Return to Work: Guidance for Workplace Reopening

Updated: May 12, 2020

White and Williams LLP

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White and Williams LLP

Introduction

With the process of allowing non-essential businesses to reopen beginning, businesses are being confronted with numerous complex and inter-related questions on how to best proceed with restarting operations. This process will likely be highly specific and determined by industry, risk profile, size and geographic location.

This Reference Guide discusses some of the primary considerations that businesses must evaluate in successfully transitioning back to a fully functional enterprise, and the risks associated with these actions. As part of this process, White and Williams will continue to provide new information on key issues as they develop.

State Guidelines on the Timing of Relaxing Non-Essential Business Restrictions

Currently, states are implementing various approaches towards “rolling back” restrictions on non-essential business operations. In general, the degree to which operations can start back up is based on local levels of transmission and the need to take an incremental approach. Accordingly, reopening does not mean that things will return to how they were three months ago. Companies are in for a long haul, and their operations may be subject to new policy adjustments at the local, state and federal levels. Here is a review of the conditions at the time of this writing for the states where White and Williams maintains offices:

Delaware

Governor John Carney issued a statewide stay-at-home order that will remain until May 31, or until the "public health threat is eliminated." Non-essential businesses are to remain closed and violation of the Governor’s emergency declaration could constitute a criminal offense. Governor Carney said the administration wants to begin first phase of a reopening plan based on guidance from the CDC and the White House. The Governor has referenced plans for “interim steps” to reopen the economy between now and June 1 and expects to release more details.

Delaware has joined a coalition with other northeastern and mid-Atlantic states – Connecticut, Massachusetts, New Jersey, New York, Pennsylvania and Rhode Island – to coordinate the reopening of the economy, according to a press release from New York Governor Andrew Cuomo's office.

At this time, Delaware employers must take the following steps to assure that employees on-site can perform critical roles while staying healthy:

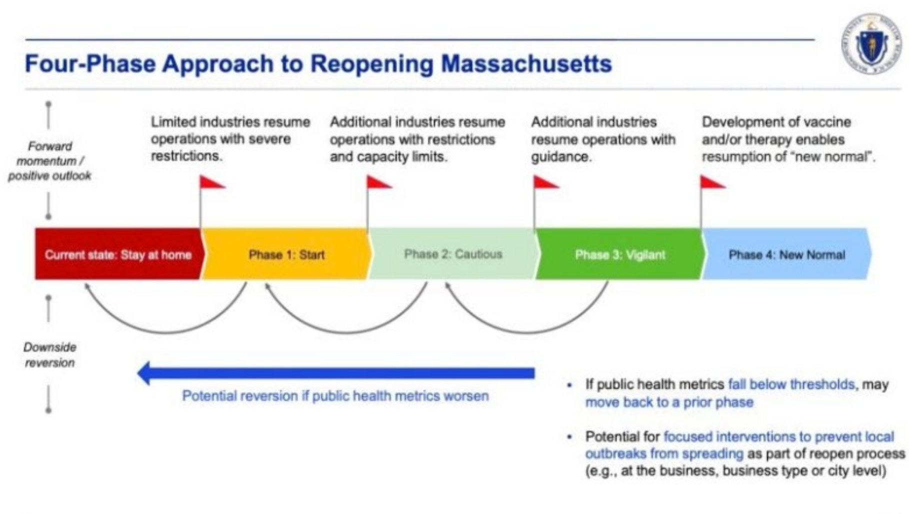
- **Hand Washing.** Provide employees access to regular handwashing with soap, hand sanitizer and disinfectant wipes and ensure that common areas (including, but not limited to, break rooms, locker rooms, dining facilities, rest rooms, conference or training rooms) are cleaned on a regular basis, including between any shifts.
- **Provide Masks.** Provide masks for employees to wear during their time at the business and make it a mandatory requirement to wear masks while on the work site, except to the extent an employee

is using break time to eat or drink, in accordance with the guidance from the Department of Health and the CDC.

- **Make Space.** On-site employees should follow the social distancing six (6) feet rule and all other CDC guidelines while in the workplace.
- **No Visitors.** Allow only necessary employees in the office and restrict deliveries except for essential supplies like masks and hand sanitizer.
- **Meet Remotely.** When on-site employees must meet, use Zoom, Google Hangouts, GoToMeeting and/or Skype for Business.
- **Redesign Offices.** Add partitions where needed and raise cubicle walls. Add Plexiglas dividers in common areas, such as the break room, so people can still sit six (6) feet apart and interact safely. In more open areas, such as manufacturing and warehousing facilities, mark six (6) foot positions with brightly colored duct tape so employees always have a sense of a safe distance to maintain from each other.

Massachusetts

Massachusetts' essential services emergency order is set to expire on May 18, 2020. The Reopening Advisory Board, which Governor Charlie Baker formed in late April, recently met with over forty Massachusetts industry leaders. On May 11, 2020, Governor Baker announced a Four-Phase approach to reopening Massachusetts' economy, under which industries with a lower risk of COVID-19 transmission will be permitted to open earlier than those that carry a higher risk.



Phase 1, "Start": In Phase 1, a limited number of industries with the lowest risk will resume operations, albeit under severe restrictions.

Phase 2, "Cautious": Additional industries will be permitted to reopen with restrictions and capacity limits.

Phase 3, "Vigilant": Additional industries will be permitted to resume operations.

Phase 4, "New Normal": This last phase will commence only once a vaccine or an effective treatment therapy is available.

Each phase will be dictated by public health metrics, and the reopening may revert to earlier phases if public health metrics worsen. As of now, Governor Baker is hoping to begin Phase 1 on May 18, 2020.

In addition, the Department of Public Health and the Massachusetts COVID-19 Command Center (which was formed by the Baker Administration in March 2020), has developed new Mandatory Workplace Safety Standards that will apply to all workplaces as they are permitted to reopen:

- **Social Distancing**: All individuals, including employees, customers and vendors should remain at least six (6) feet apart. Employers must also establish protocols to ensure that employees can practice adequate social distancing, provide signage for safe social distancing and require masks or face coverings.
- **Hygiene Protocols**: Employers must provide adequate hand washing capabilities in the workplace, ensure that employees are engaging in frequent hand washing and regularly sanitize high-touch areas.
- **Staffing and Operations**: Employers must train employees in social distancing and hygiene protocols, instruct employees with potential COVID-19 symptoms not to report to the workplace, establish a contingency plan for COVID-19 transmission at work and prepare a return-to-work plan.
- **Cleaning and Disinfecting**. Establish and maintain business-specific cleaning protocols, thoroughly clean and disinfect the workplace if an employee is diagnosed with COVID-19, and disinfect all common surfaces at regular intervals.

Industry-specific safety protocols and recommended best practices, and a list of industries that will be included in each phase of the reopening, will be provided by the Baker Administration in the near future.

New Jersey

On April 27, 2020, New Jersey announced its plan to reopen, called "The Road Back: Restoring Economic Health Through Public Health." The plan includes the creation of a Restart and Recovery Commission that will advise on the process for decision-making. A "methodical and strategic return to work" will be implemented based on the level of disease transmission risk and essential classification. The return-to-work process will include the continuation of social distancing measures, requirements for face coverings and work-from-home directions where feasible and appropriate. New Jersey's existing mitigation requirements are set forth in Executive Orders No. 122 and No. 125. New Jersey extended the state's public health emergency until June 5. However, the stay-at-home order and mitigation requirements remain in effect.

New York

New York has outlined the following plan:

1. **Do no harm.** Step one is to continue controlling the rate of infection. This includes extending the New York Pause order until May 15 and implementing additional measures to reduce the rate of infection, including requiring masks in public when social distancing is not possible. New York's state of emergency remains in effect until June 7.
2. **Harden the healthcare system.** Step two is continuing the surge and flex strategy to ensure anyone who needs medical attention gets it, building out a strategic stockpile of personal protective equipment (PPE) and other medical equipment and sharing resources amongst states and localities.
3. **Develop testing and contact tracing protocol.** The best data to inform decisions and calibrate the progress of any phased reopening of the economy will come via diagnostic and antibody testing. The state is working with federal partners to rapidly scale up testing. A new state-of-the-art contact tracing program was launched by New York State with the partnership of former Mayor Michael Bloomberg, Bloomberg Philanthropies and Johns Hopkins University.
4. **The 'Un-Pause NY' approach is designed to open businesses in phases of priority.** Businesses considered "more essential" with inherently low risks of infection in the workplace and to customers will be prioritized, followed by businesses considered "less essential," or those that present a higher risk of infection spread. As the infection rate declines, the pace of reopening businesses will be increased.

