

To Our Clients and Friends

Memorandum

June 1, 2020

Business Reopenings: Updated Guidance and FAQs

As we have discussed in previous memoranda, there is a patchwork of federal, state and local orders and recommendations relating to the reopening of businesses—much of it vague or ambiguous, and most of it constantly changing. Yet, compliance with governmental orders and adherence to governmental recommendations is likely to be the best strategy for (i) providing a safe workplace; (ii) instilling confidence in employees, customers and others that the workplace is safe; and (iii) mitigating potential liability for COVID-19-related claims. In addition, businesses should consider tailoring the recommendations for the business's specific circumstances and taking additional precautions that similar businesses are adopting.

Below, reflecting the new governmental guidance (including New York State guidance) that has been issued during May 2020, as well as what we are seeing in terms of companies' plans, we address frequently asked questions relating to (i) screening employees (and others) before they enter the workplace and (ii) other aspects of reopening. Please click on the questions that are of interest to you.

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Screening Employees

1. **What are companies planning to do with respect to screening employees?** Governmental guidance has made clear that, to help prevent the spread of COVID-19, businesses should regularly screen employees (and can also screen customers, clients, contractors, and other visitors) before permitting their entry to the workplace. Companies are considering whether to require self-certifications by employees regarding their temperature and other symptoms of COVID-19; to have temperature checks and a screening of symptoms conducted at the workplace; and/or to require that employees undergo COVID-19 diagnostic and/or antibody testing. Many businesses are planning to screen not only employees but all visitors to the workplace.

- **Self-certification.** We are seeing that some companies will be requiring that each employee, before leaving home for the workplace, must self-certify by email (or through a cellphone app for this purpose) that he or she does not have a fever and is not experiencing other COVID-19 symptoms. Some companies also will be requiring self-certification that the employee has not tested positive for COVID-19; has no knowledge of having been exposed to close contact, in the last 14 days, with a person who has tested positive (or had COVID-19 symptoms); and has not, in

the last 14 days, taken a commercial air flight or traveled outside the U.S. Other companies are considering having the employee provide the certification (in writing or orally) when the employee arrives at the workplace. Many companies also will be requiring self-certification by other visitors or customers before permitting their entry to the workplace.

- **Workplace screening.** Some companies are planning to have a person at the workplace (a “screener”) take the employee’s temperature and/or ask the person to answer questions or complete a written questionnaire relating to COVID-19 symptoms, testing, exposure, and travel. It appears that many companies do not intend to follow the federal guidance (described below) which recommends that, if a screener is used, the screener should do a “visual inspection for signs of illness.” (Many are uncomfortable with the uncertainty and subjectivity involved in the determination the screener would be making—we note, however, that obvious symptoms such as constant dry coughing or breathing difficulties plainly should not be ignored.)
- **Testing.** Some companies will be requiring COVID-19 testing for a return to work, and some of these will be requiring ongoing, periodic testing. Some companies will be requiring that each employee provide self-certification of having tested negative; some will be requiring a doctor’s certification of negative test results (although the governmental guidance discourages this on the basis that doctors’ time is limited during this health crisis); some are engaging healthcare vendors to manage the testing (and/or screening and certification process); and some will be conducting on-site testing at the workplace.

2. Is a business required to screen employees (or others)? The guidance from the U.S. Centers for Disease Prevention and Control (CDC) recommends that businesses “consider conducting routine, daily health checks (e.g., temperature and symptom screening) of all employees.” The guidance issued by the Occupational Health and Safety Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC) expressly permits screening (including temperature-testing and COVID-19-testing) of employees during the pandemic, as well as screening (including temperature-testing) of outside vendors entering the workplace. While the federal guidance is advisory only, certain state or local governmental authorities *require* that individuals be screened. For example, the New York State reopening plan requires that businesses “enact a continuous health screening process for individuals to enter the workplace”; and the New York State Department of Health (NYS DOH)¹ requires that businesses implement “mandatory daily health screening practices of employees and visitors.”

3. Is there a recommended method for screening or any requirement relating to who does the screening? The CDC guidance does not prescribe any specific method for the recommended health checks, but provides two “examples” of screening methods. In the first example, (i) the employee takes his or her own temperature prior to arrival at the workplace; (ii) upon the employee’s arrival at the workplace, a screener asks for confirmation that the employee’s temperature is below 100.4 degrees and that the employee is “not experiencing coughing or shortness of breath”; and (iii) the screener then “make[s] a visual inspection of the employee for signs of illness, which could include flushed cheeks or fatigue.” In the second example, upon an employee’s arrival at the workplace, a screener takes the employee’s temperature and then makes the “visual inspection for signs of illness.” (See Q.1 with respect to the screening methods being considered by most businesses.)

¹ See [here](#) the comprehensive guidance for businesses issued by the NYS DOH on May 28, 2020.

There are no specific requirements as to who does the screening. We are seeing that some companies will be using existing personnel (such as receptionists), hiring new personnel for this purpose (such as nurses), or engaging third-party contractors. The guidance permits landlords to perform this role, including temperature-testing of all individuals entering their buildings—and, in some cases, landlords that manage large buildings are planning to do so (with, in most of these cases, the costs to be borne by the tenants pursuant to the operating costs provisions of their leases). As, in most cases, businesses themselves have the responsibility for screening, if a landlord undertakes the responsibility for its business tenants, a business should understand and review the landlord's process to determine whether it is satisfactory. Also, we are seeing that, in some cases, business tenants are planning to do their own screening in addition to any screening by the landlord.

