

# Bringing Employees Back: Problems, Issues, and the Return to Work

Robert Noonan & Associates  
May 12, 2020

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## Robert Noonan & Associates Legal Services

- Advising and Representing Employers
  - Discrimination Litigation
  - Sexual Harassment Investigation and Litigation
  - Employee Benefit Litigation
  - Unemployment Compensation Appeals
- Legal Document Development
  - Separation Agreements
  - Employee Benefits
  - Employee Handbooks
- Training Services
  - Sexual Harassment Prevention
  - Employment Law for Supervisors
  - HIPAA

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## Offices

- Meriden and Middlefield  
– 860-349-7010
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### The Return to Work Problems on the Horizon

- Nurses and retail workers are suing their bosses for allegedly subjecting them to unsafe conditions during the coronavirus outbreak.
- Employees do not want to return to work because of fear or unemployment compensation or both.
- College students are demanding tuition money and consumers want their cash back from concert ticket vendors, gyms and airlines.
- Businesses allege insurance companies are trying to sidestep their coverage obligations and some people say they're being deprived of stimulus checks.

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### Generally Employers Must Consider

- Preparing Your Office or Facility
- Preparing for Workforce's Return
- Controlling Access and Congregations
- Reducing Touchpoint Contamination
- Preparing Documents
  - RTW Documentation and Employee's Response
  - Employee Attestation of Fit to Return
  - Instructions for At-Work

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### The Building or Office

- Establish cleaning schedules and practices;
- Establish access rules for customers, vendors and suppliers
- Have COVID PPE supplies for general hygiene health checks, temperature taking; gloves, masks, hand sanitizer, disinfectant wipes;
- Restrooms-have soap, water, paper towels-schedule cleaning;
  - Put hand sanitizer at entrances.
- Set up barriers for social distancing.
- Consider HVAC issues with warmer weather approaching. (fans and fan direction, AC, open doors and windows etc.)

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### Prepare for the Workforce

- Workstation COVID PPE supplies;
- Rules on masks for employees and outsiders (e.g. as for safety glasses);
- Rules on meetings-consider virtual meetings even though inside;
- Consider closed office doors and elimination of drop-ins;
- Consider business related travel;
- Decide on staggered start times, break times, departure times;
- Decide on common area protocols such as break rooms, restrooms;
- Decide on workstation cleaning responsibility;
- Decide on common touch points: doorknobs, faucets, coffee machines, refrigerators etc.

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### Prepare for the Workforce

- Have "What-to-Do if You Get Sick Before or After Work" instruction;
- "What-to-Do if You Get Sick At Work" instruction;
- Post signs on hand washing, hand sanitizers, social distancing.
- Require daily self-health checklist;
- Require a clean workstation before you leave.

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### Return to Work: Laws/Regs at Issue

- CT Executive Orders/Reopening Guidelines
- EEOC
- Unemployment Comp
- OSHA
- PPP
- WARN
- FFCRA
- COBRA

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Connecticut Opens

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Staged Reopening Overview

- Connecticut businesses to reopen in 4 stages.
- Certain businesses to reopen on May 20<sup>th</sup> if they meet guidelines prior to May 20<sup>th</sup>.
- Phase 1 businesses eligible to open May 20<sup>th</sup>:
  - Restaurants;
  - Offices;
  - Hair salons and barbershops;
  - Retail stores;
  - Outdoor museums and zoos
- Other phases have not been announced.

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Connecticut Sector Rules

- On May 9<sup>th</sup>, the State of Connecticut published “sector rules” that govern the “soft reopening” of the State that will commence on May 20<sup>th</sup>.
- These rules do not mandate that any business reopen; but they must be followed by those that opt to do so. Separate sets of rules were established for the following business sectors:
  - Offices
  - Restaurants
  - Retail & Malls
  - Hair Salons & Barbershops
  - Museums and Zoos

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### All Sectors

- Each set of sector rules contains a set of general safeguards and guidelines including the following:
  - Capacity limit of 50% for businesses that reopen.
  - Strict cleaning and disinfection protocols in all settings.
  - Those who can work from home should continue to do so.
  - Those in high-risk groups and over the age of 65 should continue to stay home.
  - Facemasks should continue to be worn in public at all times.
  - Social gatherings will be restricted to a maximum of 5 people.

