **State or local law(s) may set threshold temperature as lower than CDC temperature**
 - Philadelphia - 99.8 degrees
 - Delaware - 99.5 degrees requires discussion with employee
- **Most likely to have stricter requirements in metropolitan areas and areas with hot spots**



Temperature Taking Checklist

Mandatory screening

Decide who will be screened

Decide who will do the screening

Establish screening process and provide to employees

Logistics for conducting the screenings

Confidentiality issues

Decide if employees will be paid for screening time?



**KLEHR HARRISON
HARVEY BRANZBURG LLP**

If Employee Reports, Has or Develops Symptoms

- **Employer should send employee home if employee:**
 - registers a fever or reports to workplace with COVID-19-related symptom(s),
 - was exposed to someone who is suspected of having COVID-19,
 - refuses to be tested,
 - becomes sick during the day
- **Employers may prohibit the employee from returning to the workplace for a period of time.**
 - Sick employees should follow CDC-recommended steps.
 - Employees should not return to work until they have met the criteria to discontinue home isolation and have consulted with a healthcare provider and state or local health department
 - Documentation when want to return
- **Inform other employees who were in close proximity to ill employee of their potential exposure**



Special Considerations for High-Risk Individuals

- Older adults and people of any age who have serious underlying medical conditions
- OSHA, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA)
- Workers at higher risk for severe illness
 - self-identify
 - employers should avoid making unnecessary medical inquiries.



Leave for Ill, Quarantined Employee or High-Risk Employee

- **Employee May be Eligible for Paid and/or Protected Leave**
 - Families First Coronavirus Response Act (FFCRA) (April 1, 2020)
 - PTO (which may, under certain circumstances, run concurrently with FFCRA leave)
 - STD or LTD
 - NJ: myleavebenefits.nj.gov
 - State or local leave laws
 - Philadelphia
 - Maryland Healthy Working Families Act
 - NJ Earned Sick Leave (mysickdays.nj.gov)
 - Chart listing entitlements under federal and NJ law:
<https://www.nj.gov/labor/assets/PDFs/COVID-19%20SCENARIOS.pdf>
- **Employee May be Eligible for Unpaid Protected Leave**
 - Non-FFCRA FMLA leave
 - ADA or state equivalent
 - State laws prohibiting employers from terminating an employee because the employee had to quarantine or self-isolate (ex. MD)
- **Employee May be Eligible for Other Forms of Leave**
 - Unpaid leave under company policies
 - Leave policy implemented for COVID-19



Employee Who Refuses to Return to Workplace or Follow COVID-19 Workplace



- Communicate with employee about reasons
 - May need an accommodation
- Ensure that following pertinent federal, state or local guidelines to minimize risks of exposure to COVID-19
 - Assuages fears and employee may be future complainant to OSHA or local health authority
- If still refuses, enforce as would any other workplace policy
- Failing to return to work could impact employee's entitlement to unemployment



Cleaning Facilities After Employee Tests Positive or Has Symptoms



- Generally, employer need not shut down entire facility
- Close off any areas used for prolonged periods of time by the sick person and wait 24 hours (or as long as possible) before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets
 - Waiting 24 hours is required in Philadelphia
- If employee notifies employer after have already been in worksite when could have been contagious, cleaning if exposure within 7 days
- Follow the CDC cleaning and disinfection recommendations
- If employer does not hire an outside vendor to clean the potentially infected areas, - obligations under OSHA related to informing and protecting employees



Recording Requirements under OSHA

- Effective May 26, 2020, guidance supersedes the April 10, 2020 guidance
 - OSHA plans to inspect workplaces
 - COVID-19 is a recordable illness
 - Exceptions: certain low risk industries and employers with ten or fewer employees but OSHA encourages even the exempt to conduct and document the work-relatedness assessment
 - OSHA requires employers to attempt to determine if COVID-19 cases are work-related, but recognizes that determining the work-relatedness of cases can be difficult
- OSHA considers:
 - reasonableness of the employer's investigation into work-relatedness
 - Whether employer considered evidence reasonably available to the employer
- If reasonable and good faith inquiry but cannot determine whether it is more likely than not (a more than 50% chance) that exposure at the workplace caused the COVID-19 case = no need to record



Co-hosted by



**KLEHR HARRISON
HARVEY BRANZBURG^{LLP}**



**ODELL
STUDNER**

INSURANCE BROKERS & CONSULTANTS

Questions?

Lee D. Moylan

Klehr Harrison Harvey Branzburg LLP

(215) 569-4140

lmoylan@klehr.com

-and-

Bryan Schwartz

Odell Studner Group

(484) 582-6072

Bschwartz@OdellStudner.com

Risk Management. Solved.[®]

Thank You