



After the COVID-19 Pandemic: Planning Now for The Return to Occupancy

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1. High-level Considerations

Will you change the nature of your business?

- Conversion of real estate from hotels to other uses
- Conversion from one type of lodging to another
- Rethinking amenities

Will you just be a better you? Creating the policies for what you want to be:

- Occupational safety and health during the transition to the new normal
- Labor and employee relations
- Employee benefits during the transition and later

2. Planning within Realistic Constraints

- Relationship with your workforce post COVID-19
- Consider what the future labor market will look like
- Gradual versus grand reopening
- What if there is a second or third wave?
- Union versus non-union facilities
- Geographic factors:
 - Impacted communities
 - Commercial versus resort properties
 - Travel restrictions
- Local legal landscape

3. OSHA

There is no specific federal OSHA standard covering COVID-19.

The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

4. Safety and Health Resources

OSHA: <https://www.osha.gov/Publications/OSHA3990.pdf>

CDC: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html

World Health Organization: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

5. Basic Infection Prevention Measures

- Promote frequent hand washing by employees and guests, e.g., reminder signs (multiple languages to broaden guest communication)
- Provide alcohol-based hand-free rubs/swipes containing at least 60% alcohol in public areas, e.g., vending / ice machines on hotel floors.
- Encourage employees to stay home if they are sick.
- Encourage respiratory etiquette, including covering coughs and sneezes (multiple languages).
- Provide tissues and additional trash receptacles in public areas.
- Discourage employees from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
- Remove / reduce customer service phones in common areas.
- Increase length of time between vacancy and cleaning rooms.

6. Hygiene and Environmental Safety

- Cleaning of visibly dirty surfaces followed by disinfection is the best practice measure for prevention of COVID-19.
- Perform additional environmental cleaning on all frequently touched areas, such as front desk, elevator banks, coffee stations, doorknobs, etc.
- CDC – No additional disinfection beyond routine cleaning is recommended at this time.
- Products with EPA-approved emerging viral pathogens claims are expected to be effective against COVID-10 based on data for harder to kill viruses. Ensure use for linens/laundry.
https://www.epa.gov/sites/production/files/2020-03/documents/sars-cov-2-list_03-03-2020.pdf

7. Social Distancing (more than 6 feet – employee / guests)

- Limitations on business travel and limits on numbers allowed to travel together.
- Eliminate or limits on number of participants for conferences/meetings.
- Staggering of employee schedules on both a shift and work week basis.
- Limits on interactions between departments.
- Working from home, tele-work, etc.
- Staggering of employee breaks to minimize social interaction.
- Tightening of restrictions on visitors or off-duty employees in workplace.
- Room service restrictions, e.g., delivery only to door.
- Eliminate / reduce in-person check-in or checkout with automated process.
- Use of chatbot or similar platforms for guest communication / customer service / tipping.
- Transition continental breakfast to “grab and go” format.
- Closure of pools and gyms.
- Reduce / eliminate housekeeping services, e.g., deliver requested items to door.
- Request guests to minimize direct contact with employees.

8. OSHA Employee Hazard Assessments

- **Classifying Worker Risk Level Based on Job Tasks: Very High, High, Medium, Lower**

- Level of risk depends, among other things, industry type, need for contact within 6 feet of people known to be, or suspected of being, infected or requirement for repeated or extended contact with persons known to be, or suspected of being infected. Most hospitality employees will likely fall in the lower exposure risk (caution) or medium exposure risk levels depending on duties, location and other fact specific considerations.
- Medium: Frequent or close contact with people who may be infected but who are not known or suspected COVID-19 patients, e.g., in areas with ongoing community transmission, contact with travelers who may return from international locations with widespread transmission.
- Low: Jobs that do not require contact with people known to be, or suspected of being infected nor frequent close contact with them.

9. OSHA Requirements and Safety Concerns

Engineering Controls: Isolating employees from work-related hazards. These type of controls reduce exposure to hazards without relying on worker behavior and can be cost-effective solutions.

Administrative Controls: Requires action by employee or employer. Administrative controls are typically in work policy or procedures to reduce or minimize exposure to a hazard.

Low Exposure Risk:

- Follow “Steps All Employers Can Take to Reduce Workers’ Risk of Exposure to SARS-coV 2.”
- No additional engineering controls recommended.
- Administrative controls: Monitor public health communications recommendations and ensure employees have access to information.
- Collaborate with workers to designate effective means of communication lines.
- Note: Surgical face masks are recommended for source containment only.