Precautions and practices for businesses to guide phased return and prepare for "new normal," include:

- **Workplace**. Redesigning workplaces to include social distancing measures (*i.e.*, desks six feet apart, modified conference rooms, etc.) and implementing/continuing telecommuting for the most vulnerable.
- **Customer interaction**. Implementing measures to maintain social distancing and ensure minimal contact with customers; providing public-interacting employees with necessary protective supplies such as gloves, masks, etc.; and special precautions should be taken for businesses that primarily interact with the most vulnerable.
- **Proactive infection plan**. Ensuring protocols are in place should an employee develop COVID-19 symptoms or test positive (*i.e.*, work-from-home plan).

Governor Cuomo also recently outlined additional guidelines for the phased plan to reopen New York on a regional basis. Each region of the state – Capital Region, Central New York, Finger Lakes, Mid-Hudson Valley, Mohawk Valley, New York City, North Country, Long Island, Southern Tier and Western New York – must follow these guidelines:

1. **CDC Guidelines.** Based on CDC recommendations, once a region experiences a 14-day decline in the hospitalization rate they may begin a phased reopening.

2. **Industries.** Businesses in each region will reopen in phases. Phase one will include opening construction and manufacturing functions with low risk. Phase two will open certain industries based on priority and risk level. Businesses considered "more essential," with inherent low risks of infection in the workplace and to customers will be prioritized, followed by other businesses considered "less essential," or those that present a higher risk of infection spread. Regions must not open attractions or businesses that would draw a large number of visitors from outside the local area.
3. **Business Precautions.** Each business and industry must have a plan to protect employees and consumers, make the physical work space safer and implement processes that lower risk of infection in the business.
4. **Building Healthcare Capacity.** To maintain the phased reopening plan, each region must have at least 30% of hospital beds and ICU beds available after elective surgeries resume.
5. **Testing Regimen.** Regions must implement a testing regimen that prioritizes symptomatic persons and individuals who came into contact with a known COVID-positive person, and conduct frequent tests of frontline and essential employees. Regions must maintain an appropriate number of testing sites to accommodate its population and must fully advertise where and how people can get tested. The region must also use the collected data to track and trace the spread of the virus.
6. **Tracing System.** There must be at least 30 contact tracers for every 100,000 people. The region must also monitor the regional infection rate throughout the reopening plan.
7. **Isolation Facilities.** Regions must present plans to have rooms available for people who test positive for COVID-19 and who cannot self-isolate.
8. **Regional Coordination.** Regions must coordinate the reopening of schools, transportation systems, testing and tracing with other surrounding regions.
9. **Re-Imagining Telemedicine.**
10. **Re-Imagining Tele-Education.**
11. **Regional Control Rooms.** Each region must appoint an oversight institution as its control room to monitor regional indicators during the phased reopening, including hospital capacity, rate of infection and PPE burn rate.
12. **Protect and Respect Essential Employees.** Regions must continue to ensure protections are in place for essential employees.

Pennsylvania

The Pennsylvania Governor's Office recently announced a "Process to Reopen Pennsylvania." Pennsylvania plans to "proceed with returning to work cautiously," and will structure reopenings around ongoing social distancing, universal masking and other public health guidance to mitigate against a new spike of cases. The "Process to Reopen" is divided into three phases:

1. Red (life-sustaining businesses only);
2. Yellow (businesses with in-person operations must follow business closure and building safety orders); and

3. Green (stay-at-home and business closure orders lifted).

Effective May 8, 2020, 24 counties in Pennsylvania[1] are permitted to reopen in the "Yellow" phase. On May 8, the Governor's office announced that 13 additional Pennsylvania counties will move to the "Yellow" phase on May 15.[2] The Pennsylvania Stay-at-Home Order has been extended through June 4.

The Governor's Office also released guidance on May 4, 2020 that must be strictly adhered to by all businesses that are permitted to conduct in-person operations. The guidance closely tracks and builds on existing worker and building safety orders. Notably, the guidance provides that "businesses that have been operating remotely through individual telework of their employees must continue to telework to prevent the spreading of COVID-19 until the stay-at-home and business closure orders are fully lifted." The guidance include directives on:

- cleaning and disinfection protocols;
- protocols in the event of exposure to a probable or confirmed case of COVID-19 (including increased cleaning and disinfection and identifying and notifying close contacts of infected individuals while maintaining confidentiality);
- temperature screening of all employees;
- social distancing (including staggered work and stop times, staggered break times, etc.); and
- providing masks to employees to be worn at all times (except to eat or drink).

Special rules apply to businesses that are open to the public, including limiting occupancy inside the physical location, installing shields at registers, requiring masks to be worn by customers, scheduling handwashing breaks and cleaning carts and hand-baskets between uses. For a full listing of Pennsylvania's worker safety requirements, see the Secretary of Health Order and the accompanying FAQs.

Rhode Island

In Rhode Island, Governor Gina Raimondo signed an executive order lifting Rhode Island's stay-at-home order effective May 9, 2020.

Phase 1 of the reopening includes restrictions including capacity limits at non-critical retail stores. Additionally, everyone who can work from home should do so. Office-based businesses may begin to allow limited on-site visits for staff who have been working remotely. However, close-contact businesses, including haircutters, personal services, gyms, recreation and entertainment businesses, remain closed. Businesses will be required to certify that they have met a checklist of mitigation requirements.

[1] Bradford, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, Lycoming, McKean, Mercer, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, Union, Venango and Warren

[2] Allegheny, Armstrong, Bedford, Blair, Butler, Cambria, Fayette, Fulton, Greene, Indiana, Somerset, Washington and Westmoreland

State Worker Safety Measures

An example of what state policies will be enacted can be seen in the Pennsylvania Department of Health's Order and related FAQs that address Pennsylvania's new directives to develop workplace safety plans dealing with future exposure. The critical parts of such a plan will consist of the following:

- Establish protocols to implement upon discovery that the business has been exposed to a "probable or confirmed case of COVID-19."
- The protocols must include the following measures:
    - Close off areas visited by the person who is a probable or confirmed case of COVID-19;
    - Open outside doors and windows and ventilate the space;
    - Wait at least 24 hours before conducting a cleaning and disinfection of all areas visited by the ill person;
    - Identify employees that were in "close contact[3]" with the individual with the probable or confirmed COVID-19 case within the period of 48 hours before onset of symptoms to the time the patient isolated:
        - Employees who are identified, but who are asymptomatic, are to follow the Centers for Disease Control and Prevention (CDC) Guidance – "Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19;"
        - Identified employees who become sick during the work day are to be sent home immediately, and the work area is to be cleaned and disinfected;
        - A list is to be compiled of individuals who had close contact with the ill employee within 48 hours before onset of symptoms; and
        - Businesses are to promptly notify employees who are close contacts of any known exposure to COVID-19 at the business premises. Such notification must be made in a manner "consistent with applicable confidentiality laws." Businesses are to ensure that they maintain sufficient staff to timely and effectively implement these measures.
        - **Note:** The Americans with Disabilities Act (ADA) provides for confidentiality of employee medical information. Accordingly, employers should ensure that when they provide notification of exposure to COVID-19, they do not name the employee who is ill.
    - Implement temperature screenings before employees enter the business, prior to each shift:
        - Employees who have a fever of 100.4 degrees or higher must be sent home
        - Social distancing must be implemented while employees wait to have their temperature taken.

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[3] Defined as "being within six (6) feet of the individual for approximately 10 minutes or more."

    - **Note:** The U.S. Equal Employment Opportunity Commission (EEOC) has published Technical Assistance addressing employer temperature screening practices in compliance with the ADA. The employer should maintain the temperature screening log as a confidential medical record and should consider other steps such as ensuring that temperature screenings are conducted in a safe and confidential manner.
  - Sick employees should notify their supervisor of any COVID-19 symptoms (cough, fever, shortness of breath) and stay home; and
  - Sick employees should follow CDC guidelines and not return to work until they meet CDC criteria and in consultation with their medical providers and in conformity with state and local health department guidelines.

