Getting Back to Business

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May 21, 2020

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Agenda

Speakers

Karla Grossenbacher
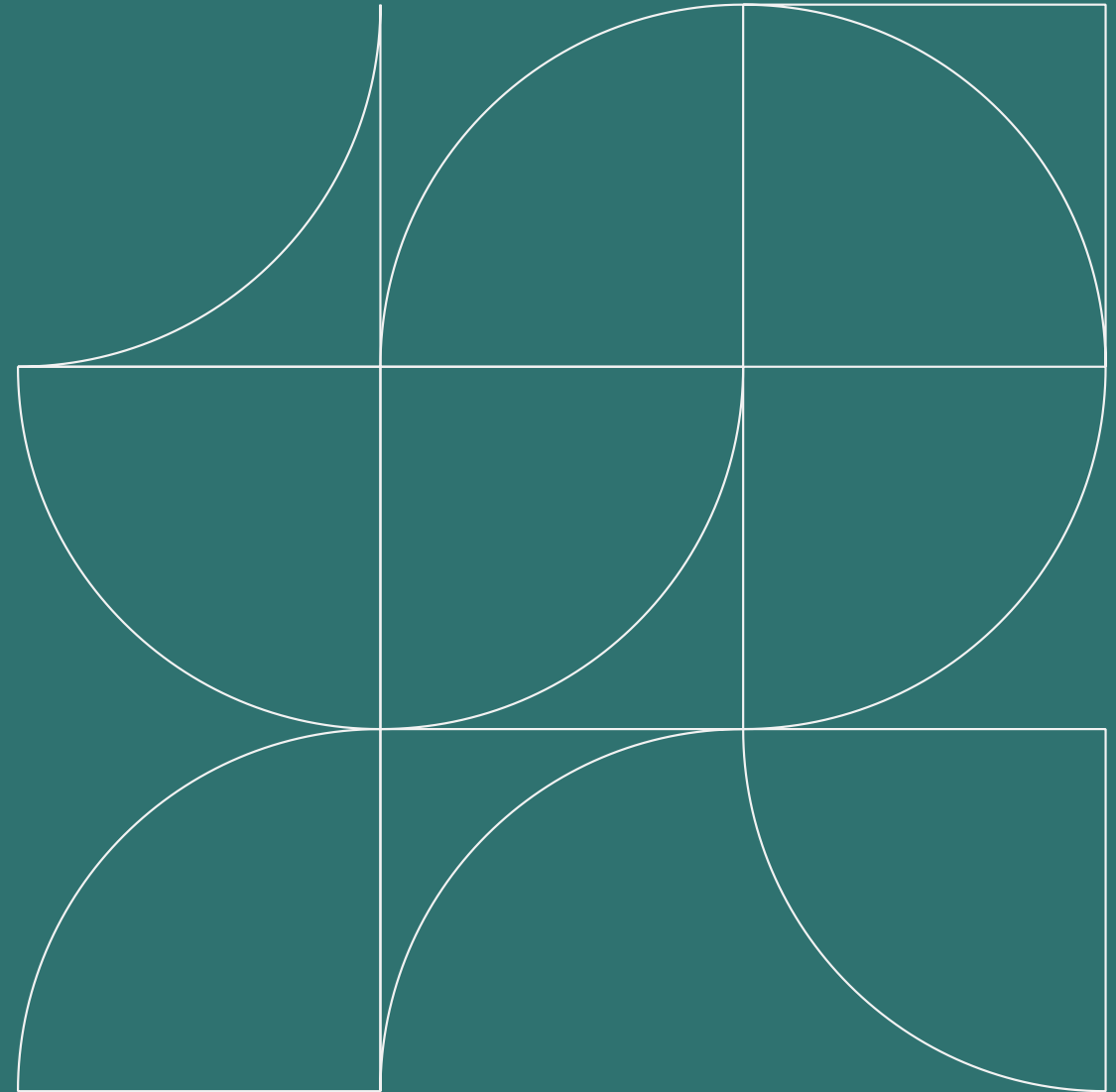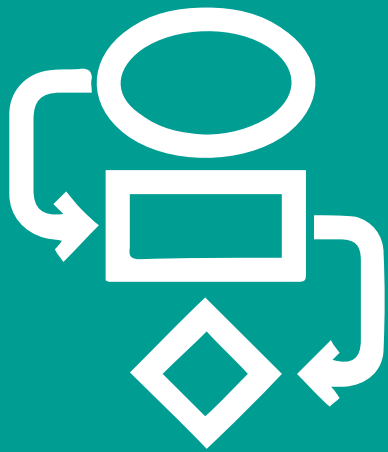Labor & Employment
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Issues to Consider Before Employees Return

