

To Our Clients and Friends

Memorandum

May 6, 2020

A Detailed Update on Reopening of Business— NY’s Plan, the Federal Guidance, and Scenarios to be Prepared For

On May 4, 2020, Governor Cuomo announced a multi-phased plan for the reopening of New York State businesses after the state’s stay-at-home order expires on May 15, 2020 (the “[NYS Plan](#)”). Many other states have already issued orders permitting, to varying extents, a reopening of businesses. Businesses that are reopening are doing so under a patchwork of restrictions mandated by state and local governments and health authorities, as well as non-binding recommendations made by various governmental agencies. In this memorandum, we discuss (i) the requirements for New York businesses with respect to reopening under the NYS Plan; (ii) the federal guidance relevant to those requirements; (iii) other federal guidance that all companies should consider when formulating their reopening plans; and (iv) reopening scenarios for which all companies should be prepared.

Critical challenges. The critical concern that every company has with respect to reopening is how to provide for the safety of its workers, customers, clients and visitors—that is, how to minimize the potential for the spread of COVID-19 at the workplace. Perhaps the most significant challenge will be how to instill confidence in the company’s employees, customers and others that the workplace is safe. A related issue is how to mitigate the risk of potential liability arising from claims by persons who believe that they contracted COVID-19, or suffered other harm related to COVID-19, in connection with the company’s reopening.¹

To address these issues, companies should comply with the applicable state and local orders regarding reopening (which generally are binding and legally enforceable) and should, to the extent relevant and practicable, follow the guidance that has been issued by federal governmental agencies (which generally is not binding). Each company should develop a reopening plan after reviewing the orders and guidance that have been issued and considering whether additional measures would be advisable based on the specific business or location. Further, each company should stay updated on any new guidance issued, and should monitor developments and revise its protocols over time as appropriate. A company will need to: communicate effectively that it has made safety a priority; has been diligent in understanding and addressing COVID-19-related issues; has complied with all relevant governmental orders; has carefully considered all relevant guidance and has adopted all (or many or some) of the recommendations; and will

¹ A challenge for plaintiffs in claiming they contracted COVID-19 at the workplace will be establishing causation (i.e., where the illness was contracted). Of note, a number of business lobbying groups and certain legislators have been advocating for the adoption of “liability shields” for businesses for claims related to COVID-19.

be proactive in addressing safety issues or concerns that may arise. A related challenge will be how best to inform employees and others about, and facilitate their adaptation to, the company's new policies and practices designed to reduce the potential for the spread of COVID-19.

A company may wish to consult with legal counsel with respect to the formulation and implementation of its reopening plans—particularly given the diffuse nature of the orders and guidance; the potentially significant issues under employment, privacy, anti-discrimination, and health laws; and the possibility of significant liability.

Existing orders and guidance on reopening.² The federal Administration and state governors have issued orders and guidelines on two separate issues: first, *when* companies should or will be permitted to reopen; and, second, *how* businesses should or must reopen (that is, what measures they should or must put into place to reopen).

With respect to the first issue, the federal government's issuance of guidelines relating to the timing for Governors to permit a reopening of businesses in their states was *not* binding on the states (or businesses)—and, indeed, the states that have reopened to date largely did not meet the prescribed benchmarks for a reopening. However, the orders that have been issued by states as to when businesses can reopen (such as the NYS Plan) generally *are* binding on businesses. Note also that many of the orders issued by cities or counties have been more stringent than the orders issued by the state; and even as state Governors have been lifting orders to stay-at-home, many of the city and county orders have remained in place.

With respect to the second issue, the guidance issued by federal governmental agencies relating to COVID-19 has generally been in the form of recommendations rather than binding rules. Therefore, when developing their reopening plans, companies can choose generally to follow (or, where appropriate, to tailor) the guidance, or not to follow it. The former course would be the most productive route toward providing, to the maximum extent possible, safety at the workplace and, as a corollary, mitigation of the risk of potential liability. Non-binding guidance has been issued by the Centers for Disease and Control (CDC), the Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC).³ Recommendations by trade associations, consulting companies, or others may be helpful as well as a company considers the development of its reopening plan.

