

“Keeping the Doors Open: Managing Workplace Medical and Legal Risks”

July 10, 2020 | Webinars

As businesses plan for employees to return to work and respond to workplace medical and legal risks, a physician, a business litigator, and an employment attorney discuss legal baselines, assessing and managing the risk of infection, and responding to exposures and infections.



Sarah Mitchell Montgomery
Partner
Jackson Walker
smontgomery@jw.com
214.953.5870



Brad Nitschke
Partner
Jackson Walker
bnitschke@jw.com
214.953.6045



Shealynn Buck, MD
Chief Medical Officer
Lockton Companies
sbuck@lockton.com
214.969.6164

Please see below for the transcript of the July 10th webinar.

Brad Nitschke

- 00:01 Good afternoon, and welcome to today's webinar, "Keeping the Doors Open: Managing Workplace Medical and Legal Risks in the Pre-Vaccine Era."
- 00:08 I'm Brad Nitschke, a partner in Jackson Walker's Dallas trial section and the Chair of the Firm's COVID-19 Task Force. I'm joined today by Jackson Walker partner Sarah Montgomery, and by Lockton Companies' Chief Medical Officer, Dr. Shealynn Buck. Sarah is a partner in Jackson Walker's Dallas Labor & Employment section whose practice focuses on helping employers turn legal theory into practical risk management. Dr. Buck is a board-certified clinical pathologist and serves as Chief Medical Officer at Lockton, where among other things, she helps Lockton and its employer clients translate clinical data into practical risk management solutions.
- 00:47 On behalf of this panel, we're so grateful that you've taken the time to join us today and hope that you'll walk away from today's discussion with some actionable information about operating in the pre-vaccine environment.
- 00:58 Before we begin, I want to cover a few housekeeping items. First, the disclaimers. This webinar is for informational purposes only and does not constitute legal or medical advice. This webinar may provide information concerning potential legal issues. However, it's not a substitute for legal advice from qualified counsel. You should not act or rely on any information from this webinar without seeking the advice of an attorney licensed to practice law in your jurisdiction for your particular issue. You should not and are not

authorized to rely on the webinar as a source of legal advice. This webinar does not create any attorney, client relationship between you and Jackson Walker. The facts and results of each case will vary, and no particular result can be guaranteed.

- 01:39 This webinar is being recorded. The recording and slide deck will be distributed shortly following today's live presentation.
- 01:45 This is a listen-only mode presentation, so while you can hear us, we're unable to hear you. That means we cannot hear any questions you might want to ask. If you do have questions, you can submit them in the chat box at the bottom of your screen. We plan to answer as many of your questions as we can at the end of the presentation, so please do submit questions throughout the program. We'll do our best to group questions together by topic to answer as many as possible while being respectful of your Friday afternoon.
- 02:11 We've developed a COVID-19 resources page, which is regularly updated on our website. You can visit any time at [JW.com/Coronavirus](https://www.jwalk.com/Coronavirus).
- 02:19 And finally, this webinar is accredited for CLE and CPE, and you'll receive certificates of completion following the webinar so that you can self-report. And with that, let's get started.
- 02:32 Here's the summary of what we'll cover during our discussion today—As I mentioned, our overall goal is for you to walk away with some key legal and medical issues that many of the businesses we support have faced in weighing whether, how, and when to reopen. First, we'll look at the legal baselines that govern all of our lives and our work right now. We'll talk about how to assess and manage COVID-19 in the workplace. And then finally, we'll walk through some hypothetical scenarios and discuss the medical and legal issues they raise along with our thoughts on how the hypothetical businesses involved might handle them.
- 03:09 Let's start with the mandatory stuff: the legal regulations that set the outer boundaries of how we all operate in the current environment. I'll discuss state and local public health orders, and Sarah will talk about federal employment laws in a minute.
- 03:23 First up, let's talk about the statewide situation in Texas. As you may know, Texas Governor Greg Abbott has taken a number of steps in recent months to address the coronavirus pandemic at the statewide level. Those actions tend to update and supersede each other, so I'm going to start with the most recent and work backwards and try to hit the high points for you. If you'd like a deeper dive into any of these executive orders or the governor's other actions, be sure to check out [Jackson Walker's coronavirus website](#), where we've got detailed summaries of each.
- 03:53 Most recently, the governor issued Executive Order GA-29. Under GA-29, masks are required, or face coverings are required, in indoor facilities that are open to the public and public outdoor spaces if maintaining six feet of social distancing is not feasible.
- 04:09 There are exceptions under GA-29 to the statewide mask requirement, and those apply to:
- children under the age of 10;

- those with medical conditions or disabilities that prevent them from wearing a face covering;
- while you're seated at a restaurant or eating or drinking; when you're driving alone or driving with members of your own household; when you're in a business that requires you to remove your mask for security reasons, such as in a bank;
- when you're engaging in socially distanced outdoor exercise and swimming;
- when you're voting or working as a poll watcher or worker;
- when you're engaged in religious worship;
- when you are giving a speech or participating in a broadcast;
- and finally, if you are in a Texas county with a very low number of COVID-19 infections, who has been allowed to opt out by the Department of State Health Services and has elected to opt out of the mask requirement by the Department of State Health Services.

Otherwise, generally speaking, if you're in an indoor space open to the public or in a public outdoor space and cannot maintain six feet of social distancing, masks are now required around the state.

- 05:19 At the same time Executive Order GA-29 was issued, the governor issued a disaster proclamation on July 2nd. This updated a prior ban on large outdoor gatherings, and it reduced the number of people allowed to gather outdoors.
- 05:34 Generally, the governor's July 2nd proclamation bans 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 guidance and those engaged in religious services, local government activities, childcare camps, or reduced-capacity amusement parks and certain recreational facilities. The July 2nd disaster proclamation also bans groups of larger than 10, whether indoors or outdoors, each of which must stay six feet away from other groups of up to 10, except where another executive order or the Department of State Health Services' minimum health standards allow a larger group to gather as would be in the case, for example, of a religious service or local government activity.
- 06:22 GA-29 is the governor's most recent order, and it builds on GA-28, his next-most recent order. This is an order that 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. It also prohibits people in Texas from visiting bars and prohibits people from visiting commercial water rafting or tubing services (this is the float the river clause). It reduces statewide restaurant capacity to 50% and implemented the outdoor gathering limit at 100 people, which GA-29 later shrunk to 10 people. As with GA-29, it [GA-28] allows certain low infection counties to opt out. So those are statewide requirements that apply to most businesses in Texas.
- 07:16 Additionally, healthcare institutions, organizations are subject to some additional requirements. The Texas Medical Board has promulgated a set of emergency rules.

Probably the most broadly applicable of which is an emergency rule requiring notice and compliance with COVID-19 minimum standards of safe practice. Generally, physicians are required to wear masks as are patients, everybody's got to be screened for COVID symptoms when seeking healthcare from a physician in Texas outside of a hospital, and certain notices have to be posted. Additionally, there are restrictions on visitors to nursing homes and assisted living facilities. There are also some local restrictions that build on those statewide restrictions. If that's your business model, be sure to check with your attorney or with your local public health authorities to remain up to date on what the local restrictions on long-term care facilities are.