Determine Which Federal, State and Local Laws and Orders Apply

– Consider any industry-specific requirements or business considerations (e.g., consumer facing, curbside pick up, offices)

– State and local orders change rapidly

– OSHA and other health and safety laws and orders (may vary by location)

– Paid sick, paid leave, unpaid leave, and other relevant laws (will likely vary by location)
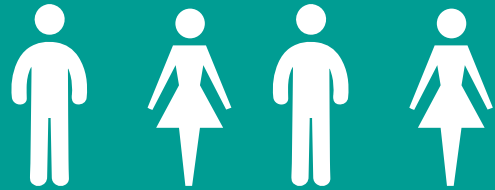
Determine an Organizational Approach

- Designate a point person or core Return To Work team who can make company-wide policy decisions
  - HR
  - IT
  - Building Facilities
  - Health & Safety
  - Office Managers
  - Senior Management

- Determine an approach that is right for the business and the workforce

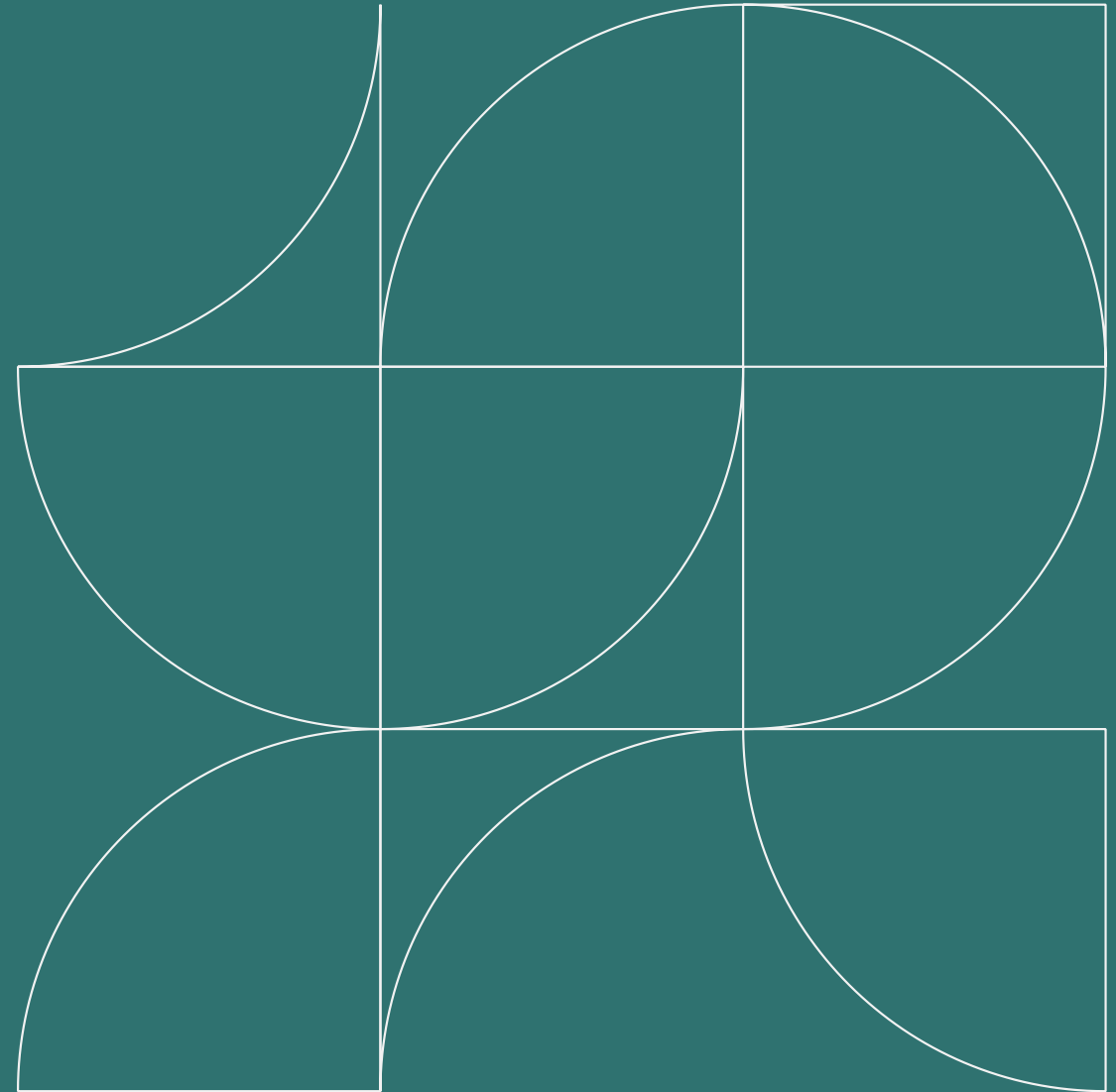# Determine Which Employees Will Return to Work (and How & When)