New York State reopening guidance. Under the NYS Plan, each of the state's ten regions will reopen when, after May 15, it meets specified criteria with respect to the rate of COVID-19 hospitalizations and deaths, hospital capacity, COVID-19 testing capacity, and contact tracing capacity.⁴ The Governor has

² The guidance described in this memorandum applies to businesses that are not in the healthcare industry. In addition, separate guidance has been issued for certain specific industries and worker groups (including healthcare, meat and poultry processing, laboratories, airlines, correctional facilities, solid waste and wastewater management, environmental (janitorial) services, and in-home repair services).

³ Certain labor union leaders and some legislators have urged that, rather than issuing guidance, OSHA should issue an emergency temporary standard that requires employers to implement specified workplace plans and practices to limit the spread of COVID-19 (including with respect to infection control, social distancing, and proper sanitation).

⁴ The NYS Plan can be found [here](#). For a region to qualify for reopening, it must show (i) a 14-day decline in net hospitalizations or not more than 15 new hospitalizations per day; (ii) a 14-day decline in deaths or fewer than 5 per day; (iii) new hospitalizations below 2 per 100,000 residents per day; (iv) a hospital bed vacancy rate of at least 30%; (v) an availability rate for intensive care unit beds of at least 30%; (vi) virus testing being done at a rate of 30 tests

made clear that more rural regions (in the central and northern parts of the state) would be the first to reopen and New York City and its suburbs would be the last. Once a region meets the criteria for reopening, the businesses in the region will reopen in four phases depending on the type of business. There will be a two-week period between each phase to evaluate the extent to which COVID-19 cases may have increased (and, potentially, a delay of the next phase if they have increased).⁵

The following types of business can open in each phase:

- Phase 1: Construction; manufacturing and wholesale supply chain; and retail (using curbside pickup only).
- Phase 2: Professional services; finance and insurance; retail; administrative support; and real estate and rental leasing.
- Phase 3: Restaurants and food service; and hotels and accommodations.
- Phase 4: Arts and entertainment; recreation; and education.

The NYS Plan provides that “each business and industry must have a plan to protect employees and consumers, make the physical work space safer and implement processes that lower risk of infection in the business.” The Plan lists the following as “precautions” that each business must take to be eligible for reopening:

- Adjust workplace hours and shifts as necessary to reduce personnel density in the workplace;
- Enact social distancing protocols;
- Restrict non-essential travel by employees;
- Require the wearing of face masks by all employees and customers who are in frequent contact with others;
- Implement strict cleaning and sanitation standards;
- Develop and maintain a health screening process for individuals to enter the workplace;
- Conduct “tracing, tracking and reporting of cases”; and
- “Develop liability processes.”⁶

per 1,000 residents per month; and (vii) a baseline of 30 contact tracers working per 100,000 residents plus and additional number of tracers based on the projected number of cases in the region. In addition, the region must have at least a 90-day supply of personal protection equipment (PPE) in store.

⁵ Thus, assuming perfect circumstances, all regions would start to open May 15 and all businesses would be open by six weeks later (June 23). This is not the expected timetable, however, for most businesses. Reportedly, only five of the state’s ten regions (Central New York, the Finger Lakes, the Mohawk Valley, the North Country and the Southern Tier) are at all close to meeting the specified benchmarks for reopening. In addition, the CDC and others have predicted an increase in COVID-19 cases following reopening, which could delay the start date and/or extend the two-week period between phases.

⁶ No clarification is provided as to what “liability processes” means. The most likely interpretation, in our view, is that businesses must develop a specified process for dealing with COVID-19-related legal claims made (and, potentially,

The NYS Plan does not provide any further detail, clarification or guidance with respect to the foregoing. In determining how to implement these “precautions,” companies should take into consideration the guidance that has been provided on these topics by federal governmental agencies, as discussed below.

Federal guidance relevant to the New York requirements. In planning for and implementing the New York State-mandated precautions, businesses should consider the relevant existing federal guidance and, as applicable, any future orders and guidance when issued by state and local authorities. The following federal guidance is relevant to the New York mandates:

- **Workplace hours**—the NYS Plan requires that businesses “adjust workplace hours and shift design as necessary to reduce density in the workplace.” The CDC guidance recommends implementing “flexible worksites (e.g., telework)” and “flexible work hours (e.g., staggered shifts).”
- **Social distancing**—the NYS Plan requires that businesses “enact social distance protocols.” The CDC guidance defines “social distancing” as avoiding large gatherings and maintaining distance of approximately 6 feet from others when possible.⁷ The CDC identifies the following strategies that could be used to facilitate social distancing: telework and staggered shifts (as noted above); increasing physical space between employees at the worksite; increasing physical space between employees and customers (e.g., drive-through operations or partitions); implementing flexible meeting and travel options (e.g., postponing non-essential meetings or events); downsizing operations; delivering services remotely (e.g., via phone, video, or web); and delivering products through curbside pick-up or delivery.⁸ The CDC guidance also states that businesses should consider using video- or tele-conferencing when possible for work-related meetings and gatherings; consider canceling, adjusting, or postponing large work-related meetings or gatherings that can only occur in-person; and holding in-person meetings in open, well-ventilated spaces.
- **Travel**—the NYS Plan requires that businesses “restrict non-essential travel for employees.” The CDC guidance recommends that, when travel is essential, the company should advise employees of additional precautions to take, based on guidance the CDC has issued relating to travel.⁹

concerns expressed) by employees, customers or others. Another interpretation we have seen is that this provision means that businesses must take additional steps, beyond those specified in the Plan, to try to limit their liability related to COVID-19.

⁷ The CDC guidance states that retail businesses should consider additional precautions, including limiting the number of customers at any one time; instituting separate operating hours for customers who are at high risk of COVID-19 complications; and adopting curbside pickup and contactless payment systems.

⁸ We note that other strategies being considered by some businesses include: designating 6-foot spacing with signs or with tape or markers on the floor; requiring the formation of lines for entry to common areas (including elevators); installing signs requiring walking in a one-way direction in hallways (to avoid individuals passing each other head-on); limiting the number of people, seats and/or tables in an area or otherwise reconfiguring furniture; closing off every other bathroom stall; closing common areas; limiting the number of persons attending a meeting; and providing new protocols for delivery or provision of food.

⁹ The CDC’s guidance for business travelers can be found [here](#) and [here](#). In addition, of note, some states are requiring arriving out-of-state travelers and returning residents to quarantine at home for 14 days. Also, many foreign countries are placing entry or quarantine restrictions on travelers who have been in the U.S. within the past 14 days; and the CDC guidance provides that travelers returning to the U.S. from foreign countries must stay home for 14 days after international travel.

- **Masks**—the NYS Plan requires that businesses “require all employees and customers to wear masks if in frequent contact with others.” The CDC recommends that individuals wear a cloth face covering (“a bandana, scarf or cloth facemask”) when in public and when social distancing is difficult (including when working near others).¹⁰ Depending on the nature of the business, the use of other personal protective equipment (PPE) should be considered.¹¹
- **Cleaning and sanitation**—the NYS Plan requires that businesses “implement strict cleaning and sanitation standards.” The CDC guidance provides that businesses should routinely clean and disinfect all frequently touched surfaces in the workplace (such as workstations, keyboards, telephones, handrails, and doorknobs); and certain surfaces and objects in public spaces should be cleaned and disinfected before *each* use (such as shopping carts and point of sale keypads).¹² The CDC guidance states that the efficacy of alternative disinfection methods—such as high-intensity UV radiation, ultrasonic waves, and LED blue light—against the COVID-19 virus “is not known.”
- **Health screening**—the NYS Plan requires that businesses “enact a continuous health screening process for individuals to enter the workplace.” The EEOC has provided that employers can test

¹⁰ Given the requirement that businesses require that their employees and customers in close contact with others wear cloth face masks, companies should consider whether they want to (or will be expected to) provide masks to employees, customers and others. (Notably, Pennsylvania’s reopening plan mandates that businesses in that state require that employees wear “non-medical “masks at all times while on the work premises and that the company provide the masks to its employees.)

¹¹ According to the OSHA regulations that have been in force since before the COVID-19 pandemic, employers are obligated to provide employees with “PPE needed to keep them safe while performing their jobs.” The type of PPE required, if any, “will be based on the risk of being infected with [COVID-19] while working and job tasks that may lead to exposure.” PPE is not recommended for “most American workers” (i.e., those with jobs that do not require contact with people known to be, or suspected of being, infected with COVID-19 nor frequent contact within 6 feet of the general public or co-workers). Since the COVID-19 pandemic, OSHA recommends use of a cloth facemask by employees who work near others.