- 08:09 Finally, hospitals in much of the state are now prohibited from performing elective surgeries or other procedures unless they're medically necessary, or they would not deplete any hospital capacity needed to cope with COVID-19. So that's the statewide picture.
- 08:23 There are a number of local government public health orders in place around the state, most notably in some of the state's urban areas who've been very active in regulating in this area. All the major urban counties in Texas now require health and safety policies for most businesses, most public-facing businesses, which include a mask requirement. Now that more or less is taken care of by the governor's statewide mask requirement, but an important note here is that if GA-29 expires, if the statewide mask requirement expires, these public health orders are still in place, unless and until they are revoked or a court or the governor instructs that they not be followed.
- 08:59 A couple of highlights from specific cities in Texas: The City of Austin yesterday has increased, expanded the mask requirements imposed by the governor. GA-29 creates some latitude and some exceptions for the mask requirement for those who are engaged in socially distant indoor activities. The City of Austin's ordinance that was just passed late yesterday doesn't appear to contain that exception. For those who have facilities within the City of Austin city limits, it appears that your mask requirements are now greater than they are elsewhere in the state. The City of Austin's also dialed up the enforcement language in its public health ordinances. There's now a threat that if an organization or a site—this is the term that ordinance uses—violates these new requirements, they could be deemed a public nuisance, which has important implications for their ability to operate in the future, and the amount of the fine has been increased. Now there's a potential \$2,000 fine per violation.
- 10:04 In Dallas County, we've seen throughout the county judge's recent public health orders, there is a ban on employers requiring an employee – other than healthcare employees – to seek COVID-19 testing before returning to work after being out for a COVID-19-related reason. In other words, in Dallas County, at least according to the county judge's order, an employer – other than a healthcare employer, who's screening using separate CDC protocols – cannot require an employee who has been exposed to COVID-19 to present evidence of a negative test or a physician's note before allowing them to return to work. There's been some discussion among employment lawyers about whether or not the

Dallas County judge has the statutory authority to impose a condition like this on employment relationships. But if this is a situation that's of concern to you, it will be important to contact an employment lawyer to talk through those issues.

11:03 Similarly, the Dallas County judge's order provides that within the City of Dallas, employees who are out because they've been infected with COVID-19 or caring for someone infected with COVID-19 may use their paid sick leave time while they're out. Again, there's some discussion among employment lawyers about whether the Dallas County judge has the authority to issue such an order, but if this affects you or your business, you may want to contact your attorney.

11:29 Then finally in Harris County, we've seen a recent ban on public gatherings that generally tracks the governor's statewide order, except that it also banned gatherings for foreclosure sales that happen once a month at the courthouse. That may especially impact real estate businesses.

11:46 Now that we've talked about some of the state and local legal parameters, I'll ask Sarah to speak to the federal workplace laws and how they apply right now.

Sarah Mitchell Montgomery

11:57 As Brad said, in addition to state and local requirements and orders, and of course the CDC, employers need to look to certain federal agencies for guidance on safely and legally reopening and returning employees to work and keeping them safely in the office. The two agencies I want to focus on are the Occupational Safety and Health Administration and the Equal Employment Opportunity Commission.

12:27 Early in this pandemic, OSHA came out with guidance on preparing workplaces for COVID-19. I'm guessing, at this point, most employers have already looked at this guidance and utilized it. If you haven't, I really urge you to use that as a resource in ensuring that the work site itself is safe for employees and other individuals who might enter. More recently, OSHA has issued guidance on returning to work. The guidance is essentially in response to state and local governments reopening their economies to allow businesses to start operating again.

13:04 Much like those reopening plans that we're seeing in various states and at the local level, the guidance is divided into phases. For Phase 1, OSHA recommends making telework available if possible, limiting the number of employees allowed in the office, providing accommodations for high-risk individuals, and limiting nonessential business travel. Phase 2: OSHA suggests continuing to allow for telework if possible, easing the restrictions on the number of employees in the office, but still strictly enforcing social distancing measures, allowing nonessential business travel to resume, and continuing to accommodate high-risk individuals. And then in Phase 3, businesses can resume unrestricted staffing of work sites. With the current status of community spread, I would say we're still really in Phase 1 of reopening. I think we were starting to ease more into Phase 2. But I think, again, with this current state of community spread, there's some backtracking into Phase 1.

- 14:18 In its guidance, OSHA provides specific steps that employers should take for all phases, every opening. Employers should implement strategies for basic hygiene, social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and of course employee training that are appropriate for the particular phase that you're in. Employers should also 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 of course, again, that's kind of where we are right now.
- 14:56 Something that OSHA is encouraging employers to do is have something in place to address backtracking and re-implementing some of those earlier precautions that were taken. Employers should be flexible and prepared to make adjustments as the number of COVID-19 cases changes in the community. Most of this, I would say, feels like common sense, and it's what employers have already been doing. I do think it's important, especially right now, to focus on this idea of remaining flexible. We've witnessed, in the last few weeks in Texas and other states, COVID numbers can change very quickly week-to-week and day-to-day, and state and local governments are moving quickly to make changes. So, employers need to be prepared and need to have those policies and practices in place to quickly adjust to this changing, ever-changing situation.
- 15:57 In addition to OSHA, we also have the EEOC. That's our other primary federal agency that is really helpful right now for employers and has a lot of guidance and resources for employers. The EEOC has a publication called "Pandemic Preparedness in the Workplace and the Americans With Disabilities Act." Again, this is something that you've probably already had access to and reviewed. This publication was not actually created specifically for COVID-19. It's actually been in existence well before COVID-19 arose, but it has been updated to be a little bit more applicable to some of the unusual circumstances surrounding COVID-19. Again, this is a great resource for employers as you're trying to address COVID-19 challenges and protect your workforce while also avoiding violations of the ADA.
- 16:51 More recently, the EEOC has issued guidance in the form of frequently asked questions that address concerns relating to the interaction of COVID-19 issues and the ADA, the Age Discrimination and Employment Act, Title VII, the Pregnancy Discrimination Act, etc. It goes into more depth and covers more of those employment laws that could be triggered in some way by employers addressing COVID-19 concerns. This is much broader guidance than the publication I mentioned a moment ago. This guidance is called "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws," and it is readily available for employers to access.
- 17:38 The focus of many of the FAQs is the use of health inquiries and medical examinations by employers when employees are returning to work or they're coming into the office. Clearly the interplay between the ADA and COVID-19-related inquiries is kind of the key focus there. The FAQs also address reasonable accommodations that employers can provide and should provide if it's not an undue hardship in response to COVID concerns from

employees. It addresses discrimination concerns that are outside of the ADA. This can include not singling out older or pregnant employees, or those who are high-risk for different or potentially discriminatory treatment. In my experience, employers generally have good intentions when they're considering taking certain steps like requiring older workers or high-risk workers to remain at home and not come into the office while allowing younger or lower-risk individuals to do so. But this can create issues of discrimination under various laws, and the EEOC guidance addresses these challenges fairly succinctly. So again, I think it's a great resource. The guidance is updated frequently, so it's going to be on top of these changes, and that's really handy that it's set in the FAQ format, which makes it much easier for the EEOC to go in and add new issues, new questions that are arising.