Note that state and local requirements may be more specific. For example, the NYS DOH guidance states that a screening questionnaire must, at a minimum, ask whether (a) the person knows that he or she was in "close or proximate contact" in the past 14 days with someone who has tested positive for or has or had symptoms of COVID-19; (b) the person has tested positive for COVID-19 in the past 14 days; and/or (c) the person has experienced any symptoms of COVID-19 in the past 14 days. The guidance permits screening "by telephone or electronic survey" and states that the process should be "coordinated to prevent employees or visitors from intermingling in close contact with each other prior to completion of the screening." The guidance also provides that the building owner/manager (or its designee) will be primarily responsible for meeting the requirements with respect to unleased or common areas of the building, and the tenant (or owner or operator of the tenant) will be primarily responsible for meeting the requirements with respect to the tenant's leased space, unless the building owner/manager and tenant "reach an alternate agreement in regard to such responsibilities (e.g. joint screening protocol)." The guidance directs building owner/managers and tenants to coordinate with each other to facilitate screenings. The NYS DOH guidance also provides the following "screening best practices" for landlords who will be conducting screenings: (i) if space and building configuration allow, conduct the screening "at or near the building entrance to minimize the impact in case of a suspected or confirmed case of COVID-19"; (ii) take measures to ensure social distancing while people queue for screening or building entry; (iii) coordinate with tenants to identify which individuals have completed a remote screening; (iv) consider using "contactless thermal cameras in building entrances to identify potentially symptomatic individuals and direct them to a secondary screening area to complete a follow-on screening"; and (v) if unable to screen at or near building entrances, remind tenants that they are responsible for screening their employees within the spaces under their control. The NYS DOH guidance also provides that any personnel performing screenings must be "trained by employer-identified individuals who are familiar with the CDC, DOH and OSHA protocols" and should be provided with appropriate personal protective equipment (PPE) ("at a minimum, a face mask, and possibly gloves, a gown, and/or a face shield").

4. What are the symptoms of COVID-19 that should be screened for? As discussed above, the CDC guidance suggests that the screener take the person's temperature; ask if the person has had a fever, a cough or trouble breathing; and "make a visual inspection of the employee for signs of illness, which could include flushed cheeks or fatigue." We note that the CDC guidance also provides the following list of the symptoms of COVID-19: "fever or chills; cough; shortness of breath or difficulty breathing; fatigue; muscle or body aches; headache; new loss of taste or smell; sore throat; congestion or runny nose; nausea or vomiting; diarrhea." The CDC guidance states that the list of symptoms is non-exhaustive (and we note, for example, that a recently identified additional symptom, not specified in the CDC guidance, is a skin rash). We are seeing that some companies will be screening only for fever, a cough or trouble breathing, while others will be inquiring about a broader list of COVID-19 symptoms. With respect to

fever, the CDC guidance suggests that a temperature of 100.4 degrees Fahrenheit or above would be the appropriate threshold for COVID-19 screening. We are seeing that most companies will be adopting this threshold, but others will be using 100.0 degrees or, to account for individual differences with respect to “normal” temperature, some will simply ask whether the person has “a fever.”

5. Is there a prescribed protocol for persons conducting screenings? The CDC guidance states that a screener who *will not* be taking temperatures should maintain a distance of 6 feet from the person being screened (and if that distance can be maintained, the screener need not use PPE). A screener who *will* be taking temperatures should be physically separated from the person being tested, by standing behind a glass or plastic window or other physical barrier, and should follow the following protocol: (i) wash hands with soap and water for at least 20 seconds (or, if soap and water is not available, then use hand sanitizer with at least 60% alcohol); (ii) then, if also screening for symptoms, “make the visual inspection for signs of illness”; (iii) then, put on disposable gloves and, while keeping his or her face behind the window or barrier, reach through the window or around the barrier to take the person’s temperature; and (iv) then discard the gloves and wash hands again.² The guidance states that a screener should change gloves between each check (unless a disposable or non-contact thermometer was used and the screener did not have physical contact with the person being tested).

6. What kind of thermometer should be used for temperature-testing? The guidance does not address the type of thermometer to be used. The EEOC guidance states that, if an employer conducts medical testing (including temperature-testing), it must ensure the reliability and accuracy of the testing. We are seeing that most companies plan to use infrared scanning digital thermometers, which are used by scanning a person’s forehead from a distance. As these thermometers do not require contact with the person’s body, the testing is less intrusive and does not risk the spread of infection. (We note, however, that the accuracy of these thermometers has long been questioned within the medical community, as reported in the press). The CDC guidance states that, if a non-contact thermometer is used, it should be cleaned and disinfected “according to manufacturer’s instructions and facility policies.”

7. If COVID-19 testing is performed or required, which test should be used? The EEOC guidance refers employers to guidance from the CDC, the U.S. Food and Drug Administration (FDA), or other recognized public health authorities to determine which tests to use.³

8. Do employees have to submit to screening? Employees may be subjected to discipline or termination for refusing to comply with required screening as they would be for refusing to comply with other company policies and practices in place for the safety of the workplace.⁴ At the same time, we note

² The guidance states that, if these social distance or barrier controls “cannot be implemented during screening,” then “PPE can be used” by the screener—specifically, “a facemask, eye protection (goggles or disposable face shield that fully covers the front and sides of the face), and a single pair of disposable gloves,” and “a gown could be considered if extensive contact with an employee is anticipated”—however, the guidance states that the use of PPE alone would be a less protective approach than social distancing or use of a physical barrier (and also would contribute to shortages of the supply of PPE).

³ See [here](#) the CDC guidance on authorized tests for COVID-19 (updated as of May 23, 2020).