- Decide when to bring employees back
- Determine which employees are legally permitted to return to the worksite
- Decide which employees to return to the worksite immediately (and timing for others)
- Consider that certain employees may be prohibited from returning to the worksite due to actual COVID-19, symptoms, potential exposure, isolation or quarantine by a health care provider or public health officer, etc.
- Determine which employees are on legally-protected leaves (plan for business impact of anticipated future requests)
- Decide how to handle high-risk employees
- Decide how to handle employees with logistical/other barriers to returning to the worksite (e.g., child care, transportation)

Determining if Individual Employees are Safe to Return

- Screening process to determine if individual employees are safe to return
- Determine protocol for employees who:
  – have tested positive for COVID-19
  – have been diagnosed as presumptively positive for COVID-19
  – have experienced COVID-19 symptoms
  – have potential exposure, but no symptoms
- Questionnaires, temperature checks, self-certifications and testing

Logistics and Communication

Reintegration Logistics and Other Considerations

- Develop a transition plan and process to handle re-integration logistics

- Develop a process for identifying and communicating with employees who may need additional accommodations when they return to work, and/or requests to continue working from home

- Confirm accuracy of sick, vacation, and PTO banks

- Determine if there is a need to bargain with any union(s) regarding return to work policies, protocols, and/or practices

Potential Changes in Pay, Hours, Schedules Duties/Wage Hour Considerations

- Considerations for potential reductions in pay or hours, changes to work schedule, changes to duties

- Evaluate need to reclassify exempt employees to nonexempt (salary basis test, salary thresholds, changes in duties) and, if yes, development of protocol/notice

- Distribution of any legally required notices regarding changes in pay

- Identify and address potential off-the-clock issues (e.g., symptoms checks at home, temperature check lines at work, putting on PPE at home, cleaning tools at home)

- Identify and address potential additional meal and rest break claims (e.g., if employees are asked to eat lunch at their work stations, if COVID-19 procedures cut into meal breaks)

Update Employment Policies and Other Practices

- Determine new COVID-19 legal requirements (and applicable sunset provisions)

- Update employee handbook or other policies as necessary

- Create and implement COVID-19 related and other policies/protocols

- Anticipate more requests for time off, reasonable accommodations, remote work, etc.

- Specifying a complaint procedure

Communication of Updated Policies / Protocols

- Consider remote communication of new policies prior to employees' return to work

- Orientation or training for employees upon return to work, especially for HR and management

- Renewed communication of policies that are already in place

- Posting requirements for employers based on COVID-19 related orders

- Evaluation of hiring practices in light of COVID-19

Requests to Work Remotely After Worksite Opens

– Has overall philosophy toward remote work changed since COVID-19?

- Requests for reasonable accommodations for a disability (including potential need to revisit pre-COVID-19 accommodation request denials)

- Requests due to fear of COVID-19 (note: potential ADA and whistleblower issues)

- Requests due to membership in a vulnerable population

- Requests due to allegation(s) of violations of health and safety orders and/or laws or need to quarantine due to potential exposure

- Requests due to child/senior care challenges

- Requests due to transportation challenges

- Requests due to household family members being in a vulnerable population (pre-vaccine) (e.g. household family members with underlying medical conditions/immuno-compromised or who are senior citizens)

- Requests due to other personal reasons

Fear/Refusal to Return to the Workplace

- Determine whether employee fear/refusal is connected to a medical condition or other reason potentially protected by law

- If the fear is related to a medical condition or illness, an employer may be obligated to engage in the interactive process with the employee

- Determine whether there are reasonable accommodations, such as a work from home accommodation, that might be available