19:09 Now that we've looked at reopening from the legal perspective, I'm going to turn it over to Dr. Buck to provide us with an overview of some of the operational challenges of reopening. Dr. Buck, what comes into play operationally when employers are reopening and trying to stay open during this difficult time?

Shealynn Buck, MD

19:31 Thanks so much, Sarah. As employers are operationalizing their reopening plans, these are the areas where our clinical and health risk team is receiving more questions about unique considerations as they relate to the employer's specific type of business, their locations, and their employee population. We are also seeing that some of these operational considerations may have been overlooked in the planning process or may not have been fully played out through situational planning.

20:16 As I've advised employers and our team has advised employers through real-life COVID-19 situations, one piece of advice that I'll share with this audience is that COVID-19 is not an area where you take a "we'll cross this bridge when we come to it" approach. In working with employers, our team has found that there's no one-size-fits-all solution, which it sometimes, kind of, proceeds from the general guidance that you see with CDC or with OSHA. It's really important to consider these areas on this slide and plan based upon what-if scenarios to poke holes in the plan before a COVID-19 situation occurs.

21:06 One of the things, too, that we're seeing is that this is about a process, not just, for example, screening and testing, which we're hearing a lot about. It's really important to think about COVID-19 operations and management as just that—as a process. This is a framework for thinking through some of those challenges and also considering some what-if scenarios as you start to address these operational areas.

21:06 I'll hand it back over to you, Sarah, to walk through some of the legal considerations in these areas.

Sarah Mitchell Montgomery

21:47 Fortunately, in the areas of assessing, testing, and managing COVID-19 in the workplace, employers do actually have quite a bit of flexibility in what they're able to do.

- 22:03 Further guidance from the EEOC and the CDC's recommendations, employers can 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, and you basically have a document that says that they're aware of it, they acknowledge it.
- 22:29 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 are also permitted—that includes temperature screens. For instance, before employees enter the office, employers actually may conduct COVID-19 testing prior to allowing employees to enter the work site, which there are obviously some challenges with that, and Dr. Buck is going to get into some more of the nitty gritty details on actual testing. The EEOC's guidance on this issue emphasizes that the testing must be accurate and reliable, and the EEOC directs employers to guidance from the Food and Drug Administration about safe and accurate testing, as well as guidelines from the CDC and other public health authorities. So that is an option, but, again, Dr. Buck will get into some more of the details on the actual practice of doing the testing.
- 23:34 There's a lot of talk about antibody testing, and some employers have even contemplated requiring antibody testing before allowing employees to enter the workplace, but the EEOC at this time has stated that antibody testing cannot be required to allow an employee to enter the workplace. So just keep that in mind.
- 23:55 And of course, high-risk travel or other high-risk activities are also areas where employers should kind of be on top of that. You should be trying to get information from your employees if they have travel plans, where they're going and whether, depending on where they're going, there needs to be some period of self-isolation when they return, or other steps taken to ensure that they don't bring anything back into the workplace.
- 24:28 Going to our next slide, I've focused on some of the legal pitfalls that you can run into with some of these steps that employers are taking to try to protect the workplace and keep COVID-19 out. Even though the EEOC does allow employers quite a bit of flexibility when it comes to safely returning employees to work, there are some legal pitfalls that the EEOC has identified.
- 24:52 First, you want to ensure that COVID-19 policies are applied consistently and equally. This goes back to the example that I gave earlier about employers treating older employees or high-risk employees differently than younger employees, or those who are not high-risk. Employers simply must avoid doing this. And similarly, employers should not target certain groups or treat employees differently based on other protected characteristics, such as national origin.
- 25:21 And I know that early on in the pandemic—I don't think I've heard much about this recently, but early on in the pandemic, there were reports that some employers were focusing health inquiries and self-isolation requirements for employees, for instance, from Asian

countries. And again, I don't think this is happening much now, but the point remains: do not single groups out for different or heightened treatment or scrutiny. With recent protests, I read that there are reports that employers wanted to require those who had attended a protest to self-isolate. The issue with this is again, you're targeting a group of employees for engaging in a particular activity, which is in this instance attending the protest, but these types of policies or practices weren't being extended to address all activities that may have involved similar exposure to large groups of people. So again, just use caution. If you are tempted to kind of single out a group of people to be treated differently, even if you feel there's a basis for doing so, the EEOC very well may find it discriminatory.

26:41 The EEOC does encourage employers to be flexible in providing reasonable accommodations to individuals with disabilities or who are in high-risk groups. And that's important because that doesn't go away, even with these cautions I'm giving you as far as singling groups out. So for example, if you have an individual who is diabetic and requests to work from home, or perhaps be moved into an office instead of remaining in a cubicle, you should try to accommodate this request if it doesn't create an undue hardship. But you should not force this individual to work from home if they don't want to. If they want to come in and feel that they should, you should not force them to stay at home, even if you think you're doing what's best for the employee. So that's how you can kind of run into trouble there. I recognize that this is a very fine line, and again, I would go back to what I said earlier: The EEOC's guidance is very helpful in addressing these types of issues, and of course, you can always reach out to your legal counsel for advice and guidance if you have a situation that you're concerned about and you want to make sure that you handle it just the right way.

27:54 So, that goes through how employers should handle the COVID-19 assessment and management for their employees. I'm going to turn it over to Brad, who's going to discuss what businesses can do to assess and manage COVID-19 when it comes to third parties.

Brad Nitschke

28:18 Yeah—thanks, Sarah. So, we've had a lot of questions from businesses and other organizations about screening third parties – people who aren't the organization's employees, but nevertheless are in the organization space. This is customers, clients, vendors, suppliers, contractors, and the like.

28:35 State and local orders generally don't require screening of third parties with a caveat there that there are some special rules that apply in certain places to long-term care facilities and similar facilities. For most organizations, there is some flexibility here, and really it's an individualized decision that each organization ought to make in consultation with their attorneys based on the circumstances of their business. But there are some general guidelines to consider if you are considering screening third-party visitors to your premises.

29:08 As with employees, first and most importantly, be consistent. Make sure that you have a clear process for screening, and it's applied consistently without regard to protected

classes. If you're screening customers, don't single out a particular group of customers in a protected class for screening. Screen all customers if that's the program.