¹² The CDC guidance states that, if surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection. For disinfection, most common EPA-registered household disinfectants should be effective. A list of products that are EPA-approved for use against the virus that causes COVID-19 is available [here](#). This guidance also states that the manufacturer’s instructions should be followed; in most cases, leaving the disinfecting solution on the surface for at least 1 minute is advised; and bleach solutions will be effective for disinfection for up to 24 hours. The OSHA guidance confirms that its Hazard Communication Standard ([here](#))—which requires employers to classify and communicate risks related to use of chemicals in the workplace—applies to the common chemicals used for cleaning and disinfecting the workplace for COVID-19 purposes. Thus, precautions should be taken for the safety of the persons carrying out cleaning and disinfecting, including gloves appropriate for the chemicals being used and possibly additional PPE (as well as training for the cleaning staff as to when and how to use PPE and how to properly dispose of it after use). The guidance states that items made of soft and porous materials (such as carpets, drapes, and couches), if not frequently touched, should only be cleaned (and need not be disinfected); a wipeable cover should be considered for use on electronics (such as tablets, touch screens, keyboards, remote controls, and ATM machines); outdoor areas should receive normal routine cleaning (without a need for disinfectant except on hard surfaces that are frequently touched, such as grab bars and hand rails); and regular laundering should be used for dirty laundry (but at the warmest appropriate water setting and all items should be dried completely).

The guidance notes that, for a facility that has been completely unoccupied for 7 days or more, it is believed that any COVID-19 virus would not still be surviving; but that there are many non-COVID-19 considerations when reopening buildings and spaces that have been closed for extended periods (such as measures that are necessary to ensure the safety of the building’s water system; however, the ventilation system should not have to be cleaned other than routine maintenance). The OSHA guidance states that employers should carefully evaluate whether or not work areas occupied by people who have or were suspected to have COVID-19 may have been contaminated; and, if so, the CDC guidelines (described above) for cleaning and disinfecting should be followed.

employees for temperature and/or COVID-19¹³ before they enter the workplace, without running afoul of the Americans with Disabilities Act. The EEOC guidance states that employers must ensure that, if testing is done, it is accurate and reliable.¹⁴ The guidance also states that testing for COVID-19 is not a substitute for taking other protective measures at the worksite.¹⁵ We understand that some companies are contracting with third parties to perform a screening of employees and visitors based on temperature and/or symptoms,¹⁶ and/or based on COVID-19 testing; some are seeking to have landlords of buildings be responsible for screening or testing; some are considering having employees conduct their own health screenings prior to leaving home and then report the results to the employer; and some are considering having employees sign a certification before they enter the workplace to the effect that they do not have COVID-19 symptoms, have no knowledge of having been in close contact with someone with COVID-19,¹⁷ and have not been advised by a doctor or health agency to self-isolate or quarantine. Some companies are considering requiring testing for a person only if the person has “failed” a temperature or symptoms screening. (Importantly, companies have confidentiality and non-discrimination obligations with respect to medical screening and testing—see below, “Privacy and anti-discrimination issues.”)

- **Tracing, tracking and reporting**—the NYS Plan requires that businesses “continue tracing, tracking and reporting of cases.”¹⁸ The CDC guidance states that, if an employer learns that an employee (or someone else at the workplace) has been confirmed to have COVID-19, the employer should inform the employees who were in “close contact for a prolonged period”¹⁹ with

¹³ We note that there is no guidance we are aware of that requires that any temperature-testing be conducted by a medical professional. We note, also, that while it is clear that the EEOC guidance permits testing for the COVID-19 virus, there is some uncertainty as to whether it covers antibody (serology) testing as well.

¹⁴ Guidance from the U.S. Food and Drug Administration (FDA), the CDC and other public health authorities should be followed relating to reliability of medical testing.

¹⁵ The CDC guidance emphasizes that it is the infection control practices (such as social distancing and handwashing) that are the most critical in preventing the spread of COVID-19. (Note that not all people with COVID-19 have a fever; symptoms monitoring is inherently subjective and variable; testing can produce false negatives and false positives; and testing only indicates, at best, whether the person has COVID-19 at that moment.)

¹⁶ The CDC guidance states that a person may have COVID-19 if the person has fever (100.4 or higher) and respiratory issues such as coughing or difficulty with breathing; or at least two of the following symptoms are present: fever, chills, repeated shaking with chills, muscle pain, headache, sore throat, or new loss of taste or smell. The OSHA guidance identifies the symptoms of COVID-19 as coughing, fever, shortness of breath or difficulty breathing, or a combination of early symptoms such as chills, body aches, sore throat, headache, diarrhea, nausea/vomiting, loss of smell, and/or runny nose.