- Be consistent in treatment of employees
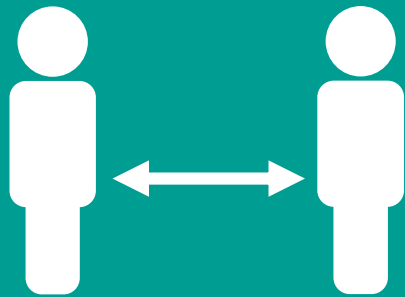
Protocols to Consider
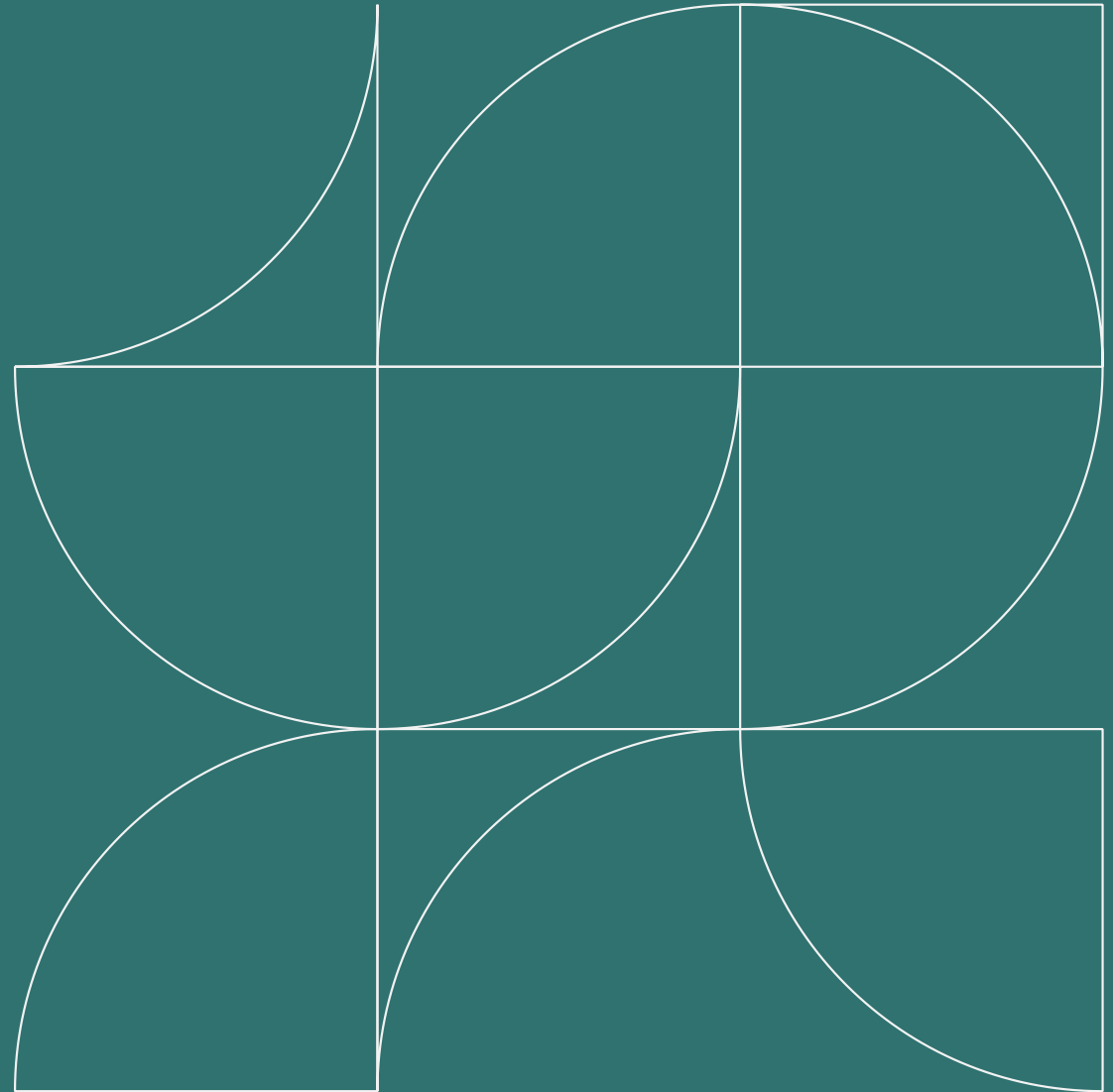
Social Distancing Protocols