- 29:30 Second, I recommend that you use a method and criteria that are recommended by health authorities. This is not a situation where you want to rely on your business' DIY capacity. The CDC has published some guidelines. The Texas Department of State Health Services has some guidelines for temperature screening and symptom checks, and I would suggest that you follow some established guidelines from public health authorities. If you do decide that deviating from those is necessary, you have an objectively reasonable basis for doing it and that you document why you've chosen to deviate. And ideally you would do that in consultation with your attorney and your risk management professionals.
- 30:10 Next, it's really important to have a plan in place for objections and symptomatic responses. As Dr. Buck mentioned earlier, this is not a "we'll cross that bridge when we get there" situation. You really want to know before you start screening third parties what you're going to do if someone, for instance, refuses to submit to a temperature check at your front door. More importantly, your employees who are administering the screening need to know what the process is, and that process and that response needs to be applied consistently. Similarly, decide ahead of time, based on guidance from health authorities, if you're screening for symptoms—which yes, responses are going to generate a particular reaction—if you're going to exclude anyone who's got a temperature over 100-point, 100.4 °F. That's something that needs to be applied consistently, and your employees who are standing at the front door need to know that.
- 31:05 Next, it's important to pay attention to local health orders. These are changing now very quickly. A couple of weeks ago, we saw the City of San Antonio issue an order late on a Monday afternoon that would have required all public-facing businesses in the City of San Antonio to start doing temperature checks within about 24 hours. Obviously for certain businesses, you think of large, big box stores that are public-facing and have a high volume of traffic. This would have required a very, very fast response and pivot. That order was rescinded, or it was modified, within about 24 hours, and so it never became effective, but it illustrates the speed at which the legal landscape here is changing.
- 31:51 So, it's very important to stay attuned to what's going on. One easy way to do that is to [subscribe to our Jackson Walker coronavirus newsletter](#). That's the vehicle that we're using to push out updates when these orders change. We send those out a few times a week, generally when there's something to report. We're not trying to flood your inbox otherwise. But that's a good way to stay up-to-speed on Texas public health alerts as they come out.
- 32:17 The next thing I'd point out is that if you're screening those who have a contractual right to enter your facility—a contractor or a vendor or a tenant—it's important to review the contract or the lease that gives the person that right first, and then decide whether that document controls your ability to impose these screening requirements. If they do, then certainly you want to either comply with what the document requires or approach the contractor or the tenant about negotiating some change under the circumstances. But it's

really important to know whether your options have been limited by something you've agreed to previously.

- 32:53 And then finally I'll mention: Even in the case of imposing screening on third parties, it's important to avoid unnecessarily retaining health information. There are in some localities in Texas, there are some contact tracing requirements that require you to retain, for instance, the names of construction workers on a construction site in the City of Austin, and that's got to be retained for a period of time. But the general rule of thumb here is you don't want to hold onto information about third parties and their health status longer than you need to.
- 33:35 Another issue that's come up in this conversation is whether or not the Americans with Disabilities Act plays a role in the legal landscape as to screening for COVID-19 for third parties. Sarah touched a little bit on this earlier with respect to screening employees. It's important to understand that the ADA, while it applies to certain employers, it also applies under a separate legal regime to businesses that are public accommodations. If you are a public accommodation, that's probably something you're aware of or you should be aware of already, because it impacts you outside of the COVID-19 space. But if you're not sure, it's important to consult your attorney and determine whether you are a public accommodation, because there is a conversation out there in the broader legal world about whether the ADA limits a business' ability if they're a public accommodation to screen for COVID-19.
- 34:30 Some of the issues that come up there is whether COVID-19 is a disability for purposes of the ADA in the public accommodations space. Looking at case law, interpreting past pandemics, there have been court decisions, for instance, that tuberculosis is a disability, whereas the swine flu is not a disability. And so, this is an open question of law. Additionally, what the ADA prohibits in some instances is imposing unnecessary eligibility criteria on people for access to a public accommodation that's based on their disability. And so, another open question here is whether a COVID-19 temperature check or symptom screen meets the requirements for being an eligibility criterion that may be prohibited under the ADA. And then finally, the ADA does create some latitude public accommodations to impose eligibility criteria when it's necessary to prevent a direct threat to people within the public accommodation, and there's case law that interprets what a direct threat means. Much of that case law suggests that an individualized assessment of the risk posed by a particular person is necessary. Some factors that might be considered in determining whether COVID-19 presents a direct threat to your business such that if you're a public accommodation, you can impose a screening requirement even on those who were affected by COVID-19 is the nature of your business first of all. The direct threat analysis may be different for a day spa than it is for a big box retailer where folks are subject to a mask requirement.
- 36:08 Another factor that you may want to consider is whether social distancing is possible. Whether or not someone who's been exposed to COVID-19 being present in your business may be different if social distancing is possible, like in a large spread out retail facility

versus a very small boutique store. Another factor is whether the business is indoors versus outdoors. The analysis here may be different for that small boutique than it would be for a large outdoor plant nursery center.

36:39 A final factor that may be worth considering is whether your business or your public accommodation tends to attract a higher-than-normal group of higher-risk individuals, such that the threat to other customers is heightened by the presence of someone who may have COVID-19. These are all questions to talk through with your risk management people and with your attorney.

37:02 If you believe you may be a public accommodation and you're considering implementing a third-party screening regime for COVID-19, the guiding principle here is this should be an assessment of actual risk under the circumstances. That's something that you should do with your professionals. So that's the big-picture legal side. And now I ask Dr. Buck to give us a more in-depth discussion of the clinical picture here.

Shealynn Buck, MD

37:27 Thank you, Brad. Testing is the #1 question category that our clinical and health risk team has been hearing from employers. And in fact, already got a question from an audience member on this presentation. We could probably spend an hour on the topic of testing alone, but through this table, I've tried to summarize some of the key considerations about the specific test categories. There are really four important takeaways for this audience that I'd like to cover.

38:04 The first is antibody testing, which is also known as serology testing. As Sarah indicated, this is not to be used for employee testing. It is not reliable for this purpose, and really the purpose of antibody testing is for public health research to study who may have been infected in the past with COVID-19. It is not yet known if someone who tests positive for COVID-19 antibodies is protected from future infection. I've been really sharing with our employers that you just don't even think about antibody testing as part of your testing consideration.

38:50 The next area is – that we've been hearing from employers – can they just test everyone, all of their employees. As Sarah stated, employee testing must be accurate and reliable. General testing of an employee population from a clinical public health perspective is not recommended except in specific industries like healthcare. The current tests that are on the market are not sensitive enough to be used outside of the context of diagnosis for an individual who's had a close-contact exposure or is symptomatic. The FDA is working on test validation parameters for general screening purposes, but the tests that meet these parameters are not yet ready for prime time.

39:50 The next key takeaway is for molecular testing. Molecular testing is the current gold standard for determining if someone has an active infection. And these tests, it's important to know, are typically sent out to a lab to perform the test. The results are provided typically in several days, up to a week. In fact, they're working on cases in Dallas, we're seeing turnaround time of eight days because of the volume of testing to the specific lab.

Molecular tests are the current go-to test identified by the CDC for employee return-to-work purposes. However, molecular tests, even though they're considered the gold standard among the tests that are currently available, they have limitations. As with all tests, it's important that the individual who receives the result has clinical guidance on what that result specifically means to them based on their history and also their health risk.