Medium Exposure Risk:

- Install physical barriers such as clear plastic sneeze guards when feasible.
- Administrative controls: Considering offering face masks to ill employees and guests to contain respiratory secretions until they can leave the workplace.
- Keep guests informed about symptoms and ask them to minimize contact with employees.
- Limit guests and public’s access to worksite or restrict access to only certain areas.
- Communicate availability of medical screening other employee health resources, e.g., on-site nurse, telemedicine services.
- Employees with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles, e.g., housekeeping.
- PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer’s hazard assessment, and the types of exposures workers have on the job.
- Potential job categories in risk level may include front desk and housekeeping.
- Front desk : Consider plastic shields.

10. Symptomatic Employees

- Remember: not all COVID-19 carriers have a fever and may exhibit other symptoms.
- Send symptomatic employees home immediately.

- Consider who the employee has worked with in close proximity. You have a legal obligation to inform employees if they may have been exposed to COVID-19.
- Do not disclose the identity of the symptomatic employee and keep all medical information confidential.
- Sanitize all areas the symptomatic employee worked.
- Remember Americans with Disabilities Act implications.

11. Taking Temperatures

- Employers may choose to take employees' temperatures but should apply the policy equally.
- Fever is not the only symptom of COVID-19. Other symptoms may include:
 - chills
 - cough
 - shortness of breath
 - sore throat
 - gastrointestinal symptoms.

12. Rising Issue : Masks/PPE

CDC Guidelines v. OSHA Requirements

- CDC now (as of April 14, 2020) recommends individuals wear cloth masks when out "in public settings where other social distancing are difficult to maintain (e.g. grocery stores and pharmacies) especially in areas of significant community based transmission."
- OSHA is not requiring cloth masks (yet) under the General Duty clause, but once they become available, it may be hard for employers to justify not providing masks to employees whose jobs require interaction with the public and distancing is not possible. Expecting further guidance soon.
- Respirators/N95 masks should be left for healthcare professionals and require training under OSHA standard.

Who Pays for the Masks?

- Before allowing employees to use "DIY masks" consider implications of state laws requiring employer to pay for PPE -- may be more strict than OSHA, e.g., California Labor Code §2802.
- In 2008, OSHA implemented a rule requiring employers to pay for protective equipment – 29 C.F.R. 1910.132.
 - Requires employer pay for protective equipment "required" for compliance with OSHA standards. Are cloth masks required?
 - Not required to pay for "ordinary clothing" or "everyday clothing" – can masks be used outside work?
 - Employer not required to reimburse employee if employee provides equipment he/she owns assuming non-mandatory.

13. Symptomatic Guests

- State Law Considerations

- Generally, if business has a reasonable belief that the guest poses a safety risk to the other guests and staff, it may refuse to accommodate the guest.
 - Ensure management is involved by instructing staff to escalate if they have guests with symptoms checking in.
 - Inform guest that you would like to accommodate them, but you have concerns about the health and safety of other guests and staff. Direct them to the nearest medical facility.
 - Ensure second staff member present as a witness if deny check in.
 - Refund the guest, if the reservation was pre-paid.
 - The manager should prepare written statements after-the-fact explaining what happened and why they believed the guest posed a health risk.
 - Disinfect the surfaces where the guest might have touched after they leave.

REMEMBER ADA – PUBLIC ACCOMODATION ISSUES!

14. New OSHA Recordkeeping Guidance

- COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if the case:
 - Is confirmed as a COVID-19 illness
 - Is work-related as defined by 29 CFR 1904.5, and
 - Involves one or more of the general recording criteria in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.
- Unless in a specific identified industry, OSHA will not enforce recordkeeping requirements to make work-relatedness determinations for COVID-19 cases, except where: (1) There is objective evidence that a COVID-19 case may be work-related; and (2) The evidence was reasonably available to the employer.

15. Local Health Department

- Consult with the local and county health departments to determine appropriate actions if a guest or worker presents symptoms of COVID-19 disease, as well as how to respond if asked to quarantine guests.
- Public health officials at the state, federal, and local level may have the legal authority to implement control measures to prevent the spread of communicable disease, such as isolation and quarantine, travel restrictions, and medical treatment.
- A public health emergency can be declared by state (e.g., the governor or state public health officer) or federal (Secretary of Health and Human Services) authorities, may allow for actions like property confiscation for use in response or emergency approvals for unapproved drugs. This includes restricting movement within a hotel and placing a quarantine on a hotel property.

16. Union-Management Relations

A return to occupancy means dealing with the full range of union/management obligations:

- Union organizing (and possibly decertification)
- Collective bargaining – contracts that have expired or are about to do so
- Mid-term bargaining over subjects not covered by the CBA
- Union information requests

- Renewed enforcement of collective bargaining agreements
- The use of self-help such as strikes or lockouts

17. Hospitality and Lodging Industry

- Employers may face heightened interest in unions because of employee concerns related to Covid-19.
- Many hotel industry employers are covered by contractual “neutrality” agreements.
 - Obligation to remain “neutral”
 - Union access to property, employee names and phone numbers
 - Card check replaces secret ballot NLRB election
 - Arbitration of terms of first contract
 - Be careful that business partners do not unwittingly commit the employer to a neutrality agreement!
- Employers that receive small business loans under the CARES Act must certify that they will remain neutral during union organizing drives for the term of the loan and refrain from “abrogating” any collective bargaining agreement for the term of the loan and two years thereafter.

