

COVID-19 PROCEDURES TO REOPEN THE ECONOMY: BACK TO WORK IS NOT NECESSARILY BACK TO NORMAL

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Date: May 6, 2020

Reopening the Economy

As much of the nation prepares to return to work after weeks of isolation in the wake of the continuing pandemic, the question as to what measures to take to protect the health and safety of the public looms over the hopes of an economic recovery. The competing societal interests of containing the spread of the Coronavirus and reducing the death toll, while at the same time preventing the continued economic decline and increase in unemployment claims, present a challenge for all Americans. Unfortunately, a vaccine is not expected in the near future, nor is the elimination of COVID-19 (the "Virus") expected in the coming months despite warmer temperatures.

As various states make difficult choices to accommodate these competing societal interests, each state including Texas, has created its own set of guidelines to assist the gradual reopening process. The Centers for Disease Control ("CDC") has also issued guidelines on how to prevent the spread of illness, how to identify potential illness and the requirements that must be met before an infected or quarantined employee should return to the workplace. With COVID-19 testing not always immediately available, there are often delays in obtaining a definitive diagnosis of the Virus. This makes evaluating the best course of action when an employee is ill or has had a potential exposure difficult. This article focuses on Governor Abbot's Open Texas Plan Report ("Report"), released on April 27, 2020, and offers some suggested procedures for getting back to work, while not necessarily getting back to normal.

Work from Home When Possible

When evaluating what business measures to take in preparation to getting your workforce back to work during the continued crisis, employers should first consider whether there are certain employees, or certain departments that can work from home ("Telework") during Texas' partial opening phase, and maybe longer. Employees who are able to Telework are not eligible for sick leave benefits under the Emergency Paid Sick Leave Act ("EPSLA") unless another COVID-19 reason prevents them from working. Having employees Telework reduces the number of individuals interacting in the workplace.

Importantly, the Fair Labor Standards Act's ("FLSA") "Continuous Workday Rule", which requires an employer to count all hours between the first hour worked and the last hour worked during a workday, does not apply to employees who Telework to prevent the spread of the Virus. Instead, employees who Telework are asked to keep track of their hours and breaks (for example: when they stop work to care for a child or assist with home schooling). This provides more flexibility during this time of crisis.

Create a Healthy and Safe Environment

Make sure to incorporate health and safety procedures to reduce the potential spread of the Virus among those employees who do return to the workplace. According to the CDC, and as explained in the Report, the Virus is mainly spread from person to person between people who are in close

contact with one another (usually within about 6 feet). The principle mode of transport for the Virus is via respiratory droplets that are dispersed when an infected person coughs or sneezes, which can be inhaled in the nose and mouth. People are thought to be most infectious in the early stages of the illness, which means that they may not show any symptoms. See the CDC website at www.cdc.gov for more information on how the Virus is spread. Accordingly, safety precautions should include:

- Social distancing in the workplace (at least 6 feet apart);
- Wearing masks, particularly when workers will be in close proximity of one another, or serving the public;
- Encouraging workers to wash their hands for 20 seconds, or use hand sanitizer with at least 60% alcohol;
- Encourage workers to cough or sneeze into a tissue or the crook of their elbow;
- Frequently sanitize all surfaces and public areas and provide hand sanitizer to workers;
- Encouraging workers to avoid touching their eyes, nose and mouth;
- Identify any worker who appears ill, send them home and instruct them to follow-up with a healthcare provider, or send them to a healthcare provider; and
- Make sure that employees who plan to return to work following an illness or positive test for the Virus are free of symptoms and/or fever. Symptoms include but are not limited to:
 - Coughing.
 - Shortness of breath or difficulty breathing.
 - Muscle pain, headache.
 - Loss of taste or smell.
 - Diarrhea.
 - Fever of 100.0 Fahrenheit or more or feeling feverish / having chills.

When Employees are Sick, Test Positive or Have Been Exposed to the Virus

Employees who are sick due to the Virus, who have tested positive for the Virus or who have been exposed to the Virus should self-quarantine for a period of at least 14 days. Such employees will be eligible for Paid Sick Leave under EPSLA. The following procedures may be helpful and comply with CDC guidelines and the guidelines contained in the Report.

- Exposed to the Virus – For employees who report a known exposure to the Virus, without symptoms and without a positive test for the Virus, self-quarantining for a period of 14 days is recommended. In those instances, the individual may Telework if possible, and if Telework is an option would not get Paid Sick Leave.
- Tested Positive for the Virus – For employees who test positive for the Virus, but who have no symptoms, a 14-day self-quarantine from the date of the test is recommended for maximum safety, although an alternative measure may be 14 days from the date of last exposure. *If the employee develops symptoms*, prior to returning to work, the employee must meet the following three (3) requirements according to CDC guidelines and the Report:
 - *At least 3 days (72 hours) have passed since recovery (resolution of fever without the use of fever-reducing medications);*

- *Improvement in respiratory symptoms (e.g. cough or shortness of breath); and*
- *At least 7 days have passed since symptoms first appeared. (Note: the CDC guidelines state 10 days, instead of 7 days, from the date of onset of symptoms).*

Employers will need to decide whether to follow the CDC’s time-frame for recovery from the COVID-19 illness or the time frame listed in the Report. It is recommended that whenever possible, the employer obtain a written report or note from the infected employee’s healthcare provider stating when the individual can return to work, and follow that recommendation. In the absence of any recommendation from a healthcare provider, the CDC’s guidelines provide more protection, although the employee may be considered ill in excess of the 80 hours allowed for Paid Sick Leave.