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### Sector Rules-General and Specific

- In addition to the general rules, each set of sector rules contains specific directives. For example, the "offices"\* sector rules require that employees maintain social distancing and wear masks at all times except when in private offices.

\*Today's focus

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### Self-Certification Prior to Opening Required

- Businesses planning to reopen required to self-certify they meet guidelines prior to opening May 20th.
- If unable to meet guidelines by May 20, must delay opening until able to.
- Certification system to be online.
- Link to certification system to be posted at: <https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Sector-Rules-for-May-20-Reopen>.

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Connecticut Department of Economic and Community Development Website (5/12/20)

- Please note all businesses subject to these guidelines are required to self-certify prior to opening May 20th. The certification system will be online this week, and a link will be added to this page at that time.

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A Note of Caution-Employee Reporting

- “We urge employees to stay vigilant and pay attention as to whether their offices are faithfully implementing these rules.”-*Reopening Guidelines*.

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Guidelines: Offices

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Offices: Reopening Processes

- 1. Encourage work from home where possible.
- 2. Share reopening guideline rules with employees. Inform of specific measures being taken.
- 3. Appoint a program administrator accountable for implementing rules.
- 4. Stagger start/stop and break times across employees.
- 5. Maintain a log of employees on premises.
- 6. Limit outsiders on site. Shipping/delivery must be completed in designated areas.

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Offices: Reopening Processes

- 7. Train employees and ensure employee participation in program prior to reopening.
  - a) Must include:
    - Rules contained in reopening guidelines.
    - Protocols on how to clean and use cleaning products safely.
  - b) If any on-site duties subcontracted, employer is responsible for ensuring subcontractors are trained.
  - c) Training must be provided during working hours and presented in language and literacy level of employees.
  - d) Must conduct weekly refreshers on policies.

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Offices: Reopening Processes

- 8. Estimate required PPE for employees and begin procuring.
- 9. Develop cleaning checklists that incorporate the rules. Designate employee responsible for implementing.
- 10. Complete thorough cleaning of facility prior to reopening. Includes:
  - Entrances/lobbies, bathrooms, kitchens, hallways, elevators, door handles/doorknobs, shared equipment, desks, chairs, computers, monitors.
- 11. Complete self-certification on DECD website.

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### Offices: Physical Space Setup

1. Post signage that reinforces:
  - Social distancing protocols
  - Cleaning and disinfectant protocols
  - Personal protection protocols (masks/gloves)
  - Employee shall stay home if sick/symptomatic.
2. Increase ventilation rates and percentage of outdoor air that circulates into system where possible.
3. Install visual markers to encourage employees to remain 6 feet apart.

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### Offices: Physical Space Setup

4. Ensure employees do not share equipment. If shared clean after each use.
5. Rearrange desks 6 feet apart and position desks so employees can avoid sitting opposite each other. Use partitions where distance cannot be maintained.
6. Close/remove amenities non-essential to businesses main function (e.g. coat rooms).
7. Install touchless appliances where possible.

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### Offices: Physical Space Setup

8. Encourage social distances on elevators by:
  - Using visual markers where employees line up for elevator.
  - Post markers that establish where to stand.
  - Encourage use of stairs.
  - Use elevators attendants to manage flow and discourage overcrowding.
9. Post clear signage that includes the state hotline (211) for employees and customers to report potential violations of the rules.

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Offices: Personal Protection

1. All employees are required to wear a mask or cloth covering that covers nose and mouth unless contrary to health.
2. Employees working alone or in segregated settings (cubicles) can remove mask but need to put it on whenever they leave that setting.
3. Employees may use their own coverings, or one provided by employer.
4. Gloves and eye protection required when using cleaning chemicals.
5. Employers are responsible for providing personal protection to employees. If they do not have adequate protection, they cannot open.
6. Customers/visitors must wear masks unless contrary to health. If they don't have one, they must be provided one or not allowed to enter.