⁴ It should be kept in mind that, under the National Labor Relations Act (NLRA) (which generally applies to union and non-union employees, other than specified exempted employees), employees may be engaged in protected “concerted activity” if a group of them acts together—perhaps, for example, to refuse to submit to COVID-19 screening or testing. If a group of employees acts together such that their rights under the NLRA are applicable, generally, the employer cannot terminate them or apply other adverse consequences, but admission to the workplace can be refused and the employees not paid.

that employers may want to approach employees with heightened sensitivity given the difficulties and uncertainties most are facing during these unprecedented times. Thus, for example, an employee's refusal or concerns with respect to screening perhaps should, in the first instance, prompt a conversation with the employee about the need for the screening and the governmental guidance or requirements that the company is following. However, if after a conversation the employee still refuses to submit to a screening, the business should consistently apply its policy (and, in many cases, the state or local health authorities' requirements) of not permitting entry without a screening.

9. Are there any administrative requirements for the screenings? State and local guidance may impose certain administrative requirements. For example, the NYS DOH guidance requires that the owner or manager of a commercial building who conducts screenings, or the owner or operator of a business who does so, as applicable, must: (i) review all employee and visitor responses collected by the screening process on a daily basis and maintain a record of such review; (ii) designate a "site safety monitor, whose responsibilities include continuous compliance with all aspects of the site safety plan"; (iii) designate a "central point of contact" (which may vary by activity, location, shift, or day), responsible for receiving and attesting to having reviewed all employee screening questionnaires and who will be identified on the screening questionnaire as the person to whom each employee and visitor entering the workplace must report if the person later experiences COVID-19 symptoms; and (iv) to the extent possible, maintain a log (with contact information) of every person, including employees or visitors, "who may have close contact with other individuals at the worksite or area" (excluding deliveries performed with PPE or in a contactless manner). The NYS DOH also requires that a business reopening safety plan must be posted "conspicuously" on site.⁵

10. What about long lines for screenings? The screening of employees (and others) prior to entry to the workplace may create long lines and time delays for employees (or customers or others) to enter. Social distancing should be maintained for persons on line (for example, by placing markings on the floor at 6-foot intervals). We note that, if there are meaningful delays, employees may assert claims for payment of wages for the time spent in line.

11. What privacy or confidentiality obligations apply with respect to screenings? It is important that businesses pay careful attention to applicable law (including privacy and anti-discrimination laws) 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. Companies must provide reasonable privacy to an employee during any required medical testing (which may include temperature-testing), and the privacy of testing results must be maintained. (Note that, if entry to the workplace is refused to a person after a screening, and the refusal is seen by others waiting on line, an employee potentially may claim that his or her medical information was not kept private; thus, consideration might be given to whether screens or other means of providing some level of privacy for exits may be possible, depending on the building space.) Employees' medical information, if retained by the employer, must be held in a secure location and separate from personnel files; and access to the information must be strictly limited. We are seeing that many companies plan not to keep records of the results of daily screenings of employees and, instead, plan to carefully dispose of them on a daily basis. Other companies, as noted, are outsourcing screening operations to specialist vendors. Note that state and local laws and guidance also may address privacy and anti-discrimination

⁵ See [here](#) the NYS template for the safety plan.

requirements. For example, the NYS DOH guidance prohibits owner/managers of commercial buildings from keeping records of employee health data obtained during screenings (including temperature-testing results). We note also that the use of more intrusive screening and other methods (such as electronic surveillance to facilitate contact tracing or monitor home isolation) create more complex privacy and anti-discrimination law issues (and generally these measures should not be implemented without the advice of legal counsel).⁶

Other Reopening Issues

12. Should a business require that face masks be worn at the workplace—and, if so, should the business provide them? The CDC guidance recommends that businesses “encourage employees to wear cloth face coverings in the workplace, if appropriate,” and that cloth face coverings be worn “in public settings where other social distancing measures are difficult to maintain, especially in areas of significant community transmission.” State and local government orders relating to the wearing of facemasks vary. As one example, the NYS DOH requires that workers wear face coverings whenever they cannot stay at least 6 feet apart from other persons (which is only permissible when the “core activity” requires a closer distance). In addition, New York State has authorized private businesses to deny entry to persons not wearing a face covering, and requires that employers, at their own cost, provide face coverings to all employees and visitors for use while at the workplace.⁷ The New York City Health Department guidance requires that (i) every person (over the age of 2 and able to medically tolerate a face covering) must wear a face covering if he or she leaves home and “might be closer than 6 feet from others” (unless exercising and maintaining a distance of 6 feet from others) and (ii) a worker must wear a face covering at work “if they have direct contact with customers or others” (and the face covering must be provided by the employer, at the employer’s expense).

13. What does a business do if it learns that a worker is confirmed to have COVID-19—does it have to notify other employees, notify a landlord, conduct contact tracing, or report the case to governmental authorities?

- Guidance issued by the CDC and OSHA recommends that, if an employee tests positive for COVID-19 or exhibits symptoms of COVID-19 at the workplace, the person should be immediately isolated (if feasible) and then sent home or to receive medical care.
- The CDC recommends that the office or building areas that may have been contaminated by the infected person should be cleaned and disinfected (when possible, after leaving the affected space vacant for 24 hours or more).
- The CDC guidance provides that a person who tests positive for COVID-19 should stay home in “isolation” until cleared by a doctor for a return to work; and that the employer should provide an

⁶ See [here](#) the more detailed discussion of privacy and anti-discrimination laws in our memorandum, *A Detailed Update on Reopening of Business* (May 6, 2020).