Considerations for Reconfiguring Workspaces

- Adjustment of paths of travel to work stations and other frequently used areas
- Redesign or slowing down of production lines to increase space between employees)
- Use of physical barriers (e.g., plexiglass, etc.)
- Repurposing of conference rooms, lunch rooms, and other communal spaces to allow for more distance
- Limits on in-person meetings
- Posters, training

Social Distancing Protocols

Considerations for Reconfiguring Schedules

– Reconfigure work schedules and/or shifts to limit the number of employees physically present in a specific office, facility, plant, or other work location at any one time

– Staggering of meal periods and rest breaks to the extent consistent with applicable law; consider permitting employees to eat at their work stations

– Implementation of full-time and/or part-time work-from-home arrangements for positions where it is feasible for employees to work from home, either full-time or a number of days each week

Other Health and Safety Protocols

- Best Practices
  - Identify point person to keep track of changes
  - Evaluate need to retain outside safety consultant
  - Determine minimum legal requirements — OSHA, CDC guidance, state and local shelter-in-place orders
    - Perform a hazard assessment as required by OSHA
  - Consider type(s) of health screens/testing to implement
    - Frequency
    - Self-checks vs. employer-administered checks
    - Protocols
  - Consider requiring health and safety items (masks, etc.)
  - Develop handwashing protocols
- Consider implication of any applicable off-duty conduct laws

Other Health and Safety Protocols

- Cleaning Considerations
  - Perform deep workplace cleaning prior to reopening
  - Consider implementation of more frequent or robust routine cleaning
  - Develop protocol around cleaning work stations
  - Coordinate with landlords and building management
    - Adequate cleaning of common areas
    - Social distancing protocols in common areas
    - Notification protocols in event of COVID-19 positive test in building
  - Consider temporarily removing shared items (e.g., staplers, three-hole punchers, and other office supplies; coffee mugs; etc.)
  - Develop a protocol for shared tools and other items (e.g., leave it for the other employee to pick up rather than handing it off in person, cleaning tools before each use, etc.)

Other Health and Safety Protocols

- Cleaning Considerations Continued
  - Develop a protocol for locker areas; ask employees to leave items at home or in cars to the extent possible. Consider whether uniforms and PPEs can put on/off at home or in the car (note: potential wage hour issues)

  - Stock the workplace with hand sanitizer, facial tissue, and sufficient cleaning supplies

  - Reminders about proper hygiene, handwashing, coughing and sneezing etiquette

  - Ensure adequate ventilation

  - Consider increased cleaning of high traffic areas, common areas, office equipment (e.g., copiers, keyboards, printers, etc.) and periodic deep cleaning of office, facility, plant, and/or other work locations by a professional cleaning service

Other Health and Safety Protocols

- Other Safety Considerations
  - Provide safety training and communications
  - Consider temporarily switching to disposable items where possible (kitchen ware, desk blotters, etc.)
  - Limit unnecessary mail
    - Consider prohibiting employees from receiving personal mail at the workplace
  - Consider temporarily closing any cafeteria or, instead, selling only pre-packaged foods
  - Consider temporarily stopping any fresh meal delivery (or avoid shared food items, shared utensils)