18. Use of Employer E-mail Systems

- Employer may limit employees’ use of company e-mail for organizational purposes, provided that the employer does not generally allow employees to use mass e-mails “for their personal benefit [...]or any organizational purpose.”
 - *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143 (2019) (*overruling Purple Communications, Inc.*, 361 NLRB 1050 (2014)).

19. Mid-Term Collective Bargaining

- Under the NLRA, an employer is obligated to bargain over “mandatory subjects of bargaining” including wages, hours and other terms and conditions of employment.
- A collective bargaining agreement may cover subjects of bargaining.
- If the agreement does not cover a particular topic (e.g., taking employees’ temperatures, dealing with guests), the employer may have a duty to bargain over the subject or over the effects of the employer’s actions.

20. Unilateral Changes to Terms of Employment

An employer may make unilateral changes to its operations, such as moving to a six-day work week, without first bargaining with the union, where the CBA provides a “sound arguable basis” for the Company’s position that the CBA permits it to do so.

21. Possible Subjects of Bargaining

- Personal Protective Equipment
- Allowing employees to wear gloves or masks
- Requiring gloves or masks
- Providing gloves or masks

- Compensation and Benefits
- Continuation of extra pay offered during the pandemic.

22. Emergency Circumstances

On March 27, 2020, the NLRB's General Counsel published a memorandum that explained several cases in which the NLRB examined whether emergency circumstances lifted an employer's duty to bargain over changes to mandatory subjects of bargaining. Key issues include:

- Did the parties have a CBA that addressed the subject of the unilateral change?
- Did the employer bargain over the "effects" of the unilateral change, e.g., layoffs, use of non-unit employees to perform the work?
- Linkage between the emergency and the subject of the unilateral change.
- Adequacy of notice to the union.
- Whether the union demanded bargaining.
- Impact on employee compensation.
- Comparative treatment of non-union employees.

23. Prevailing Wages

Prevailing wage rules may apply if the property was publicly financed or receives tax abatement.

24. Strikes

- Strikes are a form of protected concerted activity.
- Employees who engage in strikes may be replaced but not disciplined or discharged.
- But, a CBA may have a "no-strike" clause that waives employees' right to strike during the term of the agreement.
- If the CBA contains a no-strike clause, a strike over a contract interpretation/application dispute can generally be enjoined.
- Safety strikes may not be enjoinable if the employee(s) can demonstrate abnormally dangerous conditions.

25. Safety Strikes under OSHA

- "[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to **serious injury or death** arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a **real danger of death or serious injury** and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."
- 29 C.F.R. 1977.12(b)(2)

26. Safety Strikes under Labor Law

Taft-Hartley

- “Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of **abnormally dangerous conditions** for work at the place of employment of such employee or employees be deemed a strike under this chapter.”
- 29 U.S.C. 143.

27. Requirements for a Protected Strike under Taft-Hartley

- Employees’ good faith belief that their working conditions were abnormally dangerous.
- Their belief was a contributing cause of the work stoppage.
- The employees’ belief is supported by ascertainable, objective evidence.
- The perceived danger posed an immediate threat of harm to employee health or safety.
- *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002).

28. Lessons Learned Impacting Benefit Plans

- Identifying existing policies that may no longer meet needs
 - Paid time off policies
 - Converting managers from salary to part-time hourly
 - Work rules.
- Policy trends
 - Job elimination guidelines
 - Guest policies.
- Amenity and engineering changes

29. Impact on Health and Welfare Plans

- Sorting out costs under the Families First Coronavirus Response Act and the CARES Act
 - Required plan amendments.
- Enrollment issues for returning workers
 - Mid-year enrollment periods.
- Cafeteria plan issues
 - Amendments for permitted OTC medication
 - Plans should address rehire issues
- Probationary periods

30. Retirement Plan Considerations

- CARES Act
 - Withdrawal rights
 - Expanded loan rights
- Break in service rules

- How will the time away impact vesting?
- Could furloughs cause a partial termination of the plan?
- Multiemployer pension plans
 - Underfunded plans
 - Withdrawal liability.

31. Additional Resources

Employment Law Now Podcast: www.employmentlawnow.com/author/mike-schmidt/

OSHA Blog: www.oshachronicle.com/

Cozen O'Connor Coronavirus Taskforce: www.cozen.com/coronavirus-updates

Cozen O'Connor COVID-19 Issues Navigator: www.cozen.com/covid/

The State AG Report: www.StateAGReport.com