Special Measures Applicable to Businesses That Serve the Public

In addition to the above guidance for businesses with employees exposed to COVID-19, the Order also provides that businesses (other than healthcare providers) that "serve the public in a building or other defined area" implement the following measures:

- businesses should conduct business with the public by appointment only, "where feasible." If this is not feasible, businesses must limit occupancy to no greater than 50% of the number stated on the certificate of occupancy at any given time. Additionally, businesses must maintain social distancing of six feet at check-out lines and post signs throughout the site requiring social distancing by both employees and customers;
- alter business hours to the extent necessary, based on building size and number of employees, to permit sufficient time for restocking and/or cleaning;
- install shields or other barriers at registers to physically separate cashiers from customers;
- encourage online ordering by providing delivery or pick-up options;
- designate a specific time, at least once a week, for high-risk and elderly individuals to use the business if there is a continuing in-person customer facing component;
- require all customers to wear masks while on premises and "deny entry to individuals not wearing masks," unless the business is providing medication, medical supplies or food, in which case the business must provide alternative methods of pick-up and delivery. An exception is provided for individuals who have a medical condition that prevents wearing a mask (no documentation may be required to substantiate) and children under the age of two;
- limit the number of check-out lines to every other register; rotate lines; and clean check-out areas between rotations, including previously used registers and credit card machines;
- schedule employee handwashing breaks at least every hour; and
- assign employees to wipe down carts and baskets in-between use by customers.

Importantly, local authorities can have their own measures. For example, the City of Philadelphia Department of Health has issued guidance for businesses addressing COVID-19 issues in the workplace.

For employers with locations throughout the United States, it is quite likely that a patchwork approach to this issue will exist in terms of differing requirements. Accordingly, at the earliest stages of the planning process, employers will likely have to select one standard to apply to their operations as a whole, while ensuring that any local requirements are met. Many employers are already used to this process with respect to policy setting in employee handbooks. Obviously, the guidance provided by states and federal agencies should be considered in developing return-to-work policies.

Federal Safety Guidelines

There is also substantial federal guidance on returning to work. In general, the goals are the same as the state rules – maintain safety, react to infections and conduct mitigation efforts when necessary.

CDC: Recommendations for Businesses

The CDC has released "Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission" for businesses which provides the following guidance:

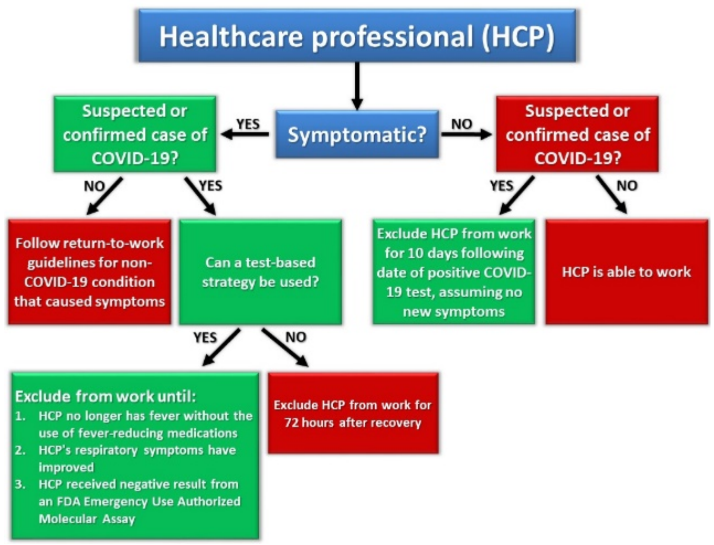
- encourage employees to bring lunch;
- document daily disinfecting procedures;
- err on the side of over-communication and training;
- incentivize employees to avoid public transport;
- stagger schedules (*i.e.*, shifts, breaks);
- limit offices to 25%, 50%, etc. (depending on community spread);
- encourage PPE, masks and hand sanitizer;
- discourage/prohibit travel;
- discourage equipment sharing;
- sanitize all common items after use (*i.e.*, copiers, break rooms, doors, conference rooms, etc.);
- limit visitors/deliveries;
- consider a visitor and employee COVID-related questionnaire;
- encourage telework;
- implement active monitoring (temperatures, etc.);
- limit number of people who can share the same area (including breaks); and
- understand your landlord's measures and encourage them to adopt any necessary further steps before bringing employees back.

CDC: Healthcare Personnel

In the area of healthcare, there are obviously much more heightened considerations around safety. For example, the COVID-19 pandemic has given rise to an ongoing and increasing demand for healthcare personnel (HCP). Recognizing the need to increase this workforce, while simultaneously mitigating the attendant spread of the virus, the CDC recently issued guidance to public health officials and state and local health departments for HCP returning to work in various healthcare settings, including the medical, dental, emergency response and the pharmaceutical arenas.

The CDC recommends that symptomatic HCP with suspected or confirmed COVID-19 be excluded from the workplace until: (i) respiratory symptoms have improved and (ii) any fever has resolved without the use of fever-reducing medications. The HCP must also show negative results from an "FDA Emergency Use Authorized (EUA)" molecular assay based on two nasopharyngeal swab specimens collected greater than 24 hours apart. If an EUA molecular assay test cannot be performed, the HCP must be excluded from the workplace until seven (7) days have passed since the onset of symptoms.

Asymptomatic HCP with a positive COVID-19 test result should be excluded from the workplace until 10 days have passed since their first positive test result, assuming no symptoms have developed. The CDC also recommends daily monitoring of asymptomatic HCP who have been exposed to the virus based on the circumstances of their exposure (*i.e.*, whether either or both the patient and HCP were using various forms of PPE at the time of the encounter).



Following a return to work, HCP who have suspected or confirmed COVID-19 should wear a facemask at all times until symptoms are completely resolved or until 14 days after illness onset, whichever is longer. Thereafter, the HCP should follow their respective facility's source control policies. An N95 filtering face piece respirators (N95 FFRs) or higher-level respirator should be worn when caring for patients with suspected or confirmed COVID-19. These HCP should also be restricted from contact with severely-immunocompromised patients (*e.g.*, transplant, hematology/oncology) until 14 days after onset of the virus and they should self-monitor for symptoms and seek re-evaluation if symptoms recur or worsen.

The CDC's return-to-work guidelines indicate that state and locate health departments may adapt them as needed based on changing circumstances. Healthcare facilities and providers are encouraged to review publications from applicable health departments, as well as publications by their respective medical societies and associations for further information on return-to-work recommendations specific to their location and practice area.

CDC: Considerations for Nursing Homes and Assisted Living Facilities

As a supplement, the CDC has also issued additional guidance for use in nursing homes (NHs) and assisted living facilities (ALFs) due to the risk of COVID-19 spreading and affecting residents. The CDC recommends that NH and ALF personnel wear facemasks at all times while they are in the facility, regardless of whether they have had suspected or confirmed COVID-19. Moreover, the CDC recommends universal use of all recommended PPE by NH and ALF personnel even when only a single case of COVID-19 has been identified in the facility.

The CDC also recommends that NH and ALF personnel receive training in the use and removal of PPE in order to avoid inadvertent contamination. Further, NHs and ALFs should implement sick leave policies that are flexible and non-punitive to encourage personnel with suspected COVID-19 symptoms to stay home. It is also recommended that NHs and ALFs create an inventory of all personnel who provide care in the facility to determine which services are non-essential and can be delayed. The CDC has also recommended that NHs and ALFs consider designating one central point of entry to the facility and establishing visitation hours if visitation must occur, to keep COVID-19 from entering the facility. The foregoing is merely one of numerous issues facing NHs and ALFs during the COVID-19 crisis, and this and other issues are addressed in "A Framework for Mitigating Liability Claims in Eldercare Facilities".

Occupational Safety and Health Administration (OSHA): N95 FFRs

The COVID-19 outbreak has increased demand for N95 FFRs, limiting availability for employees in healthcare and emergency response. On April 3, 2020, OSHA issued interim guidance for employers to combat the supply shortages of N95 FFRs and to comply with the respiratory protection standard (29 CFR §1910.134). This guidance will remain in effect until further notice and applies in all industries.

Employers must continue to manage their respiratory protection programs and be mindful of N95 FFR shortages. Specifically, employers should identify and evaluate respiratory hazards in the workplace, and develop and implement written respiratory protection programs. Businesses should reassess their engineering controls, work practices and administrative controls to identify any changes they can make to decrease the need for N95 FFRs. Some examples provided in the guidance include using portable local exhaust systems or moving operations outdoors. Employers may also consider temporarily suspending non-essential operations, to the extent such operations are not already suspended due to state mandates.