⁷ The NYS DOH guidance states that acceptable face-coverings include (but are not limited to) “cloth (e.g., homemade sewn, quick cut, or bandana), surgical masks, and face shields.” In addition, face-coverings must be cleaned or replaced after use and may not be shared. Employers must permit employees to use their own face-coverings if they wish to and cannot prevent employees from wearing their own “additional protective coverage” (e.g., surgical masks, N95 respirators, or face shields). Employers must train employees how to adequately put on, take off, clean and discard (as applicable) their face-coverings. Employers must advise employees and visitors to wear the face-covering in common areas (e.g., “elevators, lobbies, and when traveling around the office”).

employee who is directed to stay home in isolation with the relevant CDC guidance for maintaining oneself in isolation.⁸

- The guidance provides that employees who were exposed to close contact⁹ with an infected person should be notified (without identifying the infected employee, due to privacy concerns¹⁰); the exposed employees should stay home in “quarantine”; the employer should provide employees who are directed to stay home in quarantine with the relevant CDC guidance for maintaining oneself in quarantine;¹¹ and the exposed employees can return to work after 14 days if non-symptomatic during the full period.
- In most states, businesses are required to inform the local health department immediately if an employee or other person at the workplace has tested positive for COVID-19, and then are required to cooperate with the health authorities in their contact tracing efforts.
- We note that it is best practice for a tenant to notify a landlord, and a landlord to notify tenants, if there is a positive COVID-19 case at the premises. Notification may be required under state or local laws or a business’s lease (but best practice would be to provide it in any event). The NYS DOH guidance specifies that a commercial building owner or manager (or their designee), when notified of positive cases of COVID-19, must “notify the contacts of all impacted entities occupying shared spaces of the positive cases and the cleaning and disinfecting procedures taken”; and that a business must notify the building owner or manager of positive cases.
- Some states require that businesses keep daily logs of every employee and visitor at the workplace (including contact information) to facilitate these processes.¹²

⁸ See [here](#) the CDC guidance for home isolation.

⁹ Close contact is defined as, during the 48 hours before the earlier of when the infected person became symptomatic or tested positive, working within 6 feet of the infected employee for at least 10 minutes (or, depending on the circumstances, 30 minutes—if, for example, the persons were not working very close together and equipment was not shared).

¹⁰ We anticipate that an employee who is informed that he or she has been exposed to COVID-19 at the workplace will want to know who the infected person is so that he or she can gauge the level of risk based on how much contact there was with the infected person. While the employer should not disclose the name of the infected the person, the employer could provide information that it has about the duration and intensity of the contact, if doing so would not reveal who the infected person is.

¹¹ See [here](#) the CDC guidance for home quarantine.

¹² In New York State, under Phases 1 and 2 of the state’s 3-phase reopening program, each business must, to the extent possible, maintain “a log of every person, including workers and visitors, who may have close contact with other individuals at the work site or area; excluding deliveries that are performed with appropriate PPE or through contactless means.” The logs “should contain contact information, such that all contacts may be identified, traced and notified in the event an employee is diagnosed with COVID-19.” The business must notify the local health department and the NYS Department of Health immediately upon being informed of a positive COVID-19 test result by a worker at their site. If a worker or visitor tests positive, the business must cooperate with the local health department to trace all contacts in the workplace and notify the health department of all workers, employees, visitors and customers who entered the workplace for the 48 hours before the person began experiencing COVID-19 symptoms or tested positive, whichever is earlier (but must maintain confidentiality of the identity of the person with COVID-19 as required by law). The local health department will then implement the monitoring and movement restrictions of infected or exposed persons (including home isolation or quarantine). Employees who learn (through contact tracing or otherwise) that they have come into close contact with a person with COVID-19 *not* at the workplace are required to self-report to their employer immediately and then must follow all required protocols as if they had been exposed at work.

- The company should consider whether the COVID-19 case has to be recorded on the company's OSHA log or reported to OSHA (see Q.14 below).

14. Do COVID-19 cases have to be recorded on the OSHA log or reported to OSHA? OSHA has issued revised guidelines, effective May 26, 2020, which require employers to conduct a more in-depth review than was previously required as to whether an employee's COVID-19 case is "work-related."¹³ Under OSHA's recordkeeping requirements, employers are responsible for recording cases of COVID-19,¹⁴ if: (1) the case is a "confirmed case of COVID-19" as defined by the CDC;¹⁵ (2) the case is "work-related," as defined in the OSHA regulations;¹⁶ and (3) the case involves one or more of the general recording criteria set forth in the OSHA regulations.¹⁷ In addition, all employers (including those exempt from the recording requirements) are required to *report* to OSHA any "work-related" COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye.

Noting the difficulty in determining whether a COVID-19 illness is "work-related," the guidance indicates that OSHA compliance officers will exercise enforcement discretion in assessing employers' efforts in making such determinations. In exercising that discretion, the officers will consider (i) the reasonableness of the employer's inquiry into the work-related determination; (ii) the information that was reasonably available to the employer; and (iii) a weighing of the evidence. With respect to (i), the guidance notes that an extensive medical inquiry by the employer is not necessary—instead, it should be sufficient in most circumstances for the employer to (1) ask the employee how the employee believes he/she contracted the COVID-19 illness; (2) discuss with the employee his/her work and out-of-work activities that may have led to the COVID-19 illness (while respecting employee privacy concerns); and (3) review the employee's work environment for potential exposure to the SARS-CoV-2 virus (e.g., consideration of instances of other workers in that environment contracting COVID-19 illness). With respect to (ii), the guidance states that the employer should consider information available at the time it makes its work-related determination, giving due weight to any evidence of causation provided by medical providers, public health authorities, or the employee himself/herself. However, in assessing the reasonableness of an employer's determination, OSHA will also take into account any information related to an employee's COVID-19 illness that the employer learned after making its initial determination. With respect to (iii),

¹³ The revised guidance (see [here](#)), issued May 19, 2020, replaces the guidance OSHA issued in April. OSHA also issued separate new guidance (see [here](#)) (also effective as of May 26, 2020) to its enforcement officers with respect to how COVID-19-related cases will be prioritized. For workplaces in areas experiencing either sustained or a resurgence in elevated community transmission of COVID-19, OSHA will prioritize COVID-19 fatalities, imminent danger exposures, and high-risk workplaces—and, when necessary, will use alternative types of inspections, including remote inspections and rapid response investigations. For workplaces in areas where community spread of COVID-19 has significantly decreased, OSHA will prioritize enforcement of all COVID-19 cases, but otherwise will return to the enforcement priorities in effect before the COVID-19 health crisis began.