¹⁷ See note 19 below for guidelines relating to what is “close contact.”

¹⁸ Former New York City Mayor Michael Bloomberg is currently working with the state to develop (and is himself funding) a major state-wide program for contact tracing. The NYS Plan reference, apparently, is to tracking and tracing with respect to COVID-19 cases within the workplace.

¹⁹ No bright-line test is provided for what is close contact or a prolonged period. “Factors to consider [for ‘close contact’] include proximity, the duration of exposure (e.g., longer exposure time likely increases exposure risk), whether the individual has symptoms (e.g., coughing likely increases exposure risk) and whether the individual was wearing a facemask (which can efficiently block respiratory secretions from contaminating others and the environment).” “Recommendations vary on the length of time of [a ‘prolonged period’ of] exposure from 10 minutes or more to 30 minutes or more.... Brief interactions are less likely to result in transmission; however, symptoms and the type of interaction (e.g., did the person cough directly into the face of the individual) remain important.” The quarantine recommendation applies if the contact meeting these criteria occurred during the period from 48 hours

the sick individual of their possible exposure to COVID-19 in the workplace and those employees should then stay at home (in “quarantine”).²⁰ With respect to “reporting,” we note that COVID-19 is not exempted from the traditional OSHA recordkeeping and reporting requirements.²¹ A COVID-19 case generally is reportable under OSHA guidelines only if there is objective evidence, reasonably available to the employer, that the case is work-related (for example, if a number of cases developed among employees who worked closely together, without another explanation). OSHA recently issued updated guidance that loosens its enforcement of recordkeeping with respect to COVID-19.²² We note that state and local health authorities typically also require reporting of COVID-19 cases.

New York businesses, as well as businesses in other states, should consider the following additional federal guidance:

- **Sick employees should stay home.** The CDC guidance provides that an employee who has tested positive for COVID-19 or “has COVID-19 symptoms (*i.e.*, fever, cough, or shortness of breath)” should stay at home in isolation from others (“home isolation”). An employee who appears to have COVID-19 symptoms upon arrival at work or who becomes sick during the day should immediately be separated from other employees, customers, and visitors and sent home.²³

before the onset of the sick employee’s symptoms until the sick employee meets the CDC criteria for discontinuing home isolation (described below).

²⁰ The guidance also states that the employer should inform the exposed employees of the relevant CDC guidance for home quarantine ([here](#)), which covers home quarantine practices (including maintaining social distance of at least 6 feet from others in the home), what to do if symptoms develop, and when to end home quarantine. We note that, importantly, with respect to an employee with COVID-19, the employer must maintain confidentiality as required by the Americans with Disabilities Act (ADA); and, thus, best practice generally would be not to disclose the name of the employee with COVID-19 (except, as required, to health officials)—see below, “Privacy and anti-discrimination issues.”

²¹ Under these rules ([here](#)), qualifying employers must record on their OSHA log cases of COVID-19 among their workers if: (i) there is a confirmed case of COVID (*i.e.*, at least one respiratory specimen that has tested positive for the virus that causes COVID-19); (ii) the case is work-related (*i.e.*, an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness); and (iii) the case involves one or more of the general recording criteria set forth in the CDC regulations (*e.g.*, medical treatment beyond first aid, days away from work, etc.). OSHA also requires all employers to report (within 8 hours) a workplace incident that results in a fatality or to report (within 24 hours) an in-patient hospitalization. The rules are detailed and provide numerous exceptions. Certain incidents (for example, illnesses solely contracted on public or commercial transportation systems) may be recordable but not reportable. A fact-intensive inquiry—which takes into account the employee’s work duties and environment and the circumstances of the specific incident—will be required to determine whether an incident must be recorded or reported. See [here](#) for the COVID-19 Case Report Form.

²² The changes do not apply to businesses in certain industries (including healthcare, emergency response, and correctional institutions).

²³ See note 16 above for further definition by the CDC of COVID-19 symptoms. The CDC guidance also states that the employer should inform the sick employee of the CDC guidance ([here](#)), which covers how to care for oneself when sick with COVID-19, home isolation practices, how to check symptoms, when to seek medical care, and when to end home isolation.