41:00 And then lastly, there's a new test category that has recently come to market, and this is the antigen test. It is sometimes referred to as a rapid test—although there are molecular tests that are also considered rapid tests. This test is performed right in the ER or urgent care, and it can even be performed in certain clinic settings, such as you would see with like a rapid flu test or a rapid strep test. So, similar to that kind of concept. The clinician is able to get the results in about 15 minutes. The downside to the antigen test is that there is a high false negative rate. So, if the result is negative, you can't really trust that that result is a true negative. Oftentimes, the clinician will have to do what we call reflex testing to do a send out test, molecular test, to a laboratory. A positive test, you can feel pretty good that that test is positive, that that person has an active infection, but it's the negative tests that are really raising concern. In fact, the antigen test is not to be considered for employee return-to-work purposes, just the molecular test. So those are some of the highlights around testing and some of the takeaways that, where we've heard some – a lot – of questions from employers.

42:43 Let's talk about this negative test consideration. I've had a lot of questions around, "Well, can I trust a negative test?" And this really depends. Let's take the most sensitive test method, which is a molecular test. In general, this test has what we call it an 80% sensitivity at best. What this means is that if you take five people, one in five of those who test negative are actually infected. So, this is where that person-specific information and variables come into play on determining if they are truly negative. This is why that clinical oversight can be so important. These variables include things like timing of exposure and whether the person is symptomatic or has been exposed to a high-probability situation, such as a close contact who is COVID-19 positive, or if that person has worked in a highly infectious setting like a nursing home. This chart here is from a study that just shows what we call the pre-test probability—how likely is it that someone's negative based upon the probability that they were in a high-exposure event situation, and also based on the days since they were exposed to COVID-19. Again, this is why the clinical oversight of the test result interpretation is so important for return-to-work purposes. It this is also why the CDC requires two negative molecular tests for a previously positive individual to return to work, because you can't just depend on that single test. So that's some insight into the question about negative test results. Now I want to switch gears to talk about some more details around process management.

44:55 As I stated in the reopening challenges overview slide, process management is an area where we're seeing employers that may have thought they had planned, but when the real-world situation occurs, they're finding themselves kind of behind the eight ball. These are some of the key questions that we think are important to ask yourself as you're thinking about managing this entire process, which goes beyond just symptoms,

screening, and testing. It's also important to assume that we're in a situation where it's not an if, but when scenario, so assume that you're going to have someone in your workplace who has a positive test or that an outbreak will occur.

- 45:46 Some of the key considerations are critical infrastructure versus noncritical infrastructure workers. What is the decision pathway and process there? Do you have internal resources who are going to be tasked with managing parts of the process? For example, an occupational health team that's going to help provide some case management and return-to-work support for a positive individual. Do you have a telemedicine provider who has COVID-19 clinical support as part of their scope of service, who will be doing the contact tracing? Because we're finding that the contact tracing process is really falling back on the employers. In some cases, if they don't have occupational health, that's falling back to HR, and HR is saying, "We don't know how to do this." Also, have you been entertaining vendors who may be able to fill in some of those gaps where you don't have internal resources to do that?
- 46:46 So there are four key areas that it's important to make sure you have the process outlined. That's the screening testing, contact tracing, and case management steps in that process, and it's also making sure that as you look at your planning, your process, that these steps in that are connected.
- 47:10 One of the things—this is an important takeaway for the group—is that the [Johns Hopkins University has a free six-hour course on contact tracing](#) that employers can designate someone within their organization to take or group of people take. We're seeing HR actually take this course because that six-hour free course can provide the framework and information on how to support a contact tracing event. I really encourage you, if you don't have a vendor who's doing that to find someone who has the knowledge and can provide some oversight for contact tracing.
- 47:55 Finally, again, the question is, as employers are looking at this process management, they're now saying, "Wow, are there vendors who can help us with this, that we can contract with?" And the answer to that is yes. We are seeing definitely an emerging group of vendors who are providing services around COVID-19 and especially around those four key resource areas that we talked about. And we're seeing a continuum of these vendors and their ability to customize to the employer-specific needs, customer support, also risk mitigation. There is a cost that's associated, obviously, with the more capabilities that you're expecting that vendor to provide. We are seeing that the cost as we start to deploy, even, you know, the least complex, the more complex, vendor capabilities is ranging around \$2 to \$10 per employee per month. Now some of these services can be contracted for individually, but again, still need to have someone who's looking at how that whole process is linked and managed.
- 49:16 So that just kind of gives the group some insight into what we're seeing from employers as they're operationalizing this and looking at some of the clinical contact tracing and other management aspects. So now I will hand it back over to Sarah to talk about some additional legal guidelines.

Sarah Mitchell Montgomery

- 49:40 Great. Thank you so much, Dr. Buck. We have been getting a number of questions from employers recently regarding best practices for notifying others when an employee is billed. I'm going to focus on that first.
- 49:59 It's critical that employers maintain the confidentiality of all medical information for all employees, whether they're sick with COVID or not. This would include the results of temperature screens, the responses to health questionnaires, and the results of COVID-19 tests. This information should only be seen or provided to those in the company who have a need-to-know.
- 50:23 If you do have an employee who tests positive for COVID-19, you should consider issuing a general notice that an employee tested positive for COVID-19, but that individuals who had close contact with the employee or shared a common workspace have already been notified. Is the general notice required? No, but it may help in reducing rumors and speculation about whether or not someone fell sick and whether that a person has been exposed or hasn't been exposed. So it's just a way of kind of mitigating those potential rumors. At a minimum, individuals who have been in close contact with the ill individual, which is within six feet for 15 minutes or more—that's close contact per the CDC—and those who share a common workspace with the ill individual should be notified. This is key to reducing the spread of the virus, both in the workplace as well as in the community. Employers are going to have to engage in basically a form of contact tracing to accomplish this, which means asking the ill individual where they went in the office and who they had close contact with. These inquiries are permissible, and they're really necessary. Throughout this process, employers should not reveal the identities of employees who have tested positive for COVID-19 or who've had COVID-19 symptoms. And even if employees figure out who the employee likely is, employers should not confirm whether or not they're correct. So that pretty much sums that up.
- 52:00 Brad, I've basically covered what employers need to do internally, and as far as what those best practices are, but what should employers and companies do when dealing with third parties?

Brad Nitschke

- 52:13 Thanks, Sarah. I think here, again, it's key to have a plan in place. If you're a public-facing business or if you frequently have vendors or contractors in your space, it's important to think ahead about how you'll respond if you're notified that a customer or one of those visitors has potentially been exposed to the coronavirus or has tested positive for COVID-19. Contact your attorney and your risk management professional to make a plan for that response in light of the available public health information in your area. This is really something that is going to look different for every organization that's out there.
- 52:56 With respect to notifying third parties that someone in your space, whether it's an employee or whether it's a customer or visitor has been exposed, some things to think about for a few general categories of third parties: If you're in a commercial real estate

space—say you're a property manager of an office building—and a tenant has been exposed, if you are interested in notifying other tenants of that exposure, some common factors we've seen some property managers disclosing to other tenants are:

- Number one, that an employee of a tenant in the building has been exposed
- The location within the building of that person's workplace. (An employee on the third floor, for instance.)
- The date of the suspected exposure to try to control for time.
- Then also the affected common areas. (If the person frequented the coffee shop in the lobby, or always used the North elevator bank—that may be relevant information.)
- And then what decontamination measures the building has taken to clean the affected areas.

And that's just something that I think some property managers have seen as helpful in controlling some of the anxiety around this issue.