¹⁴ Note that employers with 10 or fewer employees and certain employers in low hazard industries (including many retail stores, legal or business support services, and financial investment activities) remain exempt from OSHA recording obligations. See [here](#) the full list of industries exempt from recording obligations.

¹⁵ The CDC defines a "confirmed case" as an individual having at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19.

¹⁶ OSHA defines an injury or illness as "work-related" if an event or exposure in the work environment caused or contributed to the condition or significantly aggravated a pre-existing condition.

¹⁷ An injury or illness is recordable if it results in any of the following: death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness, or otherwise involves significant injury or illness diagnosed by a physician or other licensed health care professional.

according to the guidelines, certain types of evidence may weigh in favor of or against work-relatedness.¹⁸ If an employer follows the “reasonable and good faith inquiry” set forth above and still cannot determine whether it is more likely than not that a particular case of COVID-19 is work-related, then the employer does not need to record that COVID-19 case. If, however, the employer determines that an employee’s COVID-19 illness *is* “work-related,” the employer should record the case.¹⁹

15. Does a person who reports having been exposed to someone who has or is suspected to have COVID-19, but who is himself or herself non-symptomatic, have to be excluded from the workplace? This situation may be specifically addressed under state or local law. For example, the NYS DOH guidance states that when an employee or visitor reports having had close contact with someone who has or may have COVID-19, but the person is not symptomatic, the person should not be allowed to enter the workplace and must undergo a 14-day quarantine. If such an employee or visitor is “critical to the operation or safety of an office,” he or she can ask for approval from the business and the local health authority for permission to enter the workplace and, if approved, can enter the workplace but (i) the person must take specified “additional precautions”²⁰; (ii) the business “must document the employee’s or visitor’s adherence to those precautions”; and (iii) the person “must remain under quarantine at all times when not at work” (during the 14-day quarantine period).

16. Can an employee who is at higher risk for severe illness be barred from the workplace—what approach should be taken with respect to these employees? The CDC guidance identifies persons over age 65 and those with “underlying medical conditions”²¹ as being at higher risk for severe illness. The CDC guidance provides that, generally, workers at higher risk will be protected by the strategies that prevent the spread of COVID-19 in the workplace and, in addition, the employer should “support and encourage options for telework” for these workers and “consider offering [them] duties that minimize their contact with customers and other employees..., if agreed to by the worker.”²² The EEOC has issued new

¹⁸ The guidelines state that *an employee’s COVID-19 illness likely is “work-related” if: several cases develop among workers who work closely together and there is no alternative explanation; the employee’s COVID-19 illness is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation; or the employee’s job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation. Further, an employee’s COVID-19 illness is likely not “work-related” if: the employee is the only worker to contract COVID-19 in the employee’s workplace vicinity and the employee’s job duties do not include having frequent contact with the general public, regardless of the rate of community spread; or the employee closely and frequently associates with someone outside the workplace (e.g., a family member, significant other, or close friend) who (1) has COVID-19, (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.*

¹⁹ The case would be recorded as a respiratory illness on OSHA Form 300. Note that the employee can request that his or her name not be entered on the log.

²⁰ The specified precautions are that the person must take his or her temperature before work to confirm no fever; and, if there is no fever, then must, during the work shift, (i) “self-monitor under the supervision of their employer’s occupational health program”; (ii) wear a face mask at all times while in the workplace for 14 days after the last exposure to a person with COVID-19; (iii) maintain social distancing (and “not congregate in the break room or other crowded spaces”); and (iv) clean and disinfect work spaces used. In addition, the employer should “work with facility maintenance staff to increase air exchanges in the room or building.” The person should self-report if symptoms develop and then should be treated as a person who is suspected of having COVID-19.

²¹ The CDC guidance states that these conditions include, but are not limited to, “chronic lung disease, moderate to severe asthma, hypertension, severe heart conditions, weakened immunity, severe obesity, diabetes, liver disease, and chronic kidney disease that requires dialysis.”

²² In particular, the CDC guidance states that employees in areas where there is a higher level of transmission of COVID-19 should be offered “telework and other options as feasible to eliminate travel to workplaces in lower

guidance regarding when employers can bar employees with medical conditions that could cause a severe case of Covid-19.²³ The EEOC guidance makes clear that an employer cannot bar an employee from the workplace solely because of an underlying medical condition. Instead, that action can be taken only after a series of steps are followed in which, in compliance with the Americans with Disabilities Act (ADA), the company and the employee consider ways to accommodate the employee, including possibly by altering the employee's job responsibilities. Note that if an employee does not self-report his or her higher-risk status and does not request an accommodation, the ADA does not mandate that the employer take action. At the same time, even if the employer's sole motivation is good-faith concern about the employee's well-being, the employer cannot exclude the employee (or take any other adverse action) based solely on the employee's disability, unless the disability poses a "direct threat" to the employee. The "direct threat" standard is a high one, and the determination must be made by the employer based on an individualized assessment, which involves a reasonable medical judgment about the particular employee's disability (not the disability in general).²⁴ Even if an employer determines that an employee's disability poses a direct threat to the employee's own health, the employer 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). The guidance states that employers should "encourage [these workers] to self-identify" (and "employers should avoid making unnecessary medical inquiries"); "have conversations with [these] employees if they express concerns"; and "not require employees to provide a note from their healthcare provider when they are sick and instead allow them to inform their supervisors or employee health services when they have conditions that put them at higher risk for diseases."