Under the CDC guidance, an employee can end home isolation as follows: If the employee has had COVID-19 symptoms, home isolation can end when (i) at least 72 hours have passed since the employee has not had a fever (without the use of medications for fever); and (ii) respiratory symptoms (such as cough and shortness of breath) have improved; and (iii) (a) at least 7 days have passed since symptoms first appeared or (b) the negative results have been received from at least two consecutive COVID-19 tests conducted at least 24 hours apart. If the employee

- **Provide flexible sick leave.** The CDC guidance states that employers should “actively encourage” sick employees to stay at home. The OSHA guidance recommends that companies “ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of and understand these policies.” OSHA states that these policies should “permit employees to stay home to care for a sick family member or take care of children due to school and childcare closures,” and that “additional flexibilities might include giving advances on future sick leave and allowing employees to donate sick leave to each other.” The OSHA guidance states that employers that do not currently offer sick leave to some or all of their employees “may want to draft non-punitive emergency sick leave policies.”²⁴
- **Consider those employees at higher risk for serious illness.** Based on CDC and OSHA guidance, businesses should be aware that some employees, such as older adults, those with chronic medical conditions,²⁵ and those who are pregnant, may be at higher risk for serious illness. The CDC recommends that businesses “[c]onsider minimizing face-to-face contact between these employees or assign work tasks that allow them to maintain a distance of six feet from other workers, customers and visitors, or to telework if possible.” Note that, due to anti-discrimination issues, business should not *unilaterally* make special arrangements for persons at higher risk (see below—“Privacy and antidiscrimination issues”). The EEOC guidance provides that, absent “undue hardship” (i.e., “significant difficulty or expense” for the employer), an employer should provide reasonable accommodation for employees who have indicated that they have disabilities that put them at greater risk to COVID-19 (e.g., underlying medical conditions).²⁶

has tested positive for COVID-19 but has not had any symptoms, home isolation can end after at least 7 days have passed since the employee’s first positive test for COVID-19, so long as the employee has remained asymptomatic.

The CDC guidance states that “certain employers can choose to apply more stringent criteria for certain returning workers where a higher threshold to prevent transmission is warranted.” The guidance recommends that more stringent criteria be considered for (i) healthcare workers in contact with people at high risk of illness or death if they get COVID-19; (ii) workers in “critical infrastructure”; (iii) persons who “work with high-value assets (e.g., military) where introduction of COVID-19 could cause major disruptions or reduce national security”; and (iv) persons with “conditions that may weaken their immune system” (as these persons “could have prolonged viral shedding after recovery”). The guidance states that an employer should not require testing or a doctors’ note as a prerequisite for a return to work (apparently, based on concerns that, currently, the availability of testing and doctors is limited). The guidance states that determinations with respect to returning to work should be made “in consultation with healthcare providers and state and local health authorities,” as “local decisions depend on local circumstances.” See below, “Privacy and anti-discrimination issues.”

²⁴ As discussed above with respect to a return to work, the guidance states that employers should not require a positive COVID-19 test result or a healthcare provider’s note for employees who are sick to validate their illness or qualify for sick leave (or to return to work).

²⁵ The CDC guidance lists the following as persons at higher risk: (i) persons who are 65 years of age or older; and (ii) persons of any age with “underlying medical conditions, particularly if not well controlled, including”: people with chronic lung disease or moderate to severe asthma; serious heart conditions; immunocompromised (which can be caused by “many conditions,” including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications”); severe obesity (body mass index [BMI] of 40 or higher); diabetes; chronic kidney disease undergoing dialysis; or liver disease.

²⁶ What will be an effective accommodation will depend upon the employee’s job duties and workspace design, among other factors. Examples of accommodations set forth in the EEOC guidance include providing additional or enhanced PPE or other protective measures (such as erecting barriers or increasing space between the employee with the disability and others); eliminating or substituting less critical job duties; and temporarily modifying work