Pre-Shift Screening and Temperature Taking
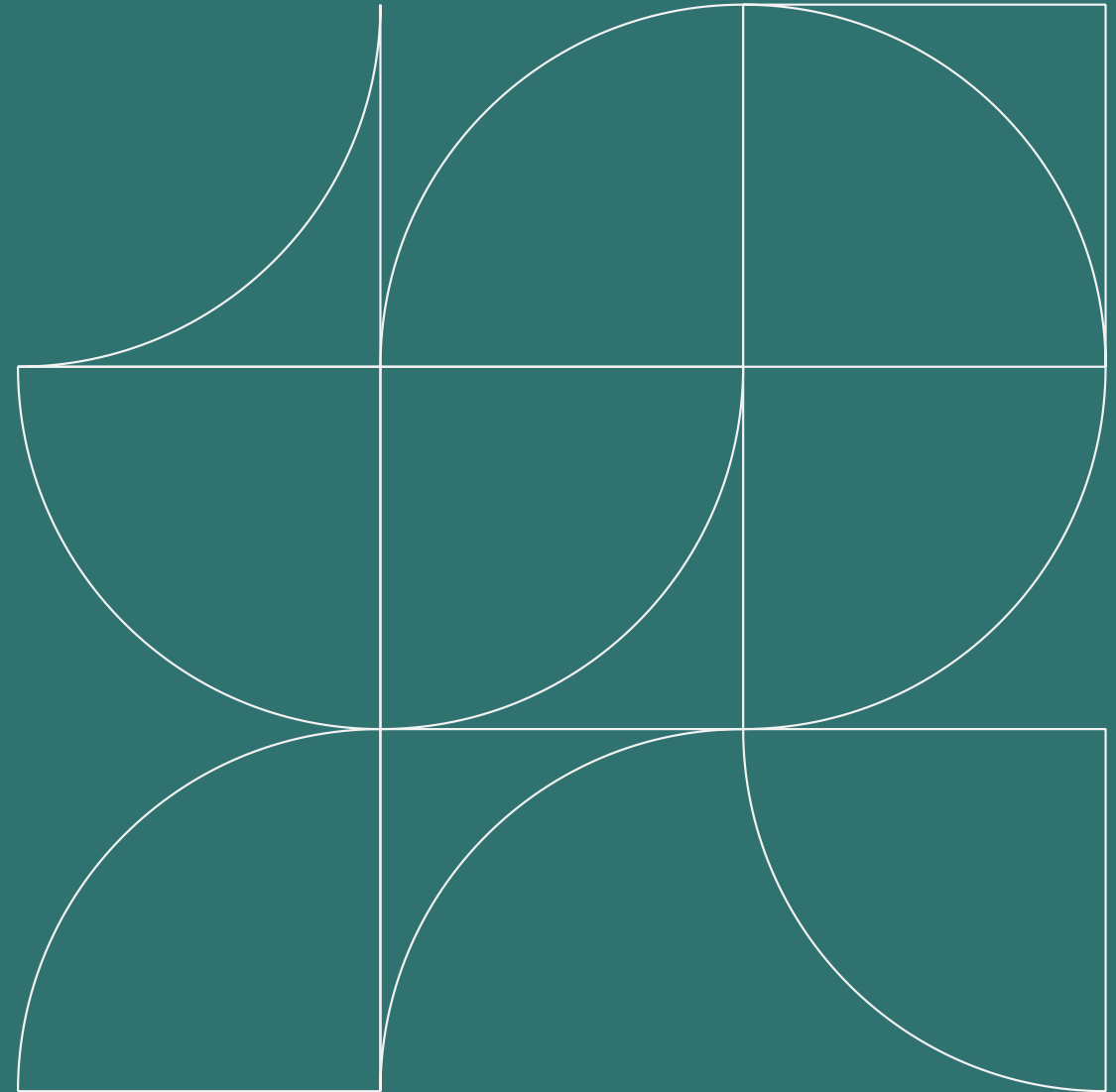
Why Is Return to Work Screening So Important?

- Provide a safe and healthy workplace generally
- Reassure employees that you are doing what some authorities require and what FDA or CDC recommend/have approved
- Reassure customers, vendors, and others who must be on premises
- Avoid possible tort liability by exercising reasonable care
- Avoid other legal risks (OSHA, ADA, ADEA, plus state and local protections)
- Avoid REPUTATIONAL risk of positive cases or worse yet deaths
- Help flatten the curve

Employee Pre-Shift Screening

- EEOC approved checking for symptoms and sending home symptomatic employees

- Types of pre-shift screenings

  – Written, oral, posting

What questions should you/can you ask?

- Have you had in the past 48 hours?
  - Cough, shortness of breath or difficulty breathing
  - Fever, chills
  - Muscle pain
  - Sore throat
  - New loss of taste or smell
  - Gastrointestinal symptoms like nausea, vomiting, or diarrhea.

- Have you had close contact with a person who has confirmed COVID-19?
- Have you had close contact with a person experiencing symptoms of COVID-19?
- Do you currently have a fever $\geq$ 100.4?