17. What happens if an employee, customer, client, or visitor refuses to return to work or to comply with the company's COVID-19-related protocols? As discussed above (see Q.9), employees can be subject to discipline or dismissal as they otherwise would be for not complying with company policies and practices. We would note that, during this difficult time, employers may wish to take into consideration that COVID-19-related issues may be viewed differently by different persons, and that each person may have a different tolerance level for risks associated with the spread of COVID-19, as well as different personal circumstances in dealing with the pandemic. At the same time, however, it will be important for an employer to be consistent in the application of its policies and practices relating to COVID-19 and to comply with legal requirements. Finally, it should be kept in mind that, under the National Labor Relations Act (NLRA) (which generally applies to union *and* non-union employees,

transmission areas and vice versa." The guidance describes three "steps" toward more normal operations, reflecting the level of need for community mitigation of COVID-19. In Steps 1 and 2 (during which businesses are instructed to "[s]cale up only if business can ensure strict social distancing, proper cleaning and disinfecting requirements, and protection of their workers and customers"), workers who are "at higher risk of severe illness are recommended to shelter in place." In Step 3 (during which businesses are instructed to scale up as above, except that only "limited" social distancing is required), it is no longer recommended that higher-at-risk workers shelter in place. During all three Steps, according to the guidance, businesses should "encourage telework for as many employees as possible," and "ask employees who use public transportation to consider using teleworking to promote social distancing."

²³ The new EEOC guidance, which was issued May 7, 2020 ([here](#)), replaced earlier guidance that the EEOC provided and withdrew on May 5, 2020.

²⁴ The ADA regulations require an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include consideration of (i) the severity of the pandemic in a particular area, (ii) the employee's own health (for example, whether the employee's disability is well-controlled), and (iii) the employee's particular job duties. A determination of "direct threat" also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

excluding supervisors, managers and certain other employees), employees may be engaged in protected concerted activity if a group of them, for example, refuses to comply with the company's COVID-19-related requirements. Under the NLRA, while the employer does not have to pay a group of employees when they refuse to work, the employer generally cannot discipline or discharge them.

18. Does a business have to post new signs at the workplace relating to COVID-19? The CDC and OSHA guidance recommends the posting of certain types of signs for specific types of business; and some states (e.g., New York) require that reopened businesses post signs in accordance with that guidance (although they may be "customized to" the specific workplace or setting). The only businesses for which OSHA has issued specific guidance with respect to signage are daycares, schools, camps, restaurants and bars; however, the guidance may be useful to other types of businesses as well. The guidance recommends that signs be posted to remind employees of the need to try to stop the spread of COVID-19; to practice good "respiratory hygiene"; to properly dispose of used PPE; to follow social distancing policies; to report symptoms of or exposure to COVID-19 (and how to do so); and to follow hand hygiene and cleaning guidelines.²⁵ Signs are available for free download from the CDC and from many state and local health authorities.²⁶

19. Is there a special cleaning regimen that has to be undertaken? The CDC and OSHA guidance provide that businesses should routinely clean and disinfect all frequently touched surfaces at the workplace (e.g., workstations, keyboards, telephones, handrails, and door knobs); and that certain surfaces and objects in public places should be cleaned and disinfected before each use (e.g., shopping carts and point of sale keypads). The guidance states that surfaces that are dirty should be cleaned with detergent or soap and water before disinfecting. We note that many companies also are addressing mailroom operations to limit contact with mail, expose mail to UV lighting, use PPE (at least gloves), and/or clean packages or other mail with disinfectants. The U.S. Environmental Protection Administration (EPA) provides a list of cleaning products approved for use against the virus that causes COVID-19, but states that most common EPA-registered household disinfectants should be effective.²⁷ With respect to reopening, the CDC guidance states that, if a facility has been completely unoccupied for at least 7 days, it is believed that the virus that causes COVID-19 would not still be surviving; however, the guidance

²⁵ According to the CDC, good respiratory hygiene requires covering one's mouth and nose when sneezing or coughing, "preferably with a cloth mask when social distancing is not possible." The CDC states that one's hands should be washed frequently, with soap, for at least 20 seconds (or, if soap and water are not available, then with hand sanitizer containing at least 60% alcohol). The National Safety Council notes that hands should be washed after blowing one's nose, coughing, or sneezing; before, during and after preparing food; after using the toilet; after touching garbage; when arriving at work or leaving work; before and after work breaks; and after touching objects that have been frequently touched by others.

²⁶ See [here](#) for signs available from the CDC.

²⁷ See [here](#) the EPA list of approved disinfectants. The CDC and OSHA guidance also advises that disinfectant should be left on the surface for at least one minute; bleach solutions will be effective for up to 24 hours; items made of soft and porous materials (e.g., carpets, drapes, and couches), if not frequently touched, can be cleaned only and not disinfected; a wipeable cover should be considered for use on electronics (e.g., tablets, touchscreens, keyboards, remote controls, ATM machines); outdoor areas should receive normal routine cleaning (without a need to disinfect except on hard surfaces that are frequently touched (e.g., handrails or grab bars); and regular laundering should be used for dirty laundry (but at the warmest appropriate water setting and all items should be dried completely). The OSHA guidance confirms that its Hazard Communication Standard (which requires employers to classify and communicate risks related to use of chemicals at the workplace) applies to the common chemicals used for cleaning and disinfecting the workplace for COVID-19 purposes. In addition, cleaning staff should be provided with appropriate PPE and appropriate training.

notes that there are many non-COVID-19-related considerations when reopening buildings and spaces that have been closed for an extended time (e.g., ensuring the safety of the building's water system). The guidance states that the regular cleaning and disinfecting regimen should be used when cleaning and disinfecting an area that may have been contaminated by a COVID-19-infected person, but, when possible, after leaving the area vacant for at least 24 hours. State and local requirements with respect to cleaning generally follow the CDC and OSHA guidelines, but should also be reviewed. For example, the New York City Health Department guidelines²⁸ specify that cleaning and disinfecting should be done "at least after every work shift daily or as needed"; states that bathrooms should be cleaned "frequently"; and identifies more examples of high-touch surfaces to be focused on when cleaning (e.g., light switches, kitchen appliances, countertops, tables, sinks, faucet and toilet handles, elevator buttons, push plates, phones, keys, desks, chairs, computer mice); provides separate guidance for cleaning vehicles, food establishments, health facilities, and other specified types of businesses; and states that cleaning staff should be reminded to wash hands frequently and to avoid touching eyes, nose and mouth and must wear face masks (provided by the employer, at the employer's cost) if they will come into contact with other individuals.