In the event that N95 FFRs are not available and the employer has shown a good faith effort to acquire them or to use alternative options, businesses should exercise discretion for the use of expired N95 FFRs. Employers may only use previously NIOSH-certified expired N95 FFRs.

Healthcare employers are subject to separate requirements regarding the use of N95 FFRs. Generally, expired N95 FFRs must not be used when performing procedures on patients infected with, or potentially infected with, COVID-19. They also should not be used by employees who are performing or who are present for procedures expected to generate aerosols or procedures where respiratory secretions are likely to be poorly controlled (*e.g.*, cardiopulmonary resuscitation, intubation, extubation, bronchoscopy, nebulizer therapy, sputum induction). Healthcare employers should prioritize the use of N95 FFRs by activity type.

OSHA has indicated that it will exercise enforcement discretion when issuing citations under 29 CFR §1910.134(d) and/or the equivalent respiratory protection provisions of other health standards based on this guidance. Recommendations to avoid citations include, but are not limited to:

- demonstrating a good faith effort to obtain alternative FFRs, reusable elastomeric respirators or air purifying respirators;
- continuing to monitor the supply of N95 FFRs and prioritize their use according to CDC guidance; and
- implementing other feasible measures to protect employees, such as using partitions, restricting access, cohorting patients or using other engineering controls, work practices or administrative controls that reduce the need for respiratory protection.

Employers who utilize respiratory protection in the workplace should carefully review their policies regarding the use of N95 FFR protective gear to ensure compliance with this new guidance.

OSHA: Returning To Work

While OSHA has no specific standard covering COVID-19, it has published guidance on what employers should do to reduce the risk of worker exposures to the virus upon return to work.

First, OHSA recognizes that risk to COVID-19 may be increased for some workers who interact with potentially infected people, including workers in the following fields:

- healthcare;
- deathcare;
- laboratories;
- airline operations;
- border protection;
- solid waste and wastewater management; and
- international travel.

Second, OSHA has implemented basic infection preventative measures, including:

- promoting frequent hand washing with soap and water for at least 20 seconds
    - if soap and water is not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol;
- discouraging workers from using other workers' phones, desk, offices, etc.; and
- maintaining regular housekeeping practices, including cleaning and disinfection of surfaces and equipment.

Third, OSHA requires employers to develop procedures for prompt identification and isolation of sick workers with COVID-19 (or workers suspected of having COVID-19), including:

- immediately isolating people who have COVID-19 symptoms;
- limiting the spread of respiratory secretions of a person who could have COVID-19;

- providing a face mask to contain possible respiratory secretions of the nose and mouth; and
- isolating people suspected of having COVID-19.

If an employer discovers that an employee has COVID-19, it is recordable on the OSHA 300 log if:

1. it is a "confirmed" case of COVID-19;
2. the work environment was likely the cause or a contributing factor of the illness; or
3. medical treatment (beyond first aid) is provided, restricted activity is imposed by a treating physician or days away from work is imposed by a treating physician.

If an employee has a confirmed case of COVID-19 that is considered work-related, the employer needs to report the case to OSHA if it results in a fatality or in-patient hospitalization.

Employers must report any worker fatality within eight (8) hours, and any hospitalization of a worker within 24 hours.

Workers' Compensation Issues Related to COVID-19

Employee Work Injuries

Besides monitoring workers and mitigating risk in the workplace, it is likely that employers will be confronted with both workers' compensation claims and potential liability and disability claims arising from exposure to the virus in the workplace, and the injuries sustained thereby, both physical and emotional. The coronavirus is entirely new (a "novel" virus), so there is nothing in statutes or case law to specifically address the illness as a "work injury" although some states such as New Jersey and Pennsylvania have proposed bills which provide that essential workers who contract the virus are "deemed" to have succumbed to it in the workplace. It is currently unclear how this issue will be treated in the future by states, but a quick reference guide can be viewed here. There are, however, some existing rules and relevant cases discussed below.

For example, in Pennsylvania, and in most other states, workers' compensation injuries must arise in the course of employment and must be related thereto. Court decisions have expanded the phrase "course of employment" to "course *and* scope of employment." For example, an employee who contracts the virus on a business trip would generally be said to be acting within the scope of employment.

Exposure to a virus or pathogen can constitute an injury. For example, an office worker who contracted meningitis from a co-worker when there was a "kiss on the cheek good-bye" at the time of a special event for the employees, and later died, was granted death benefits to his dependents. In this instance, there was a specific scenario that persuaded the workers' compensation judge to award benefits.[4]

A second category of workers compensation claims that is often covered is a so-called "occupational disease," where exposure to "potential harm is substantially greater in that industry or occupation than in the general population." 77 P.S. §27.1 (n).

[4] *New Castle v. WCAB (SALLIE)*, 546 A.2d 132 (Cmwlth. Ct. 1987)

In the *occupational disease* category, there is the case of a visiting nurse who contracted Hepatitis C through an accidental needle stick while caring for a patient. The nurse was entitled to a presumption of a causal relationship to work in light of her occupation and was awarded benefits.[5]

Accordingly, if an employer is aware of a specific incident in the workplace that can lead to a possible illness this should be reported to the workers' compensation carrier immediately. A government website is available for more information about the coronavirus and work-related injuries in Pennsylvania.

Employer Immunity

An issue related to workers' compensation is potential claims by employees asserting that an employer failed to follow its policy, or any policy, or did not have a policy in place to mitigate exposure to COVID-19. It is likely that in the coming weeks, millions of workers will return to the workforce and could be at an increased potential for COVID-19 exposure. Infections manifesting with symptoms after the employee returns to work will likely result in the employee seeking workers' compensation benefits as noted, but some employees may seek to sue the employer outside of the normal workers' compensation scheme based on the employer's alleged inadequate actions around providing a safe workplace. In fact, employers are so concerned about this issue, that many states are discussing immunity for employers if they follow state or federal orders or guidelines.

This issue is important because most state workers' compensation acts include "exclusivity provisions" that bar an employee's claim for negligence unless an exception attaches. As bodily injury claims are brought by workers for COVID-19 infection either individually, or in a collective action, the courts must determine the scope of these limited exceptions to the workers' compensation bar rules, which typically require intentional or at least reckless acts by the employer, to permit such a claim to go forward.

The interest in workers to maintain such claims is that while they have an available remedy under the various workers' compensation acts, to collect a scheduled benefit upon a showing that the virus exposure was work-related, these benefits are generally at a level below what the employee would potentially recover in a liability action. In fact, such cases are already being filed. Because of this fact, exceptions to the exclusivity provision of the workers' compensation acts will likely be fertile ground for the attempt to recover damages at a level beyond the scheduled benefit.

As noted above, some states are contemplating reducing or eliminating the need for the employee to prove causation for essential workers, thereby essentially eliminating the need to prove a nexus between the exposure in the workforce and COVID-19. Most recently, COVID-19-based lawsuits filed by supply-chain and other service-industry workers were directed against their employers claiming the intentional-act exception negated the employer's immunity. However, the workers' compensation exclusivity rule is still likely to bar most employee COVID-19 claims so long as employers protect against any of their practices being considered reckless or intentional.

[5] *Sun Home Health Visiting Nurses v. WCAB (Noguchi)*, 815 A.2d 1156 (Cmwlth. Ct. 2003)

Case law recognizing the application of the intentional act exception in Pennsylvania demonstrates that the act of the employer must effectively not be work-related and rise truly to the level of an intentional wrong. See *Martin v. Lancaster Battery Co*., 606 A.2d 444, 448 (Pa. 1992) (recognizing exception where employee was seeking compensation from employer not for work-related injury but for "aggravation" of work-related injury caused by employer's intentional misrepresentation of blood test results); *Kohler v. McCrory Stores*, 615 A.2d 27, 31 (Pa. 1992) ("[I]n order to set forth a valid cause of action against an employer, an employee must assert that his injuries are not work-related because he was injured by a co-worker for purely personal reasons."); and *Poyser v. Newman & Co*., 522 A.2d 548, 551 (Pa. 1987) (declining to recognize a broad intentional-act exception).