54:18 Should you notify customers or visitors that you've had an employee who has tested positive, or you've been notified that someone who has since tested positive was in your store or in your business? Again, this is going to be an individualized decision. Some factors to consider may be whether, for instance, there was close contact. The answer to this question may look different for a big box store where everyone's wearing a mask under the governor's order and customers are able to socially distance appropriately—may be different for that business than for a hair salon who's had an employee that's tested positive. Similarly, you want to think about whether you can decontaminate per the CDC guidelines for community facilities, which are [available on the CDC's website](#), or other applicable public health guidelines for decontaminating your space. If that's something that you decide to do and you're able to do it, if you give notice that there was an exposure, including information about the decontamination process or just that it happened may be helpful to you in managing some of those third-party relationships.

55:26 Keep in mind that while there's not a general requirement right now that all businesses in Texas notify the public health authorities of an exposure, there are some specific requirements regarding notice. For instance, laboratories have to report positive results. With the pace at which public health orders have been changing in the state, this is something that could conceivably change. So, if you're facing an exposure, consider whether you're required to give notice to the public health authorities. And then finally, if the person who was exposed and who was in your space is someone who's there under a contract with a vendor. So, if your repairman, for instance, reports having a positive test, consider whether you may need to put an insurance carrier, either yours or the contractor's, on notice, and whether there's an indemnity agreement that you may need to trigger to cover the cost associated with decontamination and with any claims that arise from that third party being in your space.

56:24 With that, let's really try to apply these principles. We're coming up on the end of the hour. We'll extend this a little bit to allow us to go through some of the hypothetical scenarios

that try to pull all of these principles together, and then answer some of your questions. But again, we'll email out a link to everyone who registered with the slides and with the audio of the presentation. So, if you have a hard stop at 1, you'll still be able to get this information later today.

56:50 We prepared some hypothetical scenarios that demonstrate how the principles we've discussed might play out in a particular hypothetical fact pattern. These are hypothetical situations that are for discussion only. Any similarity to the facts of your case are purely coincidental, and these are not intended as, and you should not use them as, legal or medical advice. These are just our musings about how these issues might play out in a fictional scenario.

57:23 The first one we'll look at—Hypothetical #1 involves an employee who is reporting a confirmed positive test. Let's say on a Monday morning, a 64-year-old employee of an insurance company who had previously returned to work after this shelter-in-place order was lifted telephones the HR department from home and says that she developed a slight fever over the weekend and went to urgent care for a COVID-19 antigen test, and now has gotten her positive test result back. The employee works alone in a cubicle when she's in the office, and she tells HR that she has consistently complied with the office's mandatory mask policy and its social-distancing policies since returning to work. So, let's start with Dr. Buck. What does it mean that the employee has had a positive COVID-19 antigen test, and what should the employer do with that information?

Shealynn Buck, MD

58:17 Yeah, thanks, Brad. So, the antigen test as we talked about is, even though it's low sensitivity, it has pretty good specificity. In other words, if you get a positive test, you can assume that the individual has an active infection. This employee would need to, of course, stay at home and would need to quarantine per the CDC guidelines. The other important note is that this is an employee who works for an insurance company, so it's assumed that this is not a critical infrastructure worker and they can work remotely. The critical infrastructure worker positive testing protocol would not apply to this individual.

59:15 From a support perspective, it's also important to reinforce that they need to contact their healthcare provider. If the employer has a telemedicine service, this is a great opportunity to have the employee contact the telemedicine service so they can get that clinical support. As they are managed, they can help to manage them through that process based upon their specific history and their health risk.

59:48 But it is important to know from an employer perspective that this is when you need to deploy your contact tracing protocol, because obviously this employee has been in the office. Even though they've been in a cubicle, still want to do an investigation, having a conversation with that employee about where they were, the areas where they were. If they had contact, what would be deemed close contact with anyone, which is what Sarah had described is the less than six feet for more than 15 minutes, and that would be considered close contact if they've had contact with anyone meeting that definition. So, they want to walk through that contact tracing process. And then there's going to be a

notification aspect of that, which Sarah can certainly talk through.

- 1:00:45 One of the questions that's often raised with that close contact definition is, "Well, what if they were wearing a face covering or mask when they were interacting with that individual for more than 15 minutes, less than six feet apart?" The CDC says that that's inconsequential, that it doesn't matter if the individuals were wearing a mask. If that person is COVID-positive, deemed to be actively infected, that that interaction would still be considered a close contact interaction and an exposure event.
- 1:01:25 Then finally, one of the things that came out of this is that this individual got an antigen test, right? And so if you'll recall in the presentation, I said that the molecular tests, the antigen test is fine for determining and diagnosing that someone has COVID, but as it relates to return-to-work, the CDC states if an employer is going to use a test-based strategy for return-to-work, that that needs to be based on a molecular test and that the individual would need to have two negative molecular test results that are collected at least 24 hours apart in order to be released basically from isolation. There is option to use a time-based or symptom-based kind of strategy for a return-to-work, but in this case, I'm imagining that they're looking at the test-based strategy. So, the molecular test is what would need to be used for that purpose.
- 1:02:28 So those are some of the key clinical considerations, Brad. You or Sarah, kind of talk through some of the legal considerations on this case.

Brad Nitschke

- 1:02:47 Yeah. Thanks, Sarah. From a legal standpoint, what should our hypothetical employer do here?

Sarah Mitchell Montgomery

- 1:02:54 Absolutely. So, Dr. Buck really covered a number of the really critical steps that the employer should take as far as making sure that the employee stays home and self-isolates, and the contact tracing that the employer needs to perform. A couple of other points—If the employee is able to telework and healthy enough to telework, and is able to telework based on her job, then you should allow the employee to do that. Otherwise, you're going to need to place that employee essentially on a form of leave, and you want to ensure as the employer that this employee receives any paid sick leave, federal state, or local paid sick leave as it's required, or paid time off—if there's paid time off—that the employee is qualified for. So, you want to ensure that you're bidding by those requirements.
- 1:03:54 And then as far as those employees that did have the close contact with this ill employee, you want to notify them, you want to let them know that they've potentially been exposed, and then they need to self-isolate for 14 days. If they're self-isolating, that does not trigger a federal paid sick leave requirement on its own. If the employer simply sends the employee home and says you need to self-isolate for 14 days, and that there is no healthcare provider that also says they need to self-isolate, or they're not seeking a medical diagnosis during the time, the Emergency Paid Sick Leave Act doesn't actually come into play, which is kind of unusual and almost doesn't seem to make sense, but that's

the literal read of the law. It does not come into play. However, there are state and local paid sick leave laws that could be triggered by an employer sending an employee home to self-isolate. Again, if you have a policy of providing paid time off, you want to ensure that you're following your own policies. And then otherwise, as I mentioned earlier, employers may want to consider issuing a general notice regarding there being a positive test just to cross any general, just rumors that are going around, and reassuring employees that if they had been potentially exposed, they would have been contacted.

1:05:32 And of course, employers may want to consider if they need to do some sort of deep clean of the office, certain spaces in the office, and that's information that they can get from the employee as far as what areas in the office the employee entered. That may not be necessary, but it's something the employer should explore. So that kind of covers the points that Dr. Buck hasn't already touched on.