20. What protection does a business have from liability for COVID-19-related claims? The U.S. Congress, as well as various state and local governments, are considering potential legislation or orders that would limit the liability of businesses for specified types of COVID-19-related claims from employees, customers, tenants, contract counterparties, the general public, or others. As noted above, currently the best strategy for mitigating liability is to follow all relevant governmental orders and guidance, tailored or augmented as appropriate for the company's specific circumstances. In addition, a company should consider following additional practices that other similar businesses are following or that have been recommended by trade groups, consulting companies, or others.²⁹

21. What requirements are applicable to business offices and commercial buildings? Generally, the CDC guidance indicates that density at the workplace should be limited to the extent possible, social distance should be maintained, and cleaning and disinfecting regimes should be maintained. The updated CDC guidance, issued May 27, 2020, provides a checklist of steps to be taken by businesses reopening offices, based on the previous guidance the CDC has issued. In the updated guidance, the CDC advises that companies will have to "[c]hange the way people work."³⁰

On May 28, 2020, the New York State Department of Health issued detailed minimum requirements for offices and commercial buildings in New York, as set forth below, which may be useful as a guidepost to businesses in other states as well.³¹ The NYS DOH guidelines generally assign "primary responsibility" to the building owner or manager for unleased and common spaces in a commercial building, and to the owner or operator of the tenant for a tenant's leased space in a commercial building, except to the extent

²⁸ See [here](#) the NYC Health Department General Guidance for Cleaning and Disinfection for Non-Healthcare Settings, issued May 29, 2020.

²⁹ Helpful, comprehensive sets of recommendations have been provided by the National Safety Council (May 24, 2020) ([here](#)) and by the Partnership for New York City (May 2020) ([here](#)). Among others, the following also have issued guidance: the Business Roundtable ([here](#)); the Building Owners and Managers Assn. ([here](#)); CBRE (commercial real estate services) ([here](#)); the National Restaurant Assn. ([here](#)); Deloitte ([here](#)); and the New York State Bar Association ([here](#)).

³⁰ See [here](#) the CDC guidance update dated May 27, 2020.

³¹ See [here](#) the NYS DOH Interim Guidance for Office-Based Work during the COVID-19 Public Health Emergency, and [here](#) the NYS DOH Interim Guidance for Commercial Buildings Management, both effective as of May 27, 2020.

they agree otherwise. Building owner/managers and tenants are directed to “coordinate,” as appropriate, to ensure that the requirements are met. The requirements are as follows:

- **Maximum occupancy:** for indoor spaces, limit the total number of occupants in any given space to 50% of the maximum occupancy permitted under the certificate of occupancy;
- **Density:** generally reduce density of the in-office workforce, by (a) considering a return-to-work in “tiers or waves” (based on factors such as function, safe transportation, and ability to work remotely); (b) “adjusting workplace hours,” instituting “team” work groups, staggering arrival and departure times (to reduce density in lobbies and elevators), and avoiding multiple teams working in one area (by staggering scheduled tasks and using signs to indicate occupied areas); (c) limiting access to the office for those employees who do not need to be there (e.g., they should be allowed to “collect their documents” from the office if required, but that should occur “minimally, not with frequency”); and (d) prohibiting non-essential visitors to the building to the extent possible;
- **Social distancing:** maintain social distancing of at least 6 feet among individuals (unless the “core activity” requires closer distance)—and, in this connection, (a) consideration should be given to closing common spaces; (b) to the extent common areas remain open, the seating must be rearranged to ensure individuals are 6 feet apart in all directions (side-to-side and facing one another); (c) workstations, seating, and desks should be arranged to ensure individuals are 6 feet apart in all directions (or, if this “is not feasible,” then face coverings or physical barriers must be provided and used³²); (d) signs and distance markers denoting 6 feet distance should be used in commonly used areas and where lines may form or people may congregate (e.g., copy rooms, kitchens, reception desks, and health screening stations); (e) 6-foot distance circles should be marked around workstations and “other common stationary work areas”; and (f) schedules should be staggered for “any gatherings” (e.g., coffee breaks, meals, and the start and end of shifts);
- **Movement:** limit “on-site interactions” as much as possible (e.g., designate separate egress and ingress for employees leaving and employees starting their shifts); limit movement (e.g., employees should stay near their workstations as much as possible); and reduce bi-directional foot traffic, using tape or signs with arrows, “in narrow aisles, hallways or spaces”;
- **Face coverings:** require that individuals wear a face covering any time that they must or may unexpectedly come within 6 feet of another person (see Q.12 above);
- **Health screenings:** require daily screenings of all employees and visitors (see the first section of this memorandum regarding health screening);
- **Common areas:** close “non-essential amenities and communal areas” (e.g., vending machines, coffee areas; gyms, pools, game rooms);
- **Workstations:** limit the use of shared workstations to the extent practicable, and, if they are used, they should be cleaned and disinfected between users; and limit the sharing of objects

³² Examples provided of physical barriers are plastic shielding walls, strip curtains; cubicle walls, plexiglass, or other impermeable dividers or partitions. They should not be used where they will interfere with ventilation, heating or cooling; and, to the extent they are used, a face covering need not be used in addition.