- **Practice Tip 1** – In the event that the employee remains sick past the 14-day period, and has exhausted all available Paid Sick Leave under EPSLA, consider whether the employee has available PTO to supplement additional time off from work. If not, unemployment benefits may be available for the unpaid time off, as explained below under Unemployment Considerations.
- **Employees Who are Sick with the Virus Without a Positive Test** – Employees who are sick with the Virus should stay home for a minimum of 14 days, with instructions not to return to work until they can meet the three requirements stated above. In addition, you should evaluate whether other employees may have been exposed to the individual close in time or immediately prior to the time that he or she developed symptoms. Once such individuals are identified, consider sending them for testing and evaluation by a healthcare provider to determine if they may have been infected with the Virus.
 - *For employees who have come into contact with the infected individual, follow the instructions of the healthcare provider who evaluates the individual. If an individual who had contact with the infected employee develops symptoms or tests positive for the Virus, he or she should follow the self-quarantine procedures listed above.*
 - *You may also need to alert local health officials so that they can perform “**Contact Tracing**” as outlined in the Report.*
- **When Test Results are Delayed** – If test results are delayed, determining when to begin counting the 14-day period may be difficult. For example, when an employee has been sick for a week before obtaining positive results for the Virus, you have a choice between counting the 14-day period from the date that the employee first exhibits symptoms (Texas Report) or 14 days from the date of the positive test (CDC Guidelines). If a healthcare provider has provided a time frame, you should follow that date. Of course, the employee must still meet the three (3) above requirements to verify that they have likely recovered fully from the illness.
 - *Note – It is important to note that the CDC recommends that those who are sick and who have tested positive for the Virus obtain two negative tests in a row, at least 24 hours apart before returning to work.*
- **Individuals at High Risk** – Certain individuals are at high risk if they contract the Virus, such as those over 65 years of age and those with underlying health conditions. Such individuals may ask to stay home and not come into work. For those employees, you should first evaluate

whether they can Telework in their job, or be moved to a job for which they are qualified and could Telework. If the answer is no for Teleworking, and the individual is not under a self-quarantine order by legal authority or by a healthcare provider, he or she may be eligible for unemployment, explained in more detail below.

- **Practice Tip 2** – If you are a business with 15 or more employees, the Americans with Disabilities Act (“ADA”) must be considered if an employee requests an accommodation due to having a medical condition that puts them at higher risk for a severe illness or death if he or she contracts the Virus. In those instances, ADA procedures should be followed, which may include obtaining medical information from a healthcare provider regarding the health condition.
 - Possible reasonable accommodations include, but may not be limited to: (a) the permission to wear face masks or enhanced protective gowns or other clothing; (b) allowing the employee to Telework if feasible; (c) allowing the employee to work in an area that will be less congested with coworkers or customers; or, (d) changing some job functions of the employee to reduce contact with others.

Employees at Risk for the Virus and Unemployment Considerations

Although all claims for unemployment are reviewed on a case-by-case basis, the Governor of the State of Texas has expanded the reasons for which an individual may claim unemployment benefits, to include the refusal to work for the following COVID-19 related reasons:

- Individuals at High Risk – people over 65 years of age.
- Household Member is at High Risk – a household member is 65 years or older.
- Diagnosed with COVID-19 – the individual has tested positive for COVID-19 by a source authorized by the State of Texas and has not recovered.
- Family Member Diagnosed with COVID-19 – anybody in the household has tested positive for COVID-19 by a source authorized by the State of Texas and is not recovered, and 14 days have not yet passed.
- Quarantined – the individual is currently in 14-day quarantine due to close contact exposure to COVID-19.
- Child Care – the child’s school or daycare is closed and no alternatives are available.
- **Practice Tip 3** – The Emergency Family Medical Leave Expansion Act (“EFMLEA”) provides up to 10 weeks of partial paid leave at 2/3 the employee’s regular rate for child care closures. However, EFMLEA is reduced by any FMLA already taken by the employee in the same one-year period. Employers who have less than 50 employees may claim an exemption from the expanded FMLA leave requirements if providing benefits would be detrimental to the viability of their business. Unemployment benefits would likely be available for those employees who do not have EFMLEA, or insufficient EFMLEA, prior to the time the school or day-care re-opens.

- **Practice Tip 4** – You should always consider first whether the employee can Telework when he or she is unable to come to work due to a self-quarantine, a positive test without illness or school or day-care closures. If the employee can Telework, no Paid Sick Leave, EFMLEA or unemployment are available. If Telework is not an option, an employee may seek payments from one of those sources, with unemployment paid when the other two options do not apply.

The information contained in this article is not designed to address specific situations. If you have questions concerning this topic, you should consult with legal counsel for advice on fact specific matters.



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