What to Document

- Documentation of responses

- ADA Confidentiality rules

  – separate form, separate medical file, confidential medical record

  – Regulatory exceptions are narrow
    - supervisor/manager
    - first aid/safety
    - agency enforcing ADA
    - workers comp
    - insurance

Temperature Screening

- Also currently permitted by the EEOC
- Types of temperature screening
  - Thermal, oral, confirmation of employee self check/self assessment
- Have a protocol
  - Protect the screener
  - Self-administered when possible
  - What is an elevated temperature?
  - Sanitization
  - Privacy Considerations
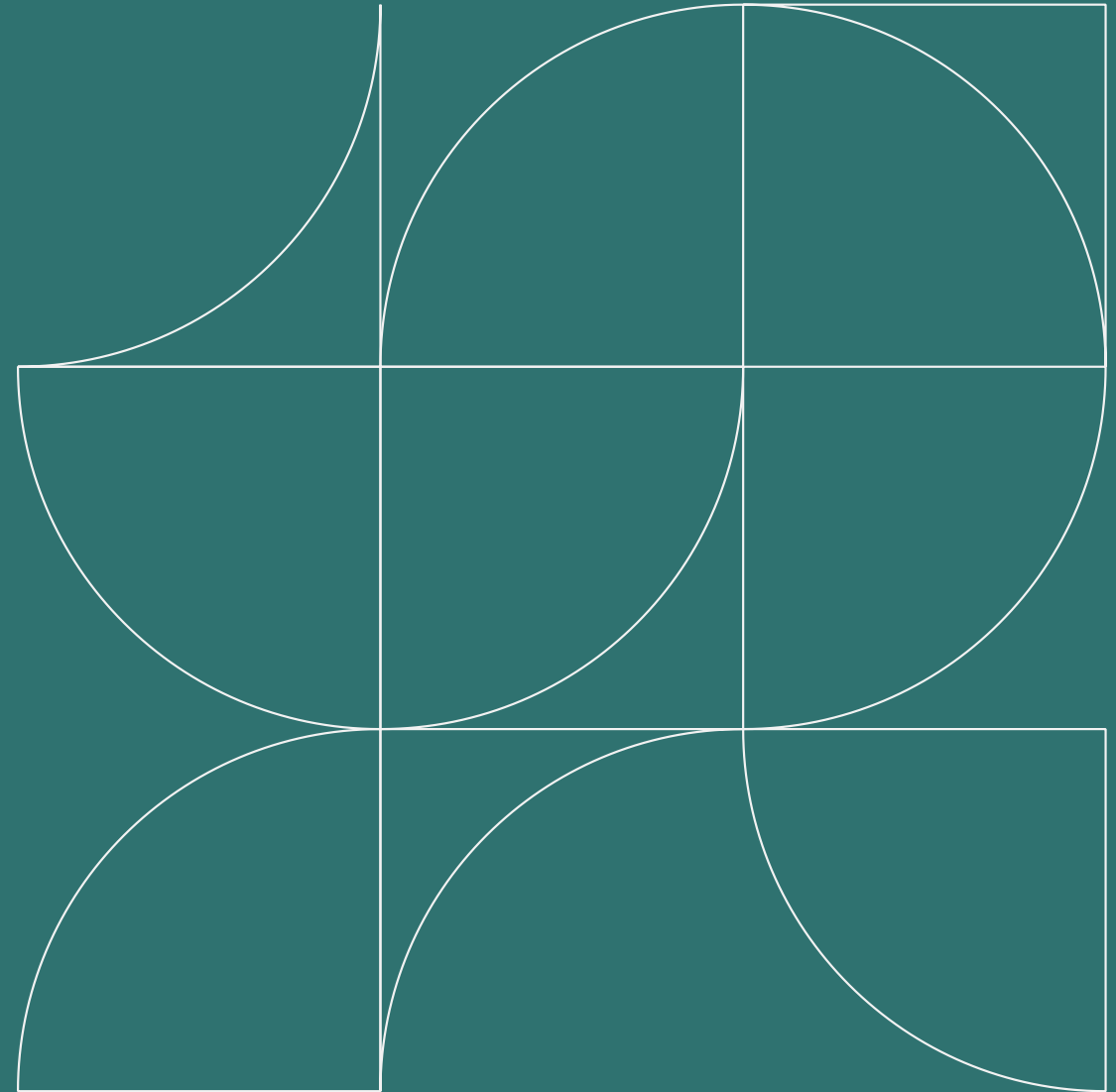
Testing as a Condition of Return to Work

Mandatory Versus Voluntary Testing

- EEOC has stated COVID-19 testing can generally be required
  - need to consider disability or religion-based requests for accommodation

- Types of Tests
  - Diagnostic tests ("molecular" or "NAAT" tests)
  - Antibody tests ("serological")

- Testing Shortcomings
  - Questionable utility
  - Cost
  - Availability

Positive Cases

Standard Protocol

- Confirm the case and timing
- Isolated affected areas and disinfect
- Contract trace
  - Focus on 48 Hour Period Prior to Symptom Onset
  - Close Personal Contact
  - Send home
    - CDC Guidance for Critical Infrastructure Workers

- Notify DOH as may be required under state law

Confidentiality

- ADA Confidentiality

- EEOC and CDC direct not to give identity of positive case
  - contact tracing apps
  - EEOC contractor/vendor exception

- Asking for consent to reveal identity

When Can They Come Back?