In New York, the exception is also narrow, requiring that the employer fully intended to cause the injury that is sued upon. For example, in *Martinkowski v. Carborundum Company/Electro-Minerals Division*, 437 N.Y.S.2d 237, 238 (Sup. Ct. 1981), the employer willfully violated OSHA regulations requiring the installation of carbon-monoxide detectors and an employee died of carbon-monoxide asphyxiation. The court held that the employer was nonetheless immune from a civil suit because there was no support for "the proposition that their failure was designed with the purpose of causing plaintiff's decedent injuries or with knowledge to substantial certainty that such injuries would ensue." Id. By contrast, in *De Coigne v. Ludlum Steel Company*, 297 N.Y.S. 636, 641 (N.Y. App. Div. 3rd Dept. 1937), there was no bar to suit. There, the employee fell ill after his employer poisoned the employee's food. Id. The court found the act to be a willful and intentional wrong that was not an accident covered by the workers' compensation scheme. Id. Obviously, that sort of willful misconduct is not a likely scenario for most employers.

New Jersey courts, on the other hand, have broadened the intentional wrong exception. While the statute itself speaks of an "intentional wrong," N.J.S.A. 34:15-8, on the part of the employer, in order to sidestep the immunity, the Supreme Court of New Jersey allows the employee to demonstrate through circumstantial evidence a "substantial certainty" of injury. In *Laidlow v. Hariton Machine Company*, 790 A.2d 884, 887 (N.J. 2002), the employee's hand was severely injured upon being caught in a rolling mill without a safety guard. The record revealed prior complaints about the missing guard and similar close calls in which gloves were pulled into the machine. Id. at 897. More importantly, the employer had systematically and deliberately deceived government safety inspectors by installing the safety guard while inspectors were onsite, but removing it otherwise to speed production. Id. at 897-98. The court held that the intentional-wrong exception applied because the totality of the facts could support a jury finding that "it was substantially certain that the removal of the safety guard would result eventually in injury." Id at 898.

By contrast, in *Van Dunk v. Reckson Associates Realty*, 45 A.3d 965, 967-68 (N.J. 2012), in a moment of frustration, a supervisor told an employee to go into a twenty-foot trench without a protective system to prevent cave-ins for a quick job, and the trench wall soon collapsed on the employee. The employee argued that the employer deliberately disregarded OSHA regulations regarding protective systems. Id. at 970. However, the court concluded that even under this fact pattern, the employer was shielded by the workers' compensation immunity because there was no "objectively reasonable basis for concluding that the violation of safety protocol was substantially certain to lead to injury or death during the few minutes." Id. at 979. The "possibility" of a cave-in was not enough. Id.

COVID-19 employee liability suits have asserted a variety of claims in an effort to come within the intentional act exception. Employees have alleged intentional failure to follow and enforce CDC guidelines regarding social distancing, customer headcount, symptomatic employees and hygiene protocols. OSHA has also published back-to-work guidelines which will could set the standards, if allegedly violated, for an intentional act exception argument.

It remains to be seen whether courts will continue to apply the relatively high bar to come within the intentional act exception as demonstrated by the above fact patterns. Employers are well-advised to maintain a policy consistent with CDC, OSHA and state back-to-work guidelines. Employers are also well-advised to maintain a strict COVID-19 response policy to maintain a safe workplace and to adhere to these guidelines. Employee counsel will certainly analogize the failure to provide PPE as akin to the failure to have a safety guard on a piece of industrial equipment in an effort, at least under New Jersey law, to create a triable issue of fact that the employer created a "substantial certainty" of harm.

In summary, employers must be vigilant to keep up with circumstances in the workplace in conjunction with the relevant guidelines issued by the CDC, OSHA and state and local health authorities. Employers can enact reasonable safety practices and procedures in compliance with the most recently promulgated OSHA guidelines for COVID-19 workplace safety.

What Happens When Your Employees Refuse to Return to Work?

You finally finish your plans and create policies in order to reopen and are met with a chorus of employee refusals to report to work out of fear of exposure to COVID-19. There is currently no obligation for an employer to accommodate an employee's "general fear" of exposure to COVID-19 if he or she reports to the workplace. In general, if the employer is able to operate, if work is available and if an employee is able to work, the employee must generally report to the workplace and the failure to do so can be grounds for discipline and/or termination. However, this general rule is fraught with exceptions and is quite complex, and mishandling an employee's refusal to return to work can expose employers to potential liability.

In short, a great deal of flexibility is needed here. Federal statutes such as OSHA, the ADA, the Families First Coronavirus Response Act (FFCRA) and the National Labor Relations Act (NLRA), along with numerous state and local statutes, may extend protections to certain workers who refuse to return to work. Accordingly, employers need to understand these protections, and how they *interact* with each other, and proceed with caution before disciplining or terminating an employee who refuses to come to work out of fear of exposure to COVID-19.

OSHA

Under OSHA, workers have the right to refuse to work if they believe they are in imminent danger. An employee must have a reasonable belief that there is a direct threat of death or serious physical harm likely to occur immediately or within a short period for this right to apply. Most work conditions in the United

States do not meet the elements under OSHA for an employee to refuse to work. Requiring workers to work with patients in a medical setting without PPE, however, may rise to the threshold. Additionally, requiring workers to work with other workers actively infected with the virus, or refusing to permit social distancing, could also create potential liability. Even where there is no immediate danger, workers may still file an OSHA whistleblower claim. If the employer establishes there was no hazard to workers by compliance with OSHA and CDC guidelines, the whistleblower claim will likely fail.

In fact, the [Washington Post reports] that OSHA has received thousands of complaints involving COVID-19 safety issues. And while workers do not have a direct cause of action against their employers, they can file whistleblower and retaliation claims against their employers under state statutory or common law standards, as discussed below.

The ADA

The ADA and state disability discrimination laws may extend protections to workers with disabilities who refuse to come to work because exposure to COVID-19 may jeopardize an underlying health condition[6]. The ADA requires employers to provide disabled workers with "reasonable accommodations" that permit the employee to perform the essential functions of his or her job. Determining which accommodations are "reasonable" is extremely fact-sensitive and typically determined on a case-by-case basis. Depending on the specific job and situation, "reasonable accommodations" can include, among other things, permitting an employee to work from home or granting an employee additional time off until the risk of exposure in the work place is eliminated or lessened.

In addition, once an employer learns that a disabled employee needs an accommodation, the ADA requires the employer to engage in an "interactive process," or back and forth discussion, with the employee to determine whether a reasonable accommodation can be made. For example, business travel to a country that is in the midst of an outbreak would be questionable where the employee is susceptible to contracting the virus. Accordingly, before disciplining or terminating an employee with a disability who refuses to come to work out of fear of exposure to COVID-19, employers must engage in the "interactive process" with the employee to determine whether a "reasonable accommodation" needs to be made available to that employee.

NLRA

Under the NLRA, workers at unionized and nonunionized employers have broad statutory protections permitting them to engage in protected concerted activity for mutual aid and protection. Similar to OSHA, the refusal must be reasonable and based on a good faith belief that working conditions are unsafe. In the context of unionized workers, a concerted refusal to work over safety concerns is protected. Unionized workers must also have a "good faith belief" supported by "ascertainable" and "objective evidence" that there is an "abnormally dangerous" working condition. Workers (even those not in unions) who assert such

[6] At time of this writing, the EEOC first issued guidance and then "withdrew" it shortly thereafter. It is likely, therefore, that there will be additional guidance in the near future.

rights, such as joining together to refuse to work in unsafe conditions or to discuss the payment of "hazard pay," are generally protected under the NLRA from discipline by the employer.

FFCRA

If an employee refuses to return to work following a shutdown order, an employer should first explore the reasons for the refusal to determine whether they are COVID-19-related. If the refusal is related to the pandemic, the employee may be protected under FFCRA. For example, if a physician advises an employee to self-quarantine because the employee is particularly vulnerable to COVID-19, the employee may be eligible for paid sick leave under FFCRA. The quarantine, however, must prevent the employee from working or teleworking. Similarly, an employee who refuses to return to work because he or she is caring for a family member who has been diagnosed with COVID-19, or a child whose school has closed, may be eligible for both paid sick leave and expanded FMLA leave under FFCRA. Notably, general fear of contracting or being exposed to COVID-19 is not a qualifying reason for leave under FFCRA. Thus, an otherwise healthy employee who exhausts all available FFCRA leave and/or PTO might be subject to discipline for refusing to perform job duties or for violating attendance policies (assuming no other protected leave is available). If current CDC models are accurate, such requests will be quite common. It is imperative that employers properly train their workers on these issues. Failure to do so will only result in employment claims that will be difficult to defend.