- **Appoint a coordinator; permit local control.** The OSHA guidance encourages businesses to appoint a “coordinator” of COVID-19 issues. The CDC guidance encourages businesses that have more than one location to “provide local managers with the authority to take appropriate actions outlined in their COVID-19 response plan based on local conditions.” We note that some companies are ensuring that their coordinator can consult with a health professional and/or other experts.
- **Encourage hand-washing and personal hygiene practices.** The CDC recommends that businesses support hand hygiene and respiratory etiquette for employees, customers, and worksite visitors, by posting signs that encourage hand hygiene and stopping the spreading of COVID-19; making available soap and water, hand sanitizer, wipes, tissues and trash receptacles; and discouraging handshaking and other unnecessary personal contact.
- **Reduce frequently touched surfaces and items.** The CDC guidance recommends that businesses consider leaving some doors open to reduce touching by multiple people; removing personal or unnecessary objects to facilitate cleaning; and removing items such as coffee creamer containers in a breakroom or cafeteria. In addition, it recommends that businesses discourage workers from using others’ phones, desks, offices, or other work tools and equipment, when possible (and, if sharing is necessary, to clean and disinfect the items before and after use); and provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks, other work tools and equipment) and employees’ personal space can be wiped down by employees before each use.
- **Consider ventilation improvements.** The CDC recommends considering whether, if resources allow, improvements to the ventilation system are appropriate in order to increase ventilation rates and the percentage of outdoor air that circulates into the system; and, when possible, using high-efficiency air filters in the HVAC system, adopting “clean-to-dirty” air flow, considering “upwards air circulation” combined with ultraviolet disinfection systems, and opening windows.

Privacy and anti-discrimination issues. Businesses must pay careful attention to applicable law and best practices relating to how information with respect to employees’ health and other personal information is obtained, used, and maintained, and as to how employees with medical conditions are treated.

- **Privacy for employees.** Under the ADA and guidance issued by the EEOC, confidentiality must be maintained for employees with respect to their temperature, symptoms, test results, and other medical information.²⁷ Accordingly, best practice is not to disclose the name of any person who has or may have COVID-19 (except, as required, to health authorities); privacy should be provided to an employee while being screened or tested; and screening or testing results should only be used to determine whether entry to the workplace is permitted and these results, if

schedules to reduce contact with co-workers or the public while commuting. The EEOC guidance encourages employers and employees to be flexible and creative in identifying reasonable accommodations.

²⁷ The results of any such medical screening for entry to the workplace (such as taking temperature and the like) likely are not subject to the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA), however, as most companies that are not self-insured are not “covered entities” (i.e., not a health plan, clearinghouse, or healthcare provider) under HIPAA.

retained, should be kept in a secure location and not with employees' personnel files. Best practice dictates that screening or testing results, or other medical information about an employee, should be disclosed to others only on a strict need-to-know basis (such as to permit the recipient to comply with the ADA and take precautions consistent with the CDC guidance). There are varying views as to whether best practice is to retain screening or testing results or to securely discard them after they are used each day to determine entry to the workplace. We note that some companies also are considering using various methods to track employees' activities at and/or away from work. These efforts, depending on the methods used and other factors, may raise significant privacy issues. As a general matter, the legitimate business purpose of any such monitoring must be balanced against the extent and intrusiveness of the information-gathering, and protections should be in place to ensure that the information is gathered, maintained, and used only as is legally permissible.

- **Privacy for non-employees.** When considering the collection of information about customers, clients, vendors, contractors, guests and other visitors to the workplace, state, international, and other laws relating to consumer privacy, data breach and individual rights concerning personal data may apply. Thus, companies will have to plan carefully with respect to the collection, maintenance, and use of this information as well.
- **Non-discrimination.** When making decisions about employees, businesses must pay careful attention to applicable law and best practices relating to non-discrimination. The CDC guidance states that, to prevent stigma and discrimination in the workplace, when determining whether an employee has or may have COVID-19, only the stated CDC guidance (discussed above) should be utilized—so, for example, determinations of risk should not be made based on an employee's race or country of origin. Also, an employer must have a legitimate, non-discriminatory basis for the selection of which employees to bring back to the workplace. Valid selection criteria should be established *before* deciding which specific employees will be rehired or returned to the workplace, and could include seniority, documented past performance, and/or operational needs.²⁸ Rehiring and return decisions should not be based on an employee's apparent higher risk of COVID-19 complications. The EEOC guidance states that employers cannot *unilaterally* decide not to hire individuals who are over 65 or pregnant because of COVID risks without running afoul of federal discrimination laws.²⁹ A business can, however (and, as discussed above, the CDC guidance recommends that a business should) discuss with at-higher-risk individuals whether they wish to

²⁸ Hiring decisions based on seniority typically provide the most protection from discrimination claims; however, issues still can arise. If, for example, a more junior person is selected over a more senior person, the considerations made should be well documented so that it can be shown that the decision was not based on the employee's age, but on operational needs of the business. If a hiring decision is based on purported performance problems that were not documented in the employee's personnel file, the employee may argue that the performance problems are just a pretext for discrimination.