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Offices: Cleaning and Disinfecting

7. Hand sanitizer must be available at entrance points and common areas where possible.
8. Cleaning/disinfecting products and/or disposable wipes must be available near commonly used surface where possible:
  - Desks, chairs, bathrooms, elevators, coffee machines, shared equipment.
9. Ensure employees wash their hands routinely with soap and water for 20 seconds.
10. Clean and disinfect bathrooms frequently. Implement a cleaning log. Must clean multiple times a day. Hourly during busy times.

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11. Business must follow federal guidelines (CDC/EPA) on what cleaning products should be used and how.
  - Use products that meet EPA's criteria for use against SARS-COVID and that are appropriate for the surface.
  - Allow disinfectant to sit for on surface for necessary contact time prior to wiping down, as recommended by manufacture.
  - Train staff on proper cleaning procedures.
  - Clean high contact surfaces daily and more frequently if used more often.

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### Offices: Health Guidance for Employees

1. Ask employees resuming on-site work to confirm they have not experienced COVID-19 CDC-defined symptoms and to monitor their own symptoms.
  - Symptoms include cough and shortness of breath. Also include any two of the following symptoms:
    - Fever
    - Chills
    - Shaking with chills
    - Muscle pain
    - Headache
    - Sore throat
    - New loss of taste or smell

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### Offices: Health Guidance for Employees

2. Employees should stay home if sick.
3. Employees must inform employers and follow state testing and contact tracing protocols in the event of positive COVID-19 case.
4. Employers may not retaliate against workers for raising concerns about COVID-related health and safety conditions.
5. Employers must adhere to federal guidance on paid leave and provide the guidance to employees. Employers must post FFCRA poster.

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### Guidelines: Variations by Industry

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### Restaurants

- Only outdoor areas can open. Indoor areas and bars remain closed.
- No reusable menus; either paper or written on chalkboard or whiteboard.
- Contactless payment encouraged.
- Tables six feet apart.
- Rolled or packaged silverware.
- Single use packages or containers for condiments.
- Arrange kitchen workstations so workers are 6 ft apart and don't face each other where possible.

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- Eliminate buffet self-serve stations.
- Close or remove non-essential amenities (e.g. dance floors, pool tables, playgrounds)
- Servers shall serve specific zones in the restaurant to minimize overlap, where possible.

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### Retail

- Stores shall consider having designated hours for vulnerable populations.
- Fitting rooms must be closed.
- Contactless payment encouraged.
- Where possible, segment the workplace into discrete zones, prevent movement between zones and close spaces where employees congregate.

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### Hair Salons and Barbershops

- No waiting areas.
- Disinfect tools between customers.
- Blow drying not permitted. (\*As of Mon. 05/11-Rules will now be updated to permit blow-drying.)
- Launder linens and capes with aggressive detergents.
- Disinfect shampoo bowls between customers. Allow disinfectant to soak in bowl for 10 minutes between customers.
- Clean and disinfect workstations and tools between customers.

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### Zoos and Outdoor Museums

- Outdoor only. Interactive or indoor exhibits closed.
- Close all gift shops and food places. Outdoor food counters/snack bars permitted in accordance with restaurant rules.
- No guided group tours.
- Post floor markings to direct visitors in a one-way flow where possible.

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### Bringing Employees Back

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### Who Am I Not Recalling?

- Caution: Even with the best of intentions, an employer may make a decision which is deemed to be discriminatory.
  - In union settings, most "Recall" contract clauses are based on seniority;
  - In non-union settings the employer has more discretion, but can face claims of discrimination based on age, disability, race, religion, workers' compensation status, pregnancy, use of FMLA in the past, etc.
- Consider the standards you will use for recall.
  - Essential v. Non-Essential Jobs;
  - Volume of Work Available;
  - Documented Sub-standard Performance;
  - Length of Service.

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### Not Calling Back Because of Increased Risk

- Example: "We won't call employees who are over age 60 and anyone else who has had a medical problem that puts him or her in a high-risk category."
- This is a prima facie example of what may be age or disability discrimination unless the employee would pose a direct threat within the meaning of the ADA.

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### EEOC: Direct Threat

- A finding of "direct threat" must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence, such as objective information from the CDC or state or local health authorities.
- The finding must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, after considering, among other things, the imminence of the risk; the severity of the harm; and the availability of reasonable accommodations to reduce the risk.
- Before concluding that an individual poses a direct threat, the employer must determine whether a reasonable accommodation could reduce the risk below the direct threat level.

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CDC Guidance

- Invite high risk employees to self-identify and allow them to decline return w/o termination.

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Return to Work Issues: Unemployment

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The Return to Work Offer

- **C.G.S. § 31-236(a)(1)**- "an individual will be disqualified from receiving benefits if he or she has failed without sufficient cause to accept suitable employment offered by an employer."

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### Test for Disqualification

- **Four-step process for determining whether a claimant is disqualified from receiving benefits due to a refusal of suitable work:**
  - (1) must have been a bona fide offer of
  - (2) work reasonably fitted and suitable to the individual with
  - (3) wages, hours, and other conditions not substantially less favorable to the individual than similar work in the locality, and
  - (4) the individual must not have demonstrated good cause for the refusal.

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### “Bona Fide Offer”

- Job referral or offer must be for available work, which means a job actually open to a qualified applicant on the date of the job referral or offer, or for a job available in the near future.
- Telephone logs or other business records shall be admissible as evidence of a bona fide offer of work.

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- The offer must be for a specific job, the work offered must be available at or near the time of the offer, and the offer must be conveyed to the claimant. Tisdale v. Medical Personnel Pool, Board Case No. 255-BR-90 (8/14/90).
- The employer must also convey the offer with sufficient specificity for the claimant to make an informed decision about its suitability. Id; See Baz v. Plasmid Inc., Board Case No. 538-BR-88 (8/5/88).

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### Prove Employee Received Offer

- Before a claimant may be disqualified for refusing work, the employer must convey and the claimant must receive a *bona fide* offer of a specific job available at or near the time of the offer.
- An exception to the general rule may exist when a claimant negates any chance of employment by manifesting an overt disinterest in the employment, effectively precluding the employer from making a specific offer. See *Tisdale v. Medical Personnel Pool*, Board Case No. 255-BR-89 (8/14/90); *Geswell v. Emmett Oil Co., Inc.*, Board Case No. 1220-85-BR (3/6/86).

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### The Offer

- Specifics as to date, time, place, pay, location.
- Establish that the employee received the offer:
  - "Sent by USPS with Return Receipt"
  - "Sent by e-mail to \_\_\_\_\_ with electronic delivered and received receipts."
- Reply doctrine-A reply to a document can evidence the receipt of the document:
  - "Please advise me that you have received this Return to Work e-mail."
  - "Do you have any questions concerning the Return to Work Notice?"

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### The Offer

- Please note that we:
  - Are conforming to the Safeguards and Guidelines for controls for business operations for the \_\_\_\_\_ sector which include:
  - List What You Are Doing to on Workplace Safety.

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### Also Include:

- If you feel sick, or have COVID symptoms before work, DO NOT REPORT TO WORK. Call us.
- If you feel sick, or have COVID symptoms at work, report to your supervisor and go home.
- Face coverings are required to help prevent the spread of COVID-19.
- Maintain a minimum six-foot distance from one another.
- Cover your sneeze or cough with a tissue or your elbow.
- Do not shake hands or engage in any unnecessary physical contact. Frequently wash hands for at least 20 seconds with soap and water or use hand sanitizer
- Staggered start times and break times;
- Visitors by appointments only.

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### Include

- "Please note that under some circumstances an employee may be disqualified from unemployment compensation for the refusal of suitable employment."
- "You will remain an employee-at-will which means that either you or we may terminate employee with or without notice or reason."
- "All pay rates, benefits and terms of employment are subject to change at the employer's discretion."

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### The Employee's Response

- Critical to get the employee's response, particularly if the employee refuses.
- It can present problems for the employee's unemployment compensation;
- It can also present problems for the employer in the form of OSHA claims, NLRB claims, and EEOC/CCHRO claims at the very least.

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### The Employee Problem Responses

- "I'm afraid to come because of my underlying health condition."
- "I'm afraid to come in because of I don't want to infect my family."
- "Everyone in the department is afraid to come back because we heard that a lot of people have tested positive."

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### I'm Not Coming Back-Unemployment Comp.

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### The Return to Work Offer

- **C.G.S. § 31-236(a)(1)**- "an individual will be disqualified from receiving benefits if he or she has failed without sufficient cause to accept suitable employment offered by an employer."

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“Suitable Work”

- **Sec. 31-236-1(c)(1)**
- In determining whether or not any work is suitable for an individual, the Administrator shall consider the degree of risk to the individual's health, safety and morals, the individual's physical and mental fitness and prior training and experience, the individual's skills, the individual's previous wage level and the individual's length of unemployment.

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Degree of Risk

- **Sec. 31-236-5**
- In determining the degree of risk, the Administrator may consider the individual's state of health, his physical capabilities, the physical and mental requirements of the job, working conditions and the existence of any medical documentation concerning the individual's limitations.
- Where an unreasonable risk to the individual's health is established, the Administrator shall find the work to be unsuitable for the individual.
  - Following state and federal guidelines will make it difficult for the claimant to claim unreasonable risk.

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Burden on Employee: Alternatives to Leaving

- A claimant is required to explore reasonable alternatives to leaving the job by expressing his or her dissatisfaction with the working conditions to the employer and seeking a remedy through reasonably available means
  - *Sinnamon v. Mental Health Commission, Board Case No. 562-BR-88 (11/10/88).*

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### Burden on Employer: Alternatives to Leaving

- **Burden then shifts to the employer to suggest alternatives to leaving.**
  - *Sinnamon v. Mental Health Commission*, Board Case No. 562-BR-88 (11/10/88).

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### CT/ UC on Disqualifying Employee from Unemployment

- An employer may protest the Notice of Potential Liability that you will receive from DOL and return it to the Merit Rating Unit,
- Or send in notification on company letterhead with pertinent information, such as claimant name, Social Security Number, date of refusal, date work supposed to start, with your contact information, including fax number, to the Merit Rating Unit at 860-263-6723.
- The matter will be then be scheduled for a fact finding to determine whether the claimant refused work without sufficient cause.
- If the employee believes, however, that returning to work poses a health risk, the Department may find that the work is not suitable employment under the law and claimant would not be denied benefits.

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### Employer Responses to "I'm Afraid to Return"

- Place employee on a leave of absence for a fixed period.
  - Do not make open-ended period of leave.
- Terminate the employee.

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### Termination and Refusal

- Connecticut unemployment compensation law:
  - Prove you made the offer;
  - The offer was definite (i.e. "bona fide")
  - Prove the work was suitable.
  - The employee refused it.

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### Develop a Returning Employee Document

- Document :
- By entering into our work location, you agree that:
  1. YOU do NOT currently have any of the following symptoms: — Coughing, sneezing — Fever — Shortness of breath, difficulty breathing — Early symptoms of acute respiratory illness such as chills, body aches, sore throat, headache, diarrhea, nausea/vomiting, runny nose, muscle pain — New loss of taste or smell (if symptoms are believed to be allergy-related, you may come to work); AND
  2. YOU have NOT had close contact (within 6 feet/2 meters for more than 15 minutes) with anyone who is either confirmed or suspected of having COVID-19, in the last 14 days, including anyone who is experiencing or displaying any of the known symptoms of COVID-19 (which are listed above); AND
  3. YOU have NOT tested positive or have been tested and are awaiting the results for COVID-19 in the last 14 days. If you cannot agree that all of the above statements are true, you may NOT enter. We appreciate your caring for others and support of a safe and healthy work environment.

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### We're Afraid to Come In

- President Donald Trump signed a five-page executive order invoking the Defense Production Act to keep meatpacking plants run by companies such as Tyson Foods, Hormel Smithfield Foods, Inc., and others open in the face of the COVID-19 coronavirus pandemic.
- The order designates the food processing facilities and slaughterhouses as critical infrastructure that must remain operational, while augmenting liability protection for the companies involved.
- Unions object: Will raise issues on OSHA and NLRA.

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Return to Work: OSHA

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Occupational Safety and Health Administration (OSHA)

- Has so far played a low-profile role in the coronavirus crisis.
- Last week, guidelines for “Opening Up America Again,” listed “Protect the health and safety of workers in critical industries” as a core responsibility of the states.

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OSHA 11 (c)

- Section 11(c) of the Occupational Safety and Health Act of 1970 29 USC 660(c), prohibits employers from retaliating against workers for raising concerns about safety and health conditions.
- Additionally, OSHA’s Whistleblower Protection Program enforces the provisions of more than 20 industry-specific federal laws protecting employees from retaliation for raising or reporting concerns about hazards or violations of various airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, securities, and tax laws.

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### OSHA 11 (c)

- No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or causes to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise of such employee on behalf of himself or others of any right afforded by this chapter.
- Cases are under OSHA's Whistleblowing Unit.
- 180 Day Statute of Limitations.
- 1/3 of the cases proceed after filing.
- Average damages per case: \$7,877. (2015-2016) Northeastern University Study

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### Generally Employees Are Not to Refuse to Work without Risk of Termination

- Employees can refuse to work if they reasonably believe they are in imminent danger.
- They must have a reasonable belief that there is a threat of death or serious physical harm likely to occur immediately or within a short period for this protection to apply.
  - The employee has a specific fear of infection that is based on fact—not just a generalized fear of contracting COVID-19 infection in the workplace.
  - The employer cannot address the employee's specific fear in a manner designed to ensure a safe working environment.

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### National Labor Relations Act

- Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.
- The National Labor Relations Board is an independent federal agency that protects employees, employers, and unions from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions.

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- Section 7 of the NLRA protects employees who engage in protected concerted activity (PCA), whether or not they are represented by a union.
- Specifically, the NLRA protects an employee from retaliation for engaging in "concerted activity" that is taken for "mutual aid or protection."
- Conduct is concerted under the NLRA if it is engaged in "with or on the authority of other employees" (i.e. two or more) and "not solely by and on behalf of the employee themselves," "where individual employees seek to initiate or to induce or to prepare for group action," or when "individual employees bring truly group complaints to the attention of management."
- Concerns expressed by an individual employee "which are the logical outgrowth of concerns expressed by a group" may also be concerted.

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### CWA Guidance

- "When your safety -- and that of your co-workers -- is on the line, you should make sure you have the best available information about workplace safety."
  - Centers for Disease Control (CDC) Interim Recommendations for Employers
  - Occupational Safety and Health Administration (OSHA) Guidance on Preparing Workplaces for COVID-19
  - AFL-CIO COVID-19 Resources for workers
  - AFL-CIO COVID Flyer

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### CWA Guidance

- Employees can use this information to demand safe working conditions through protected concerted activity.
- Workers can demand comprehensive workplace plans to identify potential exposure routes, controls to mitigate risk (such as disinfection and physical distancing) and training procedures. You can use concerted activity to demand policies to encourage sick workers to stay at home without the loss of pay, benefits, seniority or other benefits. Workers can demand paid, flexible leave and job security assurances.

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**Return to Work: Workers' Compensation**

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**Workers' Compensation**

**Q: My employee alleges that they contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?**

- It depends. If the employee is a health care worker or first responder, the answer is likely yes. For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact-specific.

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**Workers' Comp continued...**

- Under state law to determine if it is an "occupational disease," an employee must generally show two things:
  - the illness or disease must be "occupational," meaning that it arose out of and was in the course of employment; and
  - the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.
- The general test in determining whether an injury "arises out of and in the course of employment" is whether the employee was involved in some activity where they were benefitting the employer and was exposed to the virus.

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### Workers' Compensation

- **Q: What are the likely benefits an employee will be eligible to receive if their coronavirus infection is found to be a compensable workers' compensation claim?**
- Except in rare situations, employee diagnosed with the virus will have no significant long-term health care problems.
- Medical costs associated with the claim likely to be limited physician visits and anti-viral medications. More significant cases may involve hospital stays of two to three weeks.
- Compensation costs should also be limited to lost time associated with any recovery time. May also be associated with lost time due to quarantine as required by the employer or local, state, or federal government agencies.
- There could be more significant costs in extreme and rare situations involving complications from the virus.

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### Return to Work: EEOC

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### EEO Reporting Delayed

- 2019 EEO-1 reporting delayed until March, 2021 (originally due March 31, 2020).

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### Americans with Disabilities Act (ADA)

- Engage in an “interactive process” to try and provide reasonable accommodations for all employees with a disability who request one.
- “Physical or mental impairment that substantially limits one or more major life activities.”
- Many of the conditions that put an individual at a higher risk of contracting COVID-19, including diabetes, heart disease, lung disease, and immunodeficiency are almost always ‘disabilities’ under the law.

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### Reasonable Accommodation Requests

**Q: What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self?**

**A:** May include

- Additional or enhanced protective gowns, masks, gloves.
- Additional or enhanced protective measures (e.g. erecting a barrier between an employee with a disability and coworkers/the public).
- Increasing the space between an employee with a disability and others.
- Temporary modification of work schedules (if it decreases contact with coworkers and/or the public when on duty or commuting).
- Moving the location of where employee performs work (e.g., moving person to end of a production line rather than in the middle).

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### Reasonable Accommodation Requests

**Q: An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests?**

**A:** An employer may require employees to wear protective gear and observe infection control practices.

Where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer’s business under the ADA or Title VII.

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### Employees at higher risk for severe illness

**Q: An employee has a condition that puts them at higher risk for COVID-19 complications but hasn't requested an accommodation. I'm concerned his health will be jeopardized upon returning to the workplace. How does the ADA apply to this situation?**

ADA does not mandate that the employer take action absent a request.

Does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at “higher risk for severe illness” if he gets COVID-19. Not allowed unless employee’s disability poses a “direct threat” to his health that cannot be eliminated or reduced by reasonable accommodation.

Direct threat requirement is a high standard. Still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship)

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### Return to Work: FFCRA

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### Summary

- In effect until December 31, 2020.
- Two provisions:
  - Emergency Paid Sick Leave
  - Emergency Family and Medical Leave

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Return to Work: COBRA

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Updated COBRA Notices

- May 1, 2020: DOL released first updates to its model COBRA Notices since 2014:
  - \* Model General Notice
  - \* Model Election Notice
- Updated to advise that workers who are eligible for COBRA continuation coverage may choose to purchase insurance from public health exchange through ACA.
- Not a requirement to use updated model notices. Plans that do are presumed to meet COBRA notice requirements.

• Model general notice available at: <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/cobra/model-general-notice.docx>  
 • Model election notice available at: <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/cobra/model-election-notice.docx>

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Return to Work: WARN ACT

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### The WARN ACT:

- The Worker Adjustment and Retraining Notification (WARN) Act requires employers to provide workers with 60 days advance notice (or pay in lieu of) of plant closings and mass layoffs.

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### Covered Employers

- Employers with 100 or more employees, counting only employees who have worked for more than 6 months in a 12-month period and work, on average, more than 20 hours per week;
- Employers with 100 or more employees who, in the aggregate, work at least 4,000 hours per week, not including overtime

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### Employment Loss

- An employer announces a temporary layoff of 50 employees and 1/3 of the workforce and extends the layoff for longer than six months;
- An employer lays off at least 500 employees during 30-day period at one site, OR
- An employer reduces the hours of work for at least 50 employees by 50 percent or more for each month in any 6-month period, OR
- An employer closes a facility or discontinues operating a unit affecting at least 50 employees, not counting part-time workers, at a single site of employment (plant closing.)

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The RTW Offer

- Documents a layoff of less than 6 months.
- It will disqualify an employer from WARN obligations to notify or pay.

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SBA 7 (a) Loans-PPP

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May 6<sup>th</sup> SBA: PPP on RTW

- *Question: Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?*

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### PPP Continued...

- *Answer: No. SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.*

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### Next Steps

- We'll send you the Connecticut Guidelines-read them.
- Get the physical operation in place;
- Appoint a coordinator;
- Get the internal procedures in place-masks, meetings, bathrooms, breakrooms, work schedules;
- Develop an offer of employment document that spells out the details for unemployment compensation's offer of suitable employment and outlines your conformance on health and safety including employee responsibility.
- Develop a RTW statement whereby the employee attests to being asymptomatic and knows the procedures for contact off the job and on.
- Prepare against claims of discrimination, OSHA, NLRB, WARN and PPP.

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