Brad Nitschke

1:05:58 Thank you both. Let's take a slight variation on Hypothetical #1. So, same: A 64-year-old employee of an insurance agency calls HR on Monday morning, but instead of reporting a positive antigen test, she reports that she went to her grandson's birthday party on Saturday afternoon, and Sunday morning woke up to the news that another family member who attended the party now has no sense of taste or smell. She feels fine, but she's asking HR what she should do. Dr. Buck, is there anything different about how this situation would play out with our hypothetical employer from a clinical standpoint?

Shealynn Buck, MD

1:06:40 Yeah, so this is an exposure event and what's particularly interesting about this event is that we would want to certainly confirm, but based on the scenario that the employee has outlined, we can feel pretty confident that she was in contact with the individual for more than 15 minutes and less than six feet apart—again, that's the definition of close contact. But what's also interesting about this is that we don't necessarily have a positive test yet for the individual that was contacted, but we do know that the symptoms are very specific for COVID-19, which is this loss of sense of taste or smell, and so that also would lend itself to a close contact, high-risk exposure event.

1:07:42 With that exposure event, what this employee would need to do, per the CDC, is to stay home for 14 days after the exposure and also follow the social distancing rules for that. This would include household contacts. What we're finding is that individuals are having to put themselves into a separate location in the house where they're using their own restroom and things like that. Also, they would need to monitor their symptoms.

1:08:23 The CDC provides a great [symptom checker that is freely available on the CDC website](#), and that can be really helpful. They would need to check their temperature twice a day and then watch for those symptoms if they arrive and go through that symptom checker. And then also it's really important for that individual to just avoid contact with anyone who may be in that high-risk category, which would be individuals with certain conditions like diabetes and who are an age of 65 and older. So, try to avoid contact there. Then if

symptoms do develop—and this again is where the clinical oversight comes into play—if symptoms do develop, then that's where they would go down the symptom pathway. So, that's the CDC pathway for that. And again, that's where the CDC symptom checker comes in handy.

1:09:34 Also, that's where we have found employers leaning on vendors, so contracting with vendors who provide that type of clinical oversight and support so they can case manage an exposure event. So those are just a few more things. Well, I do want to emphasize this, though, is I said they need to stay home for 14 days. So, let's say that that employee goes and gets an antigen test, right? And they say, "Well, it was negative. I want to come back." The CDC states that that 14 days is irrespective of a test result. So they would—this person, because they are not a critical infrastructure worker—would need to stay home and isolate for that 14 days.

Brad Nitschke

1:10:22 Thanks. Sarah, from an employment law standpoint, is there anything different about our suspected exposure versus our positive antigen test?

Sarah Mitchell Montgomery

1:10:35 Right. So, it's really—there's a lot of overlap. In this situation, we have an individual who has not, who did not have exposure it appears and then went into the office. So, the good thing is there's not a need here for contact tracing by the employer, or a need to do some sort of deep clean or sanitization of the office. So that's helpful.

1:11:03 What I mentioned before about—this individual may be eligible for paid sick leave for the time period. Under the Emergency Paid Sick Leave Act, they would be if they were during the time, I should say, that they're seeking a medical diagnosis if they do during that 14 days. Otherwise, unless there's a requirement under state or local paid sick leave laws, or if the employer has a very specific policy requiring paid time off in this type of situation, the employer doesn't necessarily have to pay the employee during this period of self-isolation.

1:11:43 I do want to add a little something to this: That is the literal interpretation of the law, but I will tell you that we and the EEOC and other agencies encourage employers to really try to be flexible and work with employees as it relates to paid leave. Because you do want to encourage your employees to report, to let you know if they've been exposed. So if they believe, or if they know that if they have to self-isolate, they will be able to either telework if it's available or they could get some paid time off, they are going to be much more likely to report that information. So just keep that in mind, I think, being flexible in your policies, and maybe changing your policies to be perhaps more generous during this challenging time. It might at the end—in the end of the day, it might be beneficial and keep your workforce healthier.

Brad Nitschke

1:12:48 Alright, thank you. So, in Hypothetical #3, the property manager of a building is notified by an office tenant on the sixth floor that an employee has tested positive for COVID-19, and

the tenant reports that the employee has been home sick and waiting on the results of his COVID test for the last week. On his last day at work, he parked in the surface parking lot, used a particular elevator bank a few times, bought coffee and lunch in separate businesses on the ground floor, and he's not sure, but he thinks he might have used the common men's restroom on the sixth floor on his way back to the office from lunch. What should the property manager or building owner do in our hypothetical situation? Dr. Buck, let's start with you again.

Shealynn Buck, MD

- 1:13:43 This is an interesting situation because, certainly, we have an exposure event, and so contact tracing is going to be key here. What I would suggest—So, now you have a property management group, and then you have the employer or the employers, the businesses that are there. This is that scenario about, you know, don't do the "we'll cross that bridge when we get to it."
- 1:14:18 I would map out this scenario in advance if you haven't already with the property manager and collaborate on that and what you're going to do from a contact tracing perspective, because this is where you start to get into some of the nuances. What we've found, too, is sometimes property managers have actually contracted with vendors that may have this capability—and they may not even know it, but they may have this capability. I think it's, again, mapping out this type of scenario and saying, "What will we do in this situation?" And the property managers say, "Oh, well, we've already contracted with someone." Or the employer has contracted with someone to do the contact tracing.
- 1:15:08 So, again, I would make sure that you've got all those lines and responsibility lined out, because this definitely is an exposure event and would definitely need contact tracing to determine what the risk is for the individuals who were in that building and could have potentially contacted this COVID-positive individual.

Brad Nitschke

- 1:15:42 Thanks. I'll echo that from a standpoint of the property manager or the landlord's potential tort liability to others, or potential exposure to liability to others. I think this is a situation where those who are responsible for facilities or managed facilities need to have a plan in place that they've developed with their attorneys and potentially with their insurance carrier to handle reports of exposures like this. There are legal benefits and legal risks associated with notice in this situation. It's really going to be a fact-specific discussion that ideally a business in this situation would have with its attorney and its risk management and insurance professionals before this happens. But if you haven't, that would be an early phone call that I would make.
- 1:16:39 Our last scenario here is a little bit different. We've got a manufacturing business that's a 3.1 critical industry manufacturer. Everybody's been at work, and they hire an outside vendor to replace an HVAC unit in the manufacturing facility. On day three of that work, the vendor reports that its crew lead on the job is out sick with 102° fever, a cough, and has lost his sense of taste and smell. The vendor thinks that the crew lead probably

complied with the manufacturer's social distancing and mask policies while he was on the job at the manufacturing site, but also knows that the employee is a friendly smoker who tends to congregate with other client employees when he's taking a smoke break out on a job site. So, Dr. Buck, what should this manufacturer do in our hypothetical situation when it learns of this, these symptoms from a contractor?