(e.g., laptops, notebooks, touchscreens, and writing utensils), as well as the touching of shared surfaces (e.g., conference tables), or require employees to wash hands (or use hand sanitizer) before and after contact;

- **Clean desks:** consider a “clean desk policy” so that non-essential items are stored in enclosed cabinets or drawers rather than on desks (which facilitates cleaning);
- **Small spaces:** prohibit the use of small spaces (e.g., elevators, supply rooms, personal offices, vehicles) by more than person at a time; open doors and windows for ventilation; enable the use of stairs (to prevent density in elevators and elevator waiting areas); consider using technology (e.g., room sensors and real-time dashboards) to quantify and display utilization of space throughout the office; and restrict access to small areas such as bathrooms and break rooms (e.g., by “flagging when occupied”).
- **Signs:** post COVID-19-related signs throughout the office or building, as applicable;³³
- **Meetings:** limit meetings, conferences and other “in-person gatherings” to the greatest extent possible (use video or teleconferencing whenever possible); and if in-person meetings are held, they should be held in open, well-ventilated spaces with 6 feet between individuals and handshakes or other physical contact should be prohibited;
- **Travel:** limit all non-essential travel;
- **Deliveries:** establish designated areas for pickups and deliveries, and limit contact to the extent possible;
- **Hand hygiene:** maintain “hand hygiene stations”–(a) for handwashing, with soap, running warm water, disposable paper towels, and a lined garbage can; (b) for areas where handwashing may not be available or practical, then for hand sanitizing, with hand sanitizer (at least 60% alcohol); (c) make hand sanitizer available throughout common areas in the office (e.g., at entrances, exits, and reception desks); (d) install touch-free hand sanitizer dispensers where possible; (e) place signs near hand sanitizers stating that if hands are visibly dirty, hand sanitizer will not work and they should be washed with soap and water; (f) place receptacles around the office for disposal of soiled items; and (g) consider installing touch-free amenities to reduce high-touch surfaces (e.g., water fountains, trash cans, and hand dryers);
- **Cleaning:** conduct regular cleaning and disinfecting of the office (or building, as applicable), more frequently for frequently touched surfaces (“at least after each shift, daily, or more frequently as needed”); and provide appropriate cleaning and disinfecting supplies for shared and frequently touched surfaces (e.g., keyboards, touchscreens, printers, telephones, hand rails, and door knobs) and encourage employees (or cleaning staffs) to use them before and after use;
- **Food:** prohibit shared food and beverages (e.g., buffet-style meals) and encourage bringing lunch from home or provide grab-and-go food;

³³ The signs must: remind people to cover their mouth and nose with a cloth face-covering when social distancing of 6 feet cannot be maintained; properly store and discard PPE; adhere to physical distancing instructions; report symptoms of COVID-19 (and how they should do so); and follow hand hygiene and cleaning and disinfection guidelines. Signs can be obtained from the NYS DOH or custom made.

- **Communications plan:** a communications plan must be developed for employees, visitors and customers; and
- **Phase-in:** consider phasing in reopening (and initially limiting the number of employees, hours or customers) so as to allow for operational issues to be resolved before work returns to normal levels.

22. What other plans should businesses be making? We recommend that a business's plans include the following: (i) **Transition team.** A business should consider appointing a person or team to be responsible for developing the company's policies and practices relating to COVID-19, overseeing preparation of the workplace for reopening, ensuring the business's prompt response to new developments relating to COVID-19, and monitoring the safety of the workplace relating to COVID-19 on a going-forward basis. (ii) **New guidance or orders.** A business should have a process for keeping track of, and quickly adapting to, new or updated governmental orders and guidance. Many companies are appointing a person or committee to be responsible for COVID-19 matters, including keeping track of new rules and developments. Such a committee should, where practicable, include professionals from the company's human resources, legal, and other departments as appropriate. (iii) **Possible future shutdown(s).** A business should have a plan in place for a future shutdown that may be ordered or appropriate in the event there are spikes in COVID-19 cases after reopening. (We are aware of no guidance having been issued that specifies under what circumstances a new shutdown might be ordered.) (iv) **Educating employees (and others, as appropriate) about the business's COVID-19-related protocols.** This education will enable employees, customers, visitors, and others to comply with the new protocols and will help with instilling confidence in them as to the safety of the workplace. (v) **Comment and complaint process.** A business should consider implementing a process for collecting and quickly addressing complaints by employees or others relating to the business's COVID-19-related policies and actions. This process might follow the outlines of a whistleblower complaint process (including, for example, a "hotline" to call) or be as simple as providing a "Suggestion Box." Whatever the process, it should include clearly assigned responsibilities for monitoring the complaints and comments made, as well as ensuring that matters that are raised are addressed appropriately, promptly and consistently. (vi) **Dealing with differing reactions and views among employees and others.** The pandemic tends to elicit responses in individuals that are highly personal and/or political. A business should recognize that individuals' reactions to each COVID-19-related policy, procedure, or response by the business will potentially vary widely. The best response to this phenomenon may be to ensure that the company's policies and procedures are stated clearly, are communicated well to all relevant persons, and are enforced consistently—while, at the same time, acknowledging that individual responses will vary and that each person is entitled to his or her own view without being judged for it. (vii) **Thinking about the future.** This may be an appropriate time for businesses to reimagine their futures and the future of business in general. See [here](#) our memorandum, *Business Reopenings: Thinking About the Future* (June 1, 2020), which discusses broader questions relating to reopening that portend possibly transformational changes for businesses going forward.

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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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