Managing Workplace Medical and Legal Risks Amid the COVID-19 Pandemic

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As most businesses in Texas are allowed to operate at some level, many employers struggle to determine how they can reopen safely while avoiding potential legal pitfalls. Fortunately, there are general principles and practical issues to consider when preparing to reopen amid the COVID-19 pandemic.

Legal Baselines

Federal, Statewide, and Local Orders

On August 25, 2020, the federal Cybersecurity and Infrastructure Security Agency (CISA) substantially updated its guidance on identifying critical infrastructure workers and activities[1] during the COVID-19 outbreak. Earlier versions of the guidance—CISA 2.0, CISA 3.0, and CISA 3.1—were widely adopted by government officials around the country, often to carve out exceptions to shelter-in-place orders and other public health measures intended to stem the spread of the virus. CISA 4.0 acknowledges this use of prior versions of CISA guidance, but recommends a different approach focused on risk management rather than reopening categories.

While CISA 4.0 "is advisory in nature" and is not itself a binding federal standard, organization's compliance with available government guidance for preventing exposure to the coronavirus, such as CISA 4.0, may become relevant in defending against coronavirus exposure claims. Both employers of essential workers and owners of public-facing essential businesses should consider whether CISA 4.0's recommended risk mitigation strategies should be incorporated into their own COVID-19 response and prevention programs, and should keep a careful eye on legal developments in this area.

Texas Governor Greg Abbott has taken a number of steps in recent months to address the pandemic at the statewide level—including his most recent executive order, GA-29. Under this July 2 order, face coverings are required in indoor facilities that are open to the public and public outdoor spaces if maintaining six feet of physical distancing is not feasible. At the same time GA-29 was issued, Abbott issued a disaster proclamation banning outdoor gatherings of more than 10 people, except for those who are engaged in critical infrastructure activities identified in the federal government's CISA 3.1—now CISA 4.0—guidance, and those engaged in religious services, local government activities, childcare camps, or reduced-capacity amusement parks and certain recreational facilities. GA-29 builds on GA-28, which limited the occupancy for certain outdoor recreation venues—amusement parks, sporting events, pools, water parks, museums, libraries, zoos, rodeos, etc.—to 50% of normal operating limits as determined by the owner of the facility. However, the new categories of critical infrastructure workers set out in CISA 4.0—including many school and other education workers, port and maritime transportation workers, and certain laboratory and home healthcare workers—now appear to be exempt from GA-28's caps on the maximum occupancy of certain reopened businesses.

A number of local government public health orders are also in place around the state. All of Texas' major urban counties require most public-facing businesses to adopt health and safety policies, including a mask requirement. While Governor Greg Abbott has suggested that changes to his own COVID orders may be forthcoming, these local public health orders will remain in place even after Governor Abbott's orders expire or are rescinded unless local officials withdraw or amend them.

Federal Workplace Rules

In addition to state and local mandates and the Centers for Disease Control and Prevention (CDC), employers should look to the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC) for guidance on safely and legally reopening and returning employees to work.

At the onset of the pandemic, OSHA issued guidance on preparing workplaces for COVID-19.[2] More recently, OSHA issued its "Guidance on Returning to Work,"[3] which provides general principles for relaxing restrictions that were put in place to slow the spread of the coronavirus. Like state and local reopening plans, OSHA's guidance is divided into phases.

- *Phase 1:* Make telework available if possible, limit the number of employees allowed in the office, provide accommodations for high-risk individuals, and limit nonessential business travel.
- *Phase 2:* Continuing to allow for telework if possible, restrictions on the number of employees in the office

can be eased but social distancing measures should be strictly enforced, nonessential business travel can resume, and continue to accommodate high-risk individuals.

- *Phase 3:* Businesses can resume unrestricted staffing of work sites.

For each phase of reopening, OSHA recommends that employers:

- implement strategies for basic hygiene, social distancing, identification, and isolation of sick employees, workplace controls and flexibilities, and employee training that are appropriate for the particular phase you're in;
- develop and implement policies and procedures that address preventing, monitoring for, and responding to any emergence or resurgence of COVID-19 in the workplace or community; and
- be flexible and prepared to make necessary adjustments as the number of COVID-19 cases changes in the community.

Aside from OSHA, the EEOC also provides helpful guidance and resources for employers as they protect their workforce while avoiding violations of the Americans with Disabilities Act (ADA). The EEOC has updated its publication "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,"[4] which was originally issued in 2009, to incorporate updates regarding the COVID-19 pandemic. Additionally, the EEOC has issued much-broader guidance in the form of frequently asked questions. The guidance, entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,"[5] is updated frequently and is readily available for employers to access.