Shealynn Buck, MD

1:17:43 Beyond the considerations that we've outlined with the other scenarios—In my mind, what's different about this particular scenario is that it could present a super spreader event. It's not as well-contained as what was outlined in the other scenarios. What I find interesting in this situation, too, is that this is a vendor who's working on the HVAC unit. We know clinically that the COVID virus can actually be transmitted through the air. That's another wrinkle in this scenario that, as a clinician, raises concern. So, with that being said, this isn't just a simple contact tracing exercise.

1:18:44 If I were in this situation with this employer, I would say contact the health department ASAP, explain to them that this is a high-risk exposure event, potentially a super spreader event. And the health department with their epidemiology team would really need to get engaged and evaluate this event, because it goes beyond just the typical contact tracing scenario. So that's one of—those are some of the key clinical considerations that are somewhat different than the previous three scenarios.

Brad Nitschke

1:19:26 Thanks, Dr. Buck. Sarah, what should the manufacturing client do here in its role as an employer?

Sarah Mitchell Montgomery

1:19:36 A lot of the same basic steps. Of course, we have this potential super spreader event, so you very well may have a substantial part of your workforce that is going to have to be self-isolating. So that could be a real challenge and may open up some other issues that you may want to talk about, such as insurance concerns, et cetera. But generally speaking, you're kind of following the same thing. You're going to look at who was potentially exposed. I'm looking beyond the super spreader part of it. You certainly would want to know who this individual interacted with, what employees of yours were exposed to this employee, and then you would want those employees to self-isolate. You would certainly, of course, want to engage in cleaning in, of the areas this individual is in. But then of course, address the issues that Dr. Buck raised with the super spreader potential. So kind of the same as what we've covered, and, you know, just in a situation that is unusual or kind of bigger than the normal situations.

1:21:02 Definitely utilize legal counsel and experts in the area of dealing with COVID-19 spread. Don't just try to figure it out yourself. There are people out there who can help you and guide you, especially when you have these very unusual situations.

Brad Nitschke

- 1:21:24 Thanks, Sarah. I'll add from a standpoint of the manufacturer's relationship with its vendor here. This is certainly a situation where the manufacturer wants to pull the file and take a look at its hopefully well-drafted contract with this vendor and look at the indemnity provision, and determine whether it needs to put the vendor on notice that if we have to send most of the workforce home because your employee has exposed our workforce to this virus, we may have rights against you under the terms of our contract. I think another important phone call that the manufacturer can make here is to its insurance carrier, who may well come into play especially if there's a significant impact on the business here.
- 1:22:10 And a final point: I think this is a great reminder that as businesses are entering into contracts in the era of COVID-19 before a vaccine has been found, while things are still fairly disruptive, it's very important to review that otherwise boilerplate language at the end of the contract that nobody likes to read or pay attention to regarding indemnity and insurance and force majeure and termination provisions. This is the boilerplate language that we as lawyers and as business litigators are living in right now. So, if you're entering into agreements, it's more important now than maybe it ever has been in recent memory to really pay attention to that language and have an attorney who's experienced in this area guiding you.
- 1:22:55 So, with that—In our few minutes left, we're going to try to take some of the questions that we've received from you all in the audience.
- 1:23:34 The first question I want to deal with, because we received several questions about this, is the language I mentioned from the Dallas County order a little earlier regarding employers, abandoned employers, requiring doctor's notes before an employee returns to work. So, I just want to give you the language from the Dallas County order, because it's very specific. (And again, this would only apply to businesses within Dallas County. If you're not within Dallas County, this is not something that you should be concerned about.) In Dallas County, the order states that employers shall not implement any rules making a negative COVID-19 test or a note from a healthcare provider a requirement before a COVID-19-recovered employee can return to work. This provision does not apply to hospitals or healthcare workers following the CDC test-based strategy for return-to-work criteria for healthcare personnel with confirmed COVID-19. Some of the questions we received have to do with whether this is a rule or similar rules at the local level or rules that employers need to follow. My answer to that is this is in one of the Dallas County judge's orders that is still, by its terms, still in effect and still the law in Dallas County. My general advice would be that, to my own clients, would be to follow the law as it's written, unless and until the law has changed, or a court says that you don't have to follow it. We've seen some litigation about local orders that are alleged to go beyond what the governor's orders allow. We've seen litigation about the governor's orders in this area and whether they're permitted under the disaster statute. Those lawsuits are still pending, and we don't have courts that have finally resolved the question of who has authority to do what.
- 1:24:58 To answer this question—My suggestion would be to be in close contact with a lawyer who practices in this area that can help you navigate what sometimes seem to be inconsistent

or overlapping orders that create operational issues. Sarah, is there anything you want to want to add on that topic from an employment law standpoint?

Sarah Mitchell Montgomery

1:25:20 I agree with what you're saying, kind of, the approach and dealing with the Dallas order. Recently, some of these I've had questions relating to the order, and we do advise that you try to abide by the order. Focus on that symptom-based strategy for returning individuals who had COVID to work. I do want to note that the order says it applies to COVID-19-recovered individuals. So, it does not seem to impact employers' general ability to perform some sort of COVID-19 testing—which of course Dr. Buck addressed the challenges of doing that—but it isn't going to impact employer's ability to screen employees as they're coming into the office for COVID-19. I think that's important to remember. You still have that to fall back on. And then of course, you know, look at the symptom-based strategy for returning employees to work. It is one of the things that the CDC says that employers can use, and it's one of the recommended ways that you can return employees to work safely—to just fall back on that while we're kind of waiting to see what's going to happen with this order from Judge Clay Jenkins.

Brad Nitschke

1:26:52 Alright. Thanks, Sarah. Sarah, another question for you submitted by a viewer for an employee who's working remotely. How do we handle performance-related issues such as termination?

Sarah Mitchell Montgomery

1:27:05 That's a great question. You really want to handle those—You're going to handle it very much the same. You still want to do your documentation. You want to provide the necessary warnings. You really need to focus on trying to treat them as if they are in the office. You don't want to ignore performance issues and let those go by. As far as if you do need to communicate to them, I think if you are trying to avoid having individuals in the office for a safety reason, I don't think that you should require those employees to come into the office necessarily to let them know about a write up or even a termination. You should make every effort though to have a communication with them, probably telephonic or perhaps better, a Zoom—kind of face-to-face Zoom communication. But I don't think you necessarily have to alter your efforts to keep employees out of the workplace if you do have to engage in a form of discipline or even termination.

Brad Nitschke

1:28:17 Alright, thank you. That's all the time unfortunately for questions that we have here. We've got some others that have been submitted in the system that we'll attempt to follow up on as well. Feel free to reach out to any of the presenters on the webinar.

1:28:29 If you have further questions, another resource for you is Jackson Walker's dedicated coronavirus resource page, which has an FAQ section divided up by topic and then a separate section containing more detailed articles on topics relevant to coronavirus in the

current business environment that are also separated by topic. The address for that site is [JW.com/Coronavirus](https://www.jw.com/coronavirus).

1:28:52 Thanks very much for logging in today. Later this afternoon, again, we'll email you all with links to the webinar presentation, as well as links to claim your continuing education and a link to opt in to Jackson Walker's coronavirus newsletter and the alerts. Thanks again. Be safe and be well.