The ADA and COVID-19 Mitigation: A Review of the Interplay Between These Areas

In this regard, it is helpful to review recent EEOC guidance pertaining to permitted testing of workers for COVID-19 and what the ADA permits. For example, the EEOC allows employers to "test" workers for COVID-19 before they enter a work site without running afoul of the ADA. In its latest technical assistance guidance for employers dealing with the novel coronavirus pandemic, the EEOC set forth its position on testing and medical exams, providing:

> *"Any medical test that businesses require workers to take must be "job related and consistent with business necessity" under the ADA, a framework that allows businesses to legally screen workers for COVID-19 since those who are carriers will "pose a direct threat to the health of others."*

Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

The EEOC has warned in its guidance, however, that employers have to "ensure" that any tests are "accurate and reliable," suggesting that businesses review guidance from public health agencies, such as the Food and Drug Administration (FDA), about what constitutes safe and accurate testing and keep in mind that certain types of tests could yield false positives or false negatives. While this sounds straight forward it is not. Different tests have differing levels of reliability and accuracy. It is strongly suggested that expert assistance be sought in this area.

As stated by the EEOC, "accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later." Based on guidance from medical and public health authorities, employers should still require – to the greatest extent possible – that workers observe infection control practices (such as social distancing, regular handwashing and other measures) in the workplace to prevent transmission of COVID-19.

In recent weeks, the EEOC has updated its Q&A guidance to include a "Return to Work" section that covers topics such as the way businesses should handle requests by workers for accommodations and how to prevent potential harassment and discrimination when workplaces reopen. In earlier guidance, the EEOC stated that employers can take employees' temperatures to assess whether they have COVID-19 symptoms, but said that is the sort of medical data that must be kept confidential under the ADA.

The EEOC's guidance does not address the use of so-called antibody tests that can detect whether a person has had the virus and built up antibodies to it. It also does not address how state agencies will interpret these measures under state laws that protect employees even more broadly than the ADA. While it is possible, or even likely, that they will follow the EEOC guidance, there are no guarantees that states will do so.

The EEOC guidance provides the following information on acceptable employer measures:

- The following inquiries are generally *not* restricted disability-related inquiries:
  - experiencing cold or flu-like symptoms;
  - exposure to pandemic influenza during a trip; and/or
  - asking an absent employee why he or she is absent and when he or she expects to return to work.
- Asking whether a person's immune system is compromised *is* a disability-related inquiry because inquiries regarding an individual's immune system are disability-related as "a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS."
- Sending an employee home for displaying influenza-like symptoms during a pandemic is permissible because it is not disability-related.
- Employers may require that employees work from home; adopt infection-control practices while at work (such as regular handwashing); and require employees to wear PPE during the pandemic.
- Employers may make inquiries "designed to identify potential non-medical reasons for absence during a pandemic (*e.g.*, curtailed public transportation) on an equal footing with medical reasons (*e.g.*, chronic illnesses that increase the risk of complications)."
- Employers generally may take employees' temperatures.

Risk Assessment

With some "return-to-work" executive orders already underway in many states, as referenced above, employers are quickly turning their attention to "how" to do just that.

A return-to-work policy can mean a lot of things. There is the "external policy" to workers, but also an "internal policy" for handling unexpected developments. Certainly, the CDC's current guidelines are one starting point, and state guidelines will likely provide broad suggestions to employers when they are released, but each employer's policy will, by necessity, have to be tailored to fit their unique work environment. There are still many additional areas that should be reviewed, such as:

- the property manager's requirements for common areas of the employer's leasehold, *e.g.*, elevator occupancy levels;
- public transportation needs of the workforce and how cities and states will regulate same, *e.g.*, staggering work timeframes;
- a 360 degree review of the employer's offices and facilities, in order to develop the risk profile for each location;
- policies concerning visitors and long-term guests (and how employers will regulate visitors and require entry agreements from vendors whose employees will be working at the employer's offices);
- will travel restrictions be imposed on employees;
- what level of factual detail will employers obtain from returning employees and visitors on COVID-19 issues, what information can be inquired about and how will HIPAA-related information be stored;
- will employers restrict common spaces such as lunch rooms;
- will employers "redesign" workspaces and impose distancing requirements;
- will employers provide gloves and masks to workers;
- will employers stagger work days in the office and start times, especially in large buildings;
- all employers should appoint a "Workplace Coordinator," as suggested by the CDC, to monitor and shape implementation of their policies; and lastly,
- what policy will employers adopt to handle outbreaks of the virus, including the reporting and mitigation mechanisms when unexpected developments occur in the workplace pertaining to safety.

Underlying all of these considerations is the absolute need for *substantial* training. COVID-19 mitigation is likely to be a long and ongoing process with many unexpected developments. Accordingly, ongoing employee training and communication are essential and must include "follow-up" on how policies are being implemented and whether they are working.

Importantly, return-to-work policies must be discussed and developed well ahead of time because failure to follow a policy or inconsistent enforcement will lead to a number of different types of claims. For example, some companies are indicating that they will not take temperatures because the employees may refuse to follow this policy. While this may be the company position, it is important to understand that depending on the circumstances, this activity could later be required, either by future state and federal requirements, or because of workplace requirements. For example, positive tests in the workplace will likely require changes in policies and how to handle these issues should be discussed well ahead of time; judgment calls are not best suited for the spur of the moment.

Establishing a Risk Profile

In determining an employer's specific policy, each employer should devise a risk profile to shape the policy at each location which should include the following variables (which may well change over time):

1. **Risk to Public, Patients and Customers.** The greater the risk of widespread harm the more extreme measures that should be undertaken.
2. **Distancing Potential: Possible or Not Possible.** Where it is not possible, more extreme measures should be taken. This assessment should be made on a facility-by-facility and state-by state basis.
3. **Local Exposure Potential and History.** Workplaces that have a history of exposure must be viewed differently than other workplaces (even if in the same industry). Risk profiles can change depending on current facts on the ground.
4. **Environmental Assessments**. A measurement of the workforce's "at risk" potential. This is the most difficult area as the need to protect employees is at odds with state and federal discrimination requirements. For example, an employee may have a compromised immune system and science and mortality rates would strongly suggest taking steps to prevent transmission. Yet it is still somewhat unclear to what extent an employer can inquire into this area, other than possibly asking the employee to provide information they believe is relevant to their ability to return to all work-related activities. While the EEOC guidelines suggest this is possible, the states have not yet provided detail in this area. We assume that most of these issues will arise when employees ask for an accommodation in terms of where and how they perform their job duties.

Whistleblower Concerns and Investigations

Arising out of this novel situation is the likelihood that employee whistleblower and retaliation claims will substantially increase in the near term. For example, essential employees by the thousands have protested over the lack of safety policies and equipment. In fact, one national news story about deaths at a nursing home in New Jersey came to light in part through "social posting" on Facebook.

Most states have formal whistleblower policies protecting employees who complain about health- and safety-related concerns. Employees are protected from retaliation if they complain in good faith. Plaintiffs' counsel are quite familiar with this area and employers should assume this will be an important area to investigate and must avoid actions that could be considered retaliatory.

There is little doubt that maintaining a safe workplace and addressing employee concerns will be a key issue for employers. As noted by The Washington Post, OSHA has received thousands of complaints from employees regarding a lack of protections against COVID-19 in their workplaces. In response, OSHA issued a press release "reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus."

Below are some of the whistleblower protections and anti-retaliation statutes employers should be mindful of during the COVID-19 pandemic.

Occupational Health and Safety Act of 1970

Section 11(c) the Occupational Health and Safety Act of 1970 (OSH Act) prohibits employers from retaliating against employees for exercising their rights under the statute, including raising a health or safety complaint with OSHA. 29 U.S.C. §660(c). The protections contained in Section 11(c) apply to employees who report conduct they reasonably and in good faith believe violates the OSH Act. Although Section 11(c) does not provide for a private cause of action, employees can submit a complaint to the Secretary of Labor. After investigating the employee's complaint, the Secretory of Labor can sue the employer in federal court on the employee's behalf. In court, the Secretary of Labor may seek relief including reinstatement, back pay with interest, compensatory damages, punitive damages and other appropriate relief.

Section 5(a)(1) of the OSH Act, which is referred to as the "General Duty Clause," provides that employers must provide employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [the employer's] employees." 29 U.S.C. §654(a)(1). Additionally, OSHA enforces regulations that are specific to health concerns associated with COVID-19, including:

- 29 C.F.R. §1910, Subpart I, which sets forth OSHA's PPE standards and requires the use of gloves, eye and face protection and respiratory protection by employees in certain industries; and
- 29 C.F.R. §1920.134, which sets forth OSHA's Respiratory Protection Standard and provides that when respirators are necessary to protect workers, employers must implement a comprehensive respiratory program. OSHA recently issued a temporary guidance related to the enforcement of respirator annual fit-testing requirements for healthcare workers during the COVID-19 pandemic.

