



ALERTS

Considerations For Texas Employers As The State Begins To Reopen

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Highlights

The Texas Department of State Health Services has issued numerous protocols, which are minimum requirements businesses must meet as they reopen or expand

Employers should consider developing a checklist for handling a situation where an employee informs the employer that they have symptoms, have been diagnosed or have a family member who has been diagnosed with COVID-19

As employers start to reopen or plan for reopening, some are considering “informed consent/liability waiver” notices

As Texas eases pandemic-related restrictions, employers face a number of issues concerning reopening or expanding their business operations. This includes bringing employees back into the workplace after they have been working remotely or were furloughed, navigating state and local COVID-19 orders and ensuring that adequate health and wellness safeguards are in the place for customers and employees.

This is just the beginning of addressing COVID-19 issues in the workplace, as Texas businesses start to reopen and the state adjusts to a

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“new normal.”

Workplace Safety Issues

When preparing to reopen or expand business operations, each employer needs to make decisions about what type of “safety” protocols to implement. The [Texas Department of State Health Services has issued a number of health protocols](#) for employers, retailers, employees, individuals, and specific types of retail or entertainment establishments.

While attempting to strike a balance between appropriate safety procedures and what’s feasible, these protocols are minimum requirements. They include requirements for safety training, health screening, hand-washing, social distancing, and related signage. Additionally, employers should consider limiting in-person interactions, the number of people on company premises, and the size of in-person gatherings and events.

Some employers do temperature checks of employees upon entering the workplace in addition to health screenings. This can create significant wait times to enter a facility. Employees must be paid for such “wait time.” To mitigate this, some large employers have acquired thermal temperature cameras that can determine an “increased” body temperature, which employees can simply walk through, akin to a metal detector. If an employee’s body temperature is elevated, then the employee is checked further with a non-touch thermometer. The U.S. Department of Labor (DOL) and the U.S. Equal Employment Opportunity Commission (EEOC) have issued guidance that generally waives the ADA concerns that would attach to employee health and medical inquiries addressing COVID-19 concerns.

Face Masks, PPE and Floor Plans

Texas Health and Human Services protocols also recommend that individuals consider wearing cloth face coverings when entering a business. Employers are no doubt considering whether employees, customers, etc. should wear a face mask or covering.

The DOL and the Centers for Disease Control and Prevention (CDC) guidance is that surgical masks should be reserved for healthcare providers. Texas Health and Human Services protocols recommend that employers consider having all employees wear cloth face coverings and, if available, employees should consider wearing nonmedical grade face masks.

Likewise, employers have evaluated the modification of floor plans to ensure social distancing or the installation of protective plastic or glass barriers. Where barriers are not an option, plastic face shields may be an alternative, if they are available.

Workplace Sanitation

Essential businesses that continued to keep manufacturing or office operations open throughout the pandemic were the harbingers of how to clean and sanitize during the COVID-19 crisis. Texas Health and Human Services protocols cemented those procedures in writing and requires:



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- Regular and frequent disinfecting of touched surfaces
- Disinfecting of any items that come into contact with customers
- Making hand sanitizer, disinfecting wipes, soap and water, or similar disinfectant readily available to employees and customers
- Displaying signage at the business to remind everyone of the best hygiene practices

Updated Leave and Childcare Policies

The DOL requires notice of the family and sick leave benefits available to employees under the Families First Coronavirus Response Act (FFRCA). Employers with more than 50 employees who are currently subject to the FMLA will need to update their FMLA policies, procedures and leave request forms. Employers that have not previously been required to provide FMLA leave will need to implement appropriate policies and procedures to facilitate and manage these new FFCRA benefits.

Procedures If An Employee is Infected or Caring for Someone Who is Infected

Employers should consider developing a checklist for handling a situation where an employee informs the employer that he or she has COVID-19 symptoms, has been diagnosed with COVID-19, or a family member has been diagnosed with COVID-19. The checklist should include procedures for appropriately notifying co-workers of a possible exposure.

Procedures and forms should also be developed to clear the exposed or infected employee to return to work. Texas Health and Human Services protocols speak to when employees may return to work who have displayed COVID-19 symptoms, who have been diagnosed with COVID-19, or who are known to have had close contact with a person, who was lab-confirmed to have COVID-19.

Employee-Injury Claims

Employers are naturally concerned about liability if an employee or employee's beneficiary claims injury or death due to an employee's alleged exposure at work to COVID-19. This liability is largely mitigated for employers who subscribe to the Texas Workers' Compensation system. In exchange for procuring workers' compensation insurance, employee claims for injury or death due to the ordinary negligence of the employer are preempted. Only the insured benefits are available. Some employers, however, are nonsubscribers who provide ERISA-like benefit plans for workplace injuries; these plans do not preempt claims for the employer's ordinary negligence, but they usually require mandatory arbitration of claims, subject to a stop-loss insurance policy.

Customer Injury Claims

As employers start to reopen or plan to reopen, some are considering

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“informed consent/liability waiver” notices, specifically to be used for customers, members of a private club or visitors. Such waivers would place customers on notice of the potential risk of COVID-19 exposure, including the fact that people can be asymptomatic, and identifying limitations of the entity’s health screening abilities.

The waiver would expressly indicate that the customer or visitor must acknowledge they are aware of the COVID-19 risk and that they are choosing to enter the facility under those stated conditions. Consideration should also be given by employers to the risk against the business in terms of addressing employee exposure or defending workers’ compensation claims arising from that same facility.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or Doug Haloftis at 214-258-4137 or doug.haloftis@btlaw.com.

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