²⁹ Employers in New York State and New York City need to be especially cautious not to make decisions based on COVID-19-related factors (even if motivated out of concern for an employee), in light of additional protected categories (such as caregiver or familial status) that may be implicated under the New York State and City Human Rights Laws.

delay a return to work, telework, or change their tasks at work to further reduce their risk of infection.³⁰

Scenarios companies should be prepared for. We advise that companies be prepared to deal with the following kinds of situations that may arise:

- **Return to work issues.** Some employees selected by the employer for a return to the workplace may refuse to return due to fear for their safety. At the same time, some employees *not* initially selected to return to work may strongly wish to return.
- **Medical screening issues.** Some employees may refuse to comply with medical screening (such as temperature-taking, testing, self-certification, etc.) required to enter the workplace. Some employees may refuse to leave the workplace if requested to do so based on the screening, development of symptoms during the day, exposure to someone with COVID-19, etc. Some employees may contend that the screening measures are inappropriate as applied to them (for example, that temperature screening is not appropriate because their normal temperature runs high, or that symptoms screening is not appropriate because their respiratory symptoms are due to allergies). Some employees may question the validity of testing given that false negatives and false positives are possible. There are also numerous threshold issues relating to testing that must be considered (including whether there will be sufficient supplies of tests, which tests to use, where the testing would be done, who would do it, and how often it would be done).
- **Allegations of inadequate protection.** Employees may disagree with the safety protocols put into place by a business and request or demand additional or different measures or policies. An employee (or customer, visitor, or other person) who becomes sick may believe that he or she was infected at the business's workplace due to allegedly inadequate safety precautions.
- **Claims of wrongful termination.** Certain employees may claim that their employment was wrongfully terminated for COVID-19-related reasons—for example, for discriminatory reasons or for the employee's refusal to return to work due to safety concerns; or in retaliation for whistleblowing (or complaining) about problems with the company's safety protocols.
- **Refusals to comply.** Some employees, or others at the worksite, may refuse to comply with the company's COVID-related policies and/or may aggressively object to compliance by others (such as relating to the wearing of a facemask, maintaining 6 feet of distance from others, complying with restrictions on access to certain areas, etc.).
- **Employee complaints or reports about others.** Certain employees may complain that other specific individuals at the workplace are not complying with the company's prescribed protocols (and/or governmental guidance). Employees may report that other persons at the workplace in their view are exhibiting symptoms of COVID-19, or that they know that a person at the workplace has been exposed to someone else with COVID-19. Rumors may circulate that certain persons have, may have, or have had COVID-19.

³⁰ The EEOC guidance clarifies the reasonable accommodations requirement under the ADA in the context of COVID-19. See the discussion above (including note 26).

- **Continued or increased spread of COVID-19.** COVID-19 cases and/or deaths may spike, leading to a spike in absenteeism among the workforce. Companies should consider cross-training employees to cover more than one function; creating “teams” with staggered work days (so that each team is exposed only to the other members of the team and not all teams are affected by a particular case of COVID-19); having temporary employees available; and/or planning for operations to be reduced if necessary. (Note that, if executive employees—who primarily perform managerial duties and are exempt from overtime pay under the Fair Labor Standards Act (FLSA)—are called upon to perform a significant amount of non-managerial work due to staffing issues, their exempt status may become endangered.) A spike in cases and/or deaths may also result in a reinstatement of stay-at-home orders; and companies should consider planning now for the possibility of another shutdown.
- **Compensation issues.** A myriad of potential compensation-related issues may arise. Certain employees may feel that their compensation during the stay-at-home period and/or the reopening period was inappropriate. For employees who are exempt from overtime under the FLSA based on a majority of their pay being comprised of commissions, their exempt status may be compromised if their commissions dropped significantly in the new economic environment. Continued non-exempt status may also be an issue for “outside sales employees” who are now performing most of their work from a fixed location (including their home due to stay-at-home orders or their office due to travel restrictions). Some employees may argue that the extra time they spend on medical screening or testing requirements imposed by the employer are compensable. Employees with employment agreements may contend that the employer has not complied with the terms of the agreement in light of new policies and practices related to COVID-19.

(See [here](#) our earlier memorandum, *Preliminary Thinking on Reopening a Business*, dated April 22, 2020).

* * *

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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