OSHA recently published a document entitled Guidance on Preparing Workplaces for COVID-19, which contains recommendations to assist employers in providing a safe and healthful workplace during the COVID-19 pandemic.

An adverse employment action taken by an employer in response to an employee's reasonable, good faith complaint that the employer has violated any of the provisions discussed above, or any other relevant provision of the OSH Act, potentially could serve as a basis for a retaliation claim under Section 11(c).

NLRA

Sections 8(a)(1) and 8(a)(3) of the NLRA prohibit employers from retaliating against an employee for, among other things, participating in "concerted activities." 29 U.S.C. §158(a). A recent National Labor Relations Board (NLRB) decision, *Maine Coast Regional Health Facilities*, NLRB, 01-CA-209105, 01-CA-212276 (March 30, 2020), indicates that healthcare workers who are terminated for voicing concerns about working conditions in healthcare facilities may have a retaliation claim under the NLRA.

New York Whistleblower Statutes

New York has two whistleblower statutes – New York Labor Law §740 and New York Labor Law §741 – that may be relevant to claims arising from COVID-19. New York Labor Law §740 protects employees from retaliation for reporting a violation of the law that "creates and presents a substantial and specific danger to the public health or safety." N.Y.L.L. §740(2)(a). An employee's good faith belief that his or her employer engaged in a violation of the law is not sufficient to sustain a claim under § 740. Rather, the employee must show that the employer engaged in an "actual violation" of a safety statute or regulation.

New York Labor Law §741 is specific to healthcare employees and protects such employees from retaliation for disclosing or objecting to "an activity, policy or practice of [the employee's] employer . . . that the employee, in good faith, reasonably believes constitutes improper quality of patient care." N.Y.L.L. §741(2). Thus, §741 differs from §740 in that, under the former provision, healthcare employees are only required to show they had a reasonable, good-faith belief that the employer engaged in a violation of the law. Additionally, whereas §740 prohibits retaliation on the basis of complaints that affect the "public-at-large," §741 protects healthcare employees who report violations "which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient." N.Y.L.L. §741(1)(d).

State Whistleblower Protections

Other state statutes also protect employees against retaliation on the basis of reporting health and safety concerns. Examples of such statutes include the following:

- New Jersey's Conscientious Employee Protection Act is very broad and it prohibits employers from retaliating against an employee for objecting to, or refusing to participate in, any activity, policy or practice which the employee reasonably believes is in violation of a law, rule or regulation issued under the law, or, if the employee is a licensed or certified healthcare professional, constitutes improper quality of patient care. N.J.S.A. §34:19-3(c).

Common Law Retaliatory Discharge Claims in Various States

In addition to statutory measures, over half of the states recognize a "common law" cause of action for retaliatory discharge based on a violation of public policy involving health and safety concerns. Here are some examples of states that recognize such a claim:

- New Jersey has recognized a common law cause of action for retaliatory discharge. To sustain such a claim, a plaintiff must show his or her discharge was contrary to a clear mandate of public policy, including public health and safety. See *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980).

- Washington, D.C. has recognized a common law cause of action for wrongful termination where an employee was discharged for refusing to engage in illegal activity. *See Adams v. Cochran & Co., Inc.*, 597 A.2d 28 (1991). The D.C. Court of Appeals expanded the applicability of this claim, allowing a plaintiff who alleged she had been discharged from her job as a nurse in violation of public policy because she advocated for patients' rights to proceed on a wrongful termination claim. See *Carl v. Children's Hospital*, 702 A.2d 159 (1997).

Accordingly, if a valid safety claim is raised it must be investigated, and if warranted, resolved. Failure to investigate or to resolve health and safety issues in the workplace can place employers (and their employees) in a precarious situation. Employers should be slow to discipline employees who complain about health and safety issues and should seek guidance from their counsel. Depending on how serious the matter is, corporate officers may need to advise Board members. In fact, it would be wise to consider setting up a "safety committee" at the Board level if one does not exist already to review this area.

How to Handle Employee Benefits and Disability Insurance Claims Post Pandemic

Besides creating new policies, there will be significant information to digest once employees return in connection with the administration of employee benefit issues. This is only a partial review of these complicated benefit areas.

Impact on Employer Health Plans

On April 11, 2020, the Centers for Medicare and Medicaid Studies (CMS), in conjunction with the Department of Treasury and the United States Department of Labor (DOL), released FAQs detailing certain coverage elements mandated by FFCRA and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (together, the COVID Statutes). The guidance applies broadly to most forms of health coverage, including many types of benefits offered through employer-sponsored group health benefit plans.

The FAQs address the types of plans covered by changes imposed by the COVID Statutes, the types of benefits that the COVID Statutes require and certain administrative and operational clarifications regarding the application of those changes.

Types Of Plans

The FAQs indicate that the changes implemented by the COVID Statutes will apply broadly to most types of healthcare coverage, including both individual health insurance coverage (including student health coverage) and most group or group-type health insurance plans provided by employer plan sponsors or similar entities (*e.g.*, union coverage).

Mandated Benefits

Other than some exempt plans, health insurance plans are required to provide benefits for certain products and services without cost-sharing requirements. Specifically, such plans must provide coverage for:

- In-vitro COVID-19 tests (including serological testing which tests for prior infection), if the test is approved by the FDA, the test manufacturer has or will apply for emergency approval by the FDA or the test is approved by a state which has notified the Department of Health and Human Services (HHS) of such approval; and
- Items or services provided during any in-person visit with a medical provider (which explicitly includes such a visit provided via telemedicine) that results in the administration of such a test, including evaluation and services required to determine whether the test is advisable.

These products and services must be provided without cost-sharing or required pre-authorization or referrals. If the health plan has a negotiated rate with the provider of the covered service, reimbursement is at the negotiated rate. However, if no negotiated rate exists, the health plan is required to reimburse the provider at the provider’s publicly posted cash rate. There are no stated limitations on such rate, but it is required to be made available on a publicly accessible website.

Although exempt from the requirement to provide such services, the FAQs indicate that an Employee Assistance Program will not violate the “no substantial medical benefits” requirement described above by providing coverage for these listed benefits (meaning that it may remain an “excepted benefit” for other legal purposes). The FAQs also note that coverage for such services may be provided at an on-site medical clinic without jeopardizing the clinic’s status as an excepted benefit.

Other Items

The FAQs also address certain other clarifications implemented by the COVID Statutes. Specifically, the FAQs reiterate that telemedicine coverage that meets certain safe harbor requirements will not negatively impact an individual’s ability to utilize a health savings account, and urges state governments to encourage the use of telemedicine. Additionally, the FAQs note that restrictions on mid-year changes to health plans will not be enforced to the extent such changes are required to comply with the COVID Statutes, but specifically note that plans may not implement changes that reduce other benefits to offset the expenses for benefits mandated by the COVID Statutes.

These changes are all effective as of the effective dates of the COVID Statutes (March 18th and 27th, respectively). Employer plan sponsors should coordinate with counsel and their insurers or third-party administrators as soon as possible to ensure compliance with these requirements.

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Enhanced Unemployment Benefits Under The CARES Act

It is clear that for many employers return to work may mean return to work part-time, return to work on certain days or that some employees will return to work and others will not. As a direct result if recent federal actions under the Coronavirus Aid, Relief, and Economic Security Act (the Act), employers are confronting issues that they have never seen before which will be explored below. Among the provisions included, the Act provides several types of enhanced unemployment benefits, including:

- A flat $600 benefit, which is paid on top of the regular unemployment compensation to which the worker is entitled;
- Waiver of any benefit application waiting period, so that workers can apply and receive benefits, immediately;
- An extension of the period of benefits;
- An extension of coverage to workers who otherwise would not be eligible for unemployment benefits, or who otherwise would have exhausted their unemployment benefits; and
- The creation of federal funding for state short-time programs, under which workers are not terminated, but are retained by the employer with reduced hours.

All of these new benefits are administered by the states through agreements with the Secretary of Labor.