Assessing and Managing the Risk of Infection

Legal Parameters and Pitfalls Related to Employees

As businesses reopen, employers are provided flexibility related to assessing, testing, and managing coronavirus in the workplace. Legally, employers are allowed to and should require employees to self-report COVID-19 symptoms, exposure, or diagnosis. It is best to have this as a written policy that employees receive and acknowledge so they are aware of what the expectation is. Employers can also require employees to respond to health inquiries or questionnaires relating to COVID-19 symptoms, exposure, or diagnosis on a regular basis before they come into the office. Medical exams and testing, including temperature screens, prior to entering the worksite are also permitted.

To avoid legal pitfalls, employers must ensure that COVID-19-related policies are applied consistently and equally. Employers should not target certain groups (e.g., over 65) or treat employees differently based on other protected characteristics, such as national origin. The EEOC encourages employers to be flexible in providing reasonable accommodations to individuals with disabilities or who are in high-risk groups.

Example: If an individual who is diabetic requests to work from home or be moved from a cubicle to an office, the employer should try to accommodate this request if it doesn't create an undue hardship. The employer should not force this individual to work from home if they do not want to.

Screening Third Parties

State and local orders generally don't require screening of third parties. There are some general guidelines for businesses to consider if they intend to screen third-party visitors:

1. Businesses should have a clear process for screening and make sure that process is applied consistently without regard to protected classes.
2. Businesses should use a method and criteria that are recommended by health authorities including the CDC and the Texas Department of State Health Services. If a business decides deviating from established guidelines from public health authorities is necessary, the business should have an objectively reasonable basis for doing so and document why it has chosen to deviate. Ideally, this decision would be made in consultation with qualified legal counsel and a risk management or public health professional.
3. A plan should be in place for objections and symptomatic responses, including if a third-party visitor refuses to submit to a temperature check before entering the premises. More importantly, employees who are administering the screening need to know what the process is, and that process and response should be applied consistently and should avoid targeting individuals because of their race, gender, national origin, or other protected class. Similarly, businesses should decide ahead of time, based on guidance from health authorities, if they're screening for symptoms.
4. Businesses should pay attention to local health orders, which may require changes to screening procedures with little notice.
5. If screening those who may have a contractual right to enter the facility, such as contractors, vendors, or

tenants, businesses should review the contract or the lease that gives the person that right first and then decide whether that document controls their ability to impose these screening requirements.

6. As a general rule, businesses should avoid unnecessarily retaining health information about those who are screened for COVID-19. In some areas of Texas, local contact tracing requirements may require businesses to retain certain information for a period of time. However, any information that is stored about third parties and their health status should not be held longer than needed, and should be reasonably protected from those without a need to know it.

Public-facing businesses should also be mindful of potential claims under the ADA related to screening third parties for COVID-19. In addition to protecting employees in the workplace, the ADA also prohibits discrimination on the basis of a disability in public accommodations. Businesses that may be considered public accommodations and that are considering COVID-19 screening for visitors should consider whether the ADA applies to those efforts, and should generally focus screening efforts on assessing and preventing actual risks posed by visitors under the business's specific circumstances. For example, a small indoor boutique's assessment of the risks posed by visitors who have had recent contact with a symptomatic person may differ from that of a very large big box store with high ceilings, substantial air flow, and an outdoor garden center. Businesses that may be public accommodations should consult legal counsel in deciding whether and how to implement a visitor screening program.

Response

Legal Guidelines for Notifying Employees and Third Parties of Exposure

Employers should maintain the confidentiality of employee health information, including results of temperature screens, responses to health questionnaires, and the results of COVID-19 tests.

If an employee tests positive for COVID-19, an employer should, at a minimum, notify any individuals who have been in close contact—within six feet for 15 minutes or more—with the employee and those who share a common workspace with the employee. The employer should also consider issuing a general notice that an employee tested positive for COVID-19 and that the individuals who may have been exposed were already notified. The employer should not disclose the identities of employees who test positive for COVID-19 or are experiencing COVID-19 symptoms.

Businesses that frequently have vendors or contractors on-site should consider in advance how they will respond if an employee, customer, or visitor has been exposed or has tested positive for COVID-19. Qualified legal counsel and risk management professionals can help to form a plan for that response, which should take into account the available public health information for their specific area.

Businesses should also consider whether they can decontaminate their facility following an exposure using the CDC's guidelines for community facilities or other applicable public health guidelines. If a business decides to decontaminate, giving notice that there was an exposure and including information about the decontamination process may help to manage third-party relationships.

While most businesses in Texas are not required to notify public health authorities of an exposure, certain employers and other organizations are. After learning of a confirmed exposure, consider consulting legal counsel to determine whether current guidelines require your organization to report. Organizations should also be mindful of notice requirements in insurance policies and commercial contracts, and should consider whether the potential exposure of a non-employee while on-site requires notice to an insurance carrier or a contracting counter-party who may owe a duty to indemnify for related claims.

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ENDNOTES

(1) https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce

(2) https://www.osha.gov/Publications/OSHA3990.pdf

(3) https://www.osha.gov/Publications/OSHA4045.pdf

(4) https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

(5) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws