

NJSBA

PANDEMIC TASK FORCE

Legal Liability Considerations



NJSBA: HERE FOR

YOU

The below recommendations are guidance about the legal liability considerations that must be taken when reopening a law firm. Of utmost concern is to be vigilant about knowing and reviewing the latest Center for Disease Control (CDC) and state and federal government responses, including Executive Orders, which are critical to compliance, avoidance of harm and liability mitigation.

BACKDROP

- **CDC Requirements**—Know these. They will dictate the minimum standards that must be followed and regularly monitor those. Examples are six-foot social distancing, mask wearing and hand sanitizing.
- **Executive Orders**—Know these. Here is a full list. They will dictate the minimum standards that must be followed. It is important to regularly monitor all Executive Orders. Examples include identification of what are essential businesses and requirements for permitted openings and status of stay at home orders.
- **Occupational Health and Safety Administration (OSHA)**—An employer is not responsible where the employer’s actions are reasonable. In the context of COVID-19, what is unreasonable as not yet been determined. Following CDC guidance and Executive Orders should establish that the employer acted in a reasonable fashion.
- **Workers’ Compensation Insurance**—Employers are immune from employee suits for negligent conduct (defined as unintended harm under common law), but not gross negligence and/or willful wanton conduct. An employer is also not immune from third party suits or indemnification claims. Employers also must keep in mind the “Going and Coming Rule,” and what constitutes the scope of employment.
 - Going and coming—Employment begins “when an employee arrives at the employer’s place of employment to report for work and shall terminate when the employee leaves the employer’s place of employment, excluding areas not under the control of the employer.” N.J.S.A. 34:15-36. See also, *Hersh v. Cty. of Morris*, 217 N.J. 236, 244, (2014)
 - Intentional Conduct—An employer may be liable even though the employer did not directly intend to harm the employee if (1) based on the circumstances, there was a substantial certainty that injury would occur; and (2) the circumstances resulting in the injury cannot be standard industry practice. *Laidlow v. Hariton Machinery Co. Inc.*, 170 N.J. 602 (2002.)

- **Common Law Liability**—Employers should consider business invitee, licensee and trespasser status to determine their duty of reasonableness to third parties. Consideration as to whether COVID-19 contamination is a premises defect should also be made. Also, consider independent contractor status of persons on premises, including vendors, and consider the need for monitoring.
- **Insurance, First-Party Coverages and Liability Coverage**—The specific protections an insured has needs to be carefully examined (e.g., applications, insuring agreement, exclusions, endorsements that change those, definitions and conditions for each policy)
- **Lease Agreements**—Careful examination needs to be made of the requirements regarding liability and the shifting of any responsibility, insurance, habitability, force majeure among others needs to be made to avoid violations and the triggering of third-party liability.
- **Vendor Agreements**—Careful examination needs to be made of these agreements, including cleaning services, delivery services, file services and any entity that can potentially cause spread of Covid-19 or contamination of the workplace.
- **Client Protocols**—These need to be established for the safety of clients as well as employees and clear notice given with a process for addressing non-compliance or an unwillingness to comply.

PROCESS AND PROTOCOLS FOR WHEN SOMEONE IN THE WORKPLACE IS DIAGNOSED WITH COVID-19; CDC WORKPLACE CASES AS GUIDANCE

Employees who are Diagnosed with COVID-19 or who Live With Someone who has Been Diagnosed with COVID-19:

- Establish protocol for handling employees who test positive for COVID-19 or who have been diagnosed with COVID-19
 - Send employee home while maintaining employee’s privacy. (CDC, May 2020, p. 48)
 - Engage in contact tracing within the workplace and provide notice to employees in accordance with CDC recommendations (those in close proximity for a prolonged period.) (CDC, May 2020, p. 20)

Monitoring plan for employees working in close proximity

- Inform those who have had close contact with a person diagnosed with COVID-19 to stay home and self-monitor for symptoms, and to follow CDC guidance if symptoms develop. (CDC, May 2020, p. 48)
- Establish a protocol for handling employees who live with someone who has tested positive for COVID-19 or who has been diagnosed with COVID-19. (CDC, Interim Guidance)

Employees Who Exhibit Symptoms at Work

Establish policy requiring individuals to report symptoms immediately and procedure when an employee does so:

- Immediately separate an employee who appears to have symptoms at work; (CDC, May 2020, p. 48)
- Establish procedures for safely transporting anyone sick to their home or a healthcare facility while maintaining employee's privacy; (CDC, Employers with Workers at High Risk)
- Notify local officials, customers, and staff of a possible case while maintaining confidentiality consistent with the ADA and other local and federal laws; and (CDC, May 2020, p. 48)
- Employees should not return until the criteria to discontinue home isolation are met, in consultation with healthcare providers, including: (CDC, May 2020, p. 48)
 - Consider requiring a fitness for duty certification or health care provider note; and
 - Employers can require employees to wear masks unless the employee requests an accommodation and that accommodation is granted as required by law. Non-complying employees could be subject to discipline.
- Close off areas used by a sick person until after they are cleaned and wait 24 hours to clean and disinfect; and (CDC, May 2020, p. 48)
- Prevent and reduce transmission among employees and monitor federal, state, and local public health communications about COVID-19 regulations, guidance, and recommendations and ensure that workers have access to that information. Frequently check the CDC COVID-19 website.

- Actively encourage sick employees to stay home:
 - Employees who have symptoms should notify their supervisor and stay home.
 - Sick employees should follow CDC-recommended steps. Employees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers.
 - Employees who are well but who have a family member at home with COVID-19 should notify their supervisor and follow CDC recommended precautions. (CDC, Interim Guidance)

Confidentiality and Notifications

Personal privacy protections for any individual employee should be preserved, but mitigation response measures need to be immediately deployed and should have been developed as informed by section one. The response should depend on the nature of the risk.

Any notifications should clearly identify the nature and extent of the risk and what response will be initiated (e.g. temporary shut down for deep cleaning). Employees should be informed when and under what procedures they are expected to return.

Sample communication to employees who have NOT been in prolonged, close contact (PCC) to the employee who has tested positive for COVID-19.

- If PCC individuals have been identified:
 - On _____, 2020, we learned that a COMPANY employee working in this location was positively diagnosed with COVID-19. The employee is at home while their health is being closely monitored by their doctor. We wish our colleague a full and speedy recovery and will provide our full support. We ask you to please respect their privacy and confidentiality.

We recognize this news may create concern. We have identified individuals who have been in prolonged, close contact with this employee, and they have been instructed not to come into the office for the 14 days following their last contact. Prolonged, close contact (PCC) is defined as being within six feet of the employee who tested positive for 10 minutes or longer in the 48 hours before symptom onset. We want you know that you *have not been* identified as someone who had prolonged, close contact with that employee.

- Or, if no PCC individuals have been identified, then replace the paragraph above with:

We recognize this news may create concern. We have determined that NO individuals have been in prolonged, close contact with this employee. Prolonged, close contact (PCC) is defined as being within 6 feet of the employee who tested positive for 10 minutes or longer in the 48 hours before symptom onset.

We have performed enhanced cleaning on the floor per CDC guidelines and working closely with local public health officials. We are planning to reopen the location on (Fill in date).

As a reminder, here are some precautions you can take per CDC and WHO guidance to minimize the spread and chances of being exposed to COVID-19 during your daily activities:

- Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer that contains at least 60% alcohol.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with people who are sick.

Shut-downs if an employee is suspected or confirmed to have COVID-19

A shut down could range from the remainder of a day to indefinite depending on the extent and duration of the contamination and spread. Employers also need to consider and address the risk factors of those in the office and the need to keep them safe.

In most cases, you do not need to shut down your facility/office. If it has been less than seven days since the sick employee has been in the facility, close off any areas used for prolonged periods of time by the sick person:

- Wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible.
- During this waiting period, open outside doors and windows to increase air circulation in these areas, if feasible.

If it has been seven days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility. (CDC, Interim Guidance)

CLEANING AND DISINFECTION AFTER PERSONS SUSPECTED/CONFIRMED TO HAVE COVID-19 HAVE BEEN IN THE FACILITY

These procedures should be effective, consistent with the latest standards and performed by qualified personnel. As to personal hygiene and workstations, employees should be given supplies they need to effectively ensure a clean environment. There should always be adequate supplies accessible to employees for use in the office.

Follow the CDC cleaning and disinfection recommendations:

- Clean dirty surfaces with soap and water before disinfecting them.
- To disinfect surfaces, use products that meet EPA criteria for use against SARS-Cov-2 external icon, the virus that causes COVID-19, and are appropriate for the surface.
- Always wear gloves and gowns appropriate for the chemicals being used when you are cleaning and disinfecting.
- You may need to wear additional personal protective equipment (PPE) depending on the setting and disinfectant product you are using. For each product you use, consult and follow the manufacturer's instructions for use.
 - Cleaning staff should clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment (e.g. tablets, touch screens, keyboards, remote controls, and computers) used by the ill persons, focusing especially on frequently touched surfaces.

TESTING

Unfortunately, the science here is somewhat erratic and unreliable. Absent a reliable test with immediate results, any testing requirement for a return to work or as a condition of employment may do more harm than good. It could create an environment of unjustified fear or unjustified sense of security. Even antibody tests are not always accurate. So, testing, the legality of such aside (E.g., drug testing cases) may place employees at greater risk.

The better approach is to follow CDC guidelines and request medical clearance from a qualified medical professional before allowing a person to return to work. However, if a person exhibits symptoms or obtains a positive test, they should be treated as having COVID-19, be immediately excused from work, mitigation response initiated and return to work policy initiated.