The Federal Pandemic Unemployment Compensation

First, the Act authorizes an additional flat $600 benefit, called the Federal Pandemic Unemployment Compensation (FPUC). This benefit applies after the state and Secretary of Labor have entered into an agreement to provide the benefit, and sunsets on July 31, 2020.

Waiver of Eligibility Waiting Period

Second, the Act eliminates any state or federal eligibility waiting period. As a result, unemployed workers are eligible for benefits immediately upon losing employment. The waiver of the waiting period applies after the state and Secretary of Labor have entered into an agreement to provide the benefit, and sunsets on December 31, 2020.

Pandemic Emergency Unemployment Compensation

Third, the Act extends the duration of unemployment benefits for workers who would have otherwise exhausted their unemployment benefits, and who are able and available to work, called the Pandemic Emergency Unemployment Compensation (PEUC). The extended benefit amount includes both the regular compensation payable under the applicable state or federal law, as well as the FPUC (discussed above). The Act caps the maximum amount of PEUC to 13 additional weeks of regular unemployment benefits and FPUC.

The Act also requires states to be flexible in their requirements that workers be able and available to work, where they are unable to search for work because of COVID-19, including because they are sick, quarantined or are subject to movement restrictions.

Pandemic Unemployment Assistance

Fourth, the Act extends unemployment benefits to workers who would otherwise be ineligible for compensation or extended benefits under state or federal law or would be ineligible for PEUC, called Pandemic Unemployment Assistance (PUA).

PUA is available to workers who:

- have exhausted their rights to regular unemployment or extended benefits under state or federal law, or who have exhausted their PEUC;
- are self-employed;
- are seeking part-time employment;
- do not have sufficient work history; or
- otherwise would not normally qualify for regular or extended unemployment benefits or the PEUC.

These workers are eligible for benefits so long as they are otherwise able and available to work, but are unable or unavailable to work because:

- the employee has, or has symptoms of, COVID-19;
- a member of the employee's household has COVID-19;
- the employee is caring for a family member or household member who has COVID-19;
- the employee is a primary caregiver for a child or other household member whose school or facility has closed as a result of the COVID-19 public health emergency;
- the employee cannot go to work because of a COVID-19 related quarantine;
- the employee cannot go to work because the employee's healthcare provider has advised the employee to self-quarantine;
- the employee was supposed to start a new job, but now does not have a job, or is unable to go to work as a result of the COVID-19 public health emergency;
- the employee has become the breadwinner for a household because the former head of the household died from COVID-19;
- the employee had to quit his or her job as a result of COVID-19; or
- the employee's workplace closed because of the COVID-19 public health emergency.

The Act specifically excludes from coverage workers who can telework with pay, and workers who are receiving paid sick leave or other paid leave benefits. This is an area that is starting to heat up as employees are seeking to stay on unemployment as opposed to returning to work. At this time, both the states and the federal government appear unable to handle the numerous issues around eligibility as they are simply trying to keep up with claims processing and have not yet developed standards around COVID-related issues, particularly under the Act.

Practical Applications of PUA Benefits

As noted, the Act provides several initiatives to combat the effects of mass unemployment that differ conceptually from the traditional test for unemployment benefits. First and foremost, the Act's PUA that is designed to ameliorate the economic effects of the COVID-19 crisis. The PUA weekly monetary benefit consists of $600, which will be available through July 2020.

But unlike traditional unemployment benefits, the scope of covered individuals is rather expansive. In addition to employees generally eligible for traditional unemployment benefits, covered individuals *also* include those that are typically ineligible to receive unemployment benefits, such as self-employed individuals (*i.e.*, independent contractors), those seeking part-time employment and individuals with insufficient wage history. While PUA benefits are generally not provided to persons who either have the ability to telework (with pay) or are receiving full paid leave benefits, individuals receiving paid leave benefits in an amount *less than* their "customary work hours" may be eligible for reduced PUA benefits. In addition, a PUA recipient must certify that he/she is otherwise able to and available for work except that the individual is either (i) unemployed; (ii) unable to work; or (iii) unavailable to work on account of at least one of the following categories:

1. The individual is diagnosed with or experiencing symptoms of COVID-19 and is seeking medical diagnosis;
2. A member of the individual's household has been diagnosed with COVID-19;
3. The individual is caring for a family or household member diagnosed with COVID-19;
4. A child for which the individual has primary caregiving responsibility is out of school/daycare due to COVID-19 *and* such school/daycare is required for the individual to work;
5. The individual is unable to work due to a public COVID-19 quarantine or physician imposed self-quarantine;
6. The individual became the head of the household due to a COVID-19-related death;
7. The individual had to quit his/her job due to the COVID-19 crisis;
8. The individual's worksite closed due to COVID-19; or
9. Any additional criteria established by the U.S. Department of Labor, such as for independent contractors who are unemployed or unavailable for work due to COVID-19 thereby limiting their ability to perform "customary work activities."

Notably, an individual is not required to quit a job if he or she is receiving paid leave benefits. But under this factor, any decision to quit must have been "an involuntary decision compelled by the circumstances" above. An employee who quits his or her job solely to receive these benefits, without good cause, may have committed fraud. Additionally, where employees have been offered the option of teleworking, for the same hours, they too may be disqualified from receiving PUA benefits.

In summary, the PUA benefits provided by the Act have resulted in entirely new considerations for determining eligibility for unemployment benefits. While furloughs are not new to the traditional employment test, the additional aspects of being unable and/or unavailable to work due to a pandemic is somewhat novel. This is further complicated by the fact that many furloughed employees are receiving more income from the combination of regular unemployment and PUA benefits than when they were employed, which will inevitably result in some resistance to returning to work. It remains to be seen to what extent (if any) state agencies will conform their preexisting eligibility requirements for purposes of facilitating administration during the COVID-19 pandemic. For example, it appears some states have waived waiting periods, relaxed job search requirements and even extended eligibility to workers who "quit" because of COVID-19 exposure risks. Considering the inordinate amount of applications the states have been besieged with during the pandemic, it is fair to assume that their ability to individually address some of these issues has been significantly curtailed. Thus, while the federal government's efforts to offset historic unemployment caused by the COVID-19 pandemic have been largely successful, they have simultaneously created challenges for employers entering into the return-to-work phase of the pandemic.

Welfare Plans

Welfare plans, including medical plans, generally do not have explicit rehire provisions. However, if rehired employees have been placed on COBRA during the shutdown, the employer will need to have a process for accounting for their resumed active status. Employers should also review their cafeteria plan documents to determine if the shutdown and rehire constitutes a permissible life event, allowing employees to change elections.

Finally, it is important to note that group health plans (including fully insured group health plans) are "covered entities" under the Health Insurance Portability and Accountability Act (HIPAA), and the employer cannot use information held by such plans (such as a positive COVID-19 diagnosis) for purposes of making employment decisions, including a decision to allow an employee to return to active work.

HIPAA and Other Privacy Concerns

HHS Relaxes Some HIPAA Disclosures for Public Health

As noted above, the storage and creation of HIPAA-related information will be a by-product of employee testing and return-to-work requirements, as well as mitigation efforts around COVID-positive employees. This area will grow immensely in all likelihood as the pandemic drags on. Accordingly, building on the March 2020 notice regarding the decision by HHS to permit covered entities and their business associates to use certain internet communications services for the transmission of Personal Health Information (PHI), HHS has issued a notification that it "is exercising its discretion in how it applies the Privacy Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)" (the Notification) during the COVID-19 crisis.

The Notification indicates that during the COVID-19 outbreak, HHS will not initiate enforcement actions against covered healthcare providers or their business associates that use or disclose PHI for public health and health oversight activities. This protection applies even if the business associate was not expressly permitted to disclose PHI in its business associate agreement. Generally, HIPAA would prohibit such uses and disclosures, potentially subjecting both the covered entity and its business associate to an enforcement action and substantial penalties. HHS's announcement appears to have been motivated by delays in receiving COVID-19-related information from business associates concerned about HIPAA prohibitions.

To qualify under the HHS guidance, a business associate must act in good faith in providing PHI, and must inform the covered entity that it has done so within 10 days of the date of use or disclosure. The Notification states that disclosures to the CDC, for the purpose of slowing the spread of COVID-19, or CMS for the purpose of assisting the healthcare delivery system, would be considered "good faith" disclosures of PHI. This discretionary, non-enforcement position taken by HHS should continue until the expiration of the public health emergency, as determined by HHS or the federal government.

Importantly, the non-enforcement discretion does not extend to other requirements or prohibitions under the HIPAA Privacy Rule