

## OSHA Recommends Three-Phased Approach to Reopening Workplaces

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On June 18, 2020, the U.S. Occupational Safety and Health Administration (OSHA) released a new publication entitled [Guidance on Returning to Work](#). The Guidance contains recommendations regarding best practices for employers as workplaces re-open, including the recommendation that employers re-open workplaces in three phases.

The Guidance reiterates and expands upon the three-phase “Opening Up America Again” plan previously issued by the White House. That plan recommends that a given state or locality re-open in three phases. Phase 1 begins when the state or region satisfies the “gating criteria” (a 14-day downward trajectory of symptoms and cases combined with sufficient health care and testing capacity). During Phase 1, OSHA encourages employers to make telework available where possible, limit the number of personnel at the workplace to ensure strict social distancing, provide special accommodations for particularly vulnerable employees, and limit non-essential business travel. Then, during Phase 2, OSHA recommends that employers continue to make telework available and accommodate vulnerable employees, but also states that it may be appropriate during Phase 2 to allow non-essential business travel and to ease limitations on the number of people in the workplace. Finally, in Phase 3, employers may resume unrestricted staffing in the workplace. A state or region may proceed from Phase 1 to Phase 2, and from Phase 2 to Phase 3, when it successfully navigates the prior phase without seeing a rebound of COVID-19 cases and while still satisfying the gating criteria.

The Guidance sets forth nine principles that employers should consider in formulating re-opening plans, and provides concrete examples of how these principles may be implemented. These nine principles are:

- *Hazard assessment*, addressing how employers should assess potential risks of exposure to COVID-19;
- *Hygiene*, addressing practices for handwashing and respiratory etiquette, as well as cleaning and disinfection protocols;
- *Social distancing*, addressing how to implement social distancing protocols;
- *Identification and isolation of sick employees*, addressing employee self-monitoring and employer responses to potentially sick employees;
- *Return to work after illness or exposure*, addressing how employees who have recovered from COVID-19 or have completed a period of quarantine are to be integrated back into the workplace;
- *Controls*, addressing how to mitigate potential risks of exposure as determined by the hazard assessment;
- *Workplace flexibilities*, addressing policies such as telework and sick leave;
- *Training*, addressing the education of employees on measures the employer is taking and measures the employees can take to protect against COVID-19; and
- *Anti-retaliation*, addressing how to ensure that employees do not suffer adverse or retaliatory actions for following OSHA’s guidelines or raising workplace safety and health concerns.

The Guidance also contains a “Frequently Asked Questions” section focusing primarily on how employers may implement a worksite COVID-19 testing program if they should choose to do so. Employers may conduct worksite testing or screening if this is done in a transparent manner to all employees. Importantly, though, OSHA cautions that employers should not rely on testing or screening alone to ensure workplace safety. Given limitations on testing accuracy and the potential for asymptomatic transmission, maintaining proper hygiene, social distancing, controls, and training are all still essential for a safe re-opening. The Guidance refers employers to the U.S.

Equal Employment Opportunity Commission (EEOC) and Department of Labor guidance for further considerations with respect to testing and screening. (It is important to note that the EEOC recently prohibited employers from requiring that employees undergo antibody testing. Our alert on the EEOC's guidance can be found [here](#).)

While not exhaustive, OSHA's *Guidance on Returning to Work* provides a useful framework by which employers can think through the formation and implementation of a plan for re-opening. Also, it is important to note that OSHA's recommendations are advisory in nature and do not impose new legal obligations on employers. Nevertheless, employers will want to consult the Guidance, in addition to guidance from the Centers for Disease Control and any state-specific orders or guidance, in crafting their re-opening plans to ensure that they make reasonable efforts to keep their workplaces healthy and safe for employees.

**Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Portal](#) or contact your Foley Hoag attorney.**

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