- Option 1 – Symptom-Based
  - no fever for at least 72 hours
  - respiratory symptoms have improved
  - at least 10 days have passed since symptoms first appeared
    - if asymptomatic – since their positive test

- Option 2 – Test Based
  - depends on locally available testing resources
  - no fever
  - respiratory symptoms have improved
  - received two negative tests in a row
    - if asymptomatic, just two negative tests

Stay Informed, Be Prepared, Be Flexible

Rules for Visitors and Other Workers in the Workplace

- Determine how and in what respects the health and safety rules and social distancing protocol will apply to temporary workers, staffing agency workers, independent contractors, vendors, clients, customers, delivery workers, visitors, and others when they are in the workplace
  – Consider joint employer issues
  – Consider independent contractor classification issues
  – Work with staffing agencies on protocols
- Consider limiting visitors to the workplace
- Screening process for visitors before entering an office, facility, or other work location

Anticipate Potential Resistance to Health And Safety Rules And Social Distancing Protocol

- Employees may disagree with rules, not take the rules seriously, or simply make mistakes

  – Recent media coverage re defiance of government orders. May become increasingly political as we get closer to the election

- What are the risks to employers of lax enforcement?

  – Employees may get sick (paid sick/leaves, workers comp claims, business interruption, etc.)

  – Other employees may become fearful

  – Employee relations issues, resentment

  – Potential liability based on failure to enforce minimal standards required by CDC, OSHA, and state/local orders

Anticipate Potential Resistance to Health And Safety Rules And Social Distancing Protocol

- Strategies:

  - Clear written policies re health and safety rules, masks, social distancing protocols, etc.

  - Communications around expectations and rationale – support from top leadership.

  - Training (and documentation of training)

  - Consistent enforcement, particularly as to legally-required standards (and document enforcement).

  - Take appropriate action if there are protected reasons for the non-compliance.

Protocol in the Event of an Unannounced Inspection by OSHA, A Public Health Officer or the Police

- Anticipate possible government enforcement
  - Surprise OSHA inspections
  - Police/Sheriff (enforcement of shelter in place and other state and local orders and laws)
- Develop an action plan in advance
  - Train managers on what to do if OSHA, police, etc. show up onsite unannounced
  - Periodic self-audits for compliance, posters, etc.
  - Designate a point person in advance to take the lead
  - Have key documents ready to produce promptly, OSHA logs up to date, training documents organized, etc.
  - Seek legal advice

Contingency Planning

- Be prepared for the possible need for future employee layoffs and/or temporary furloughs or alternatives such as wage and hours reductions

- Be prepared in the event a large number of employees take sick time or other leaves. Impact on business?

- Be prepared for another shutdown or a partial shutdown due to future government orders
  - What will that look like the 2nd time around?
  - Second wave next fall?

- Have a good communication notification plan ready
  - Update employee contact information
  - Method for communicating quickly with the workforce

- Develop a media/PR strategy

Stay Informed

- Monitor for new legal requirements
  - CDC guidance on workplace safety, travel
  - EEOC guidance
  - OSHA guidance
  - State and local orders and laws – employer responsibility to stay informed
- Watch countries, states, and other businesses that open up first

Be Flexible

- May not be clear answers – use best judgment
  - This is new for everyone
  - Recognize it will be impossible to eliminate all risk
- Trial and error -- evaluate what is working well and change things that are not
  - Set employee expectations around changes
- CDC guidance, EEOC and OSHA rules, and state and local orders may change. May need to update policies with little notice
- "New normal" -- unlikely for the foreseeable future to see a return to the ways things were before the pandemic hit

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Additional Information

- Seyfarth's COVID-19 Resource Center to sign up for daily updates: www.seyfarth.com/returntobusiness

- Post-Pandemic Return to Work Checklist

- Contact us if you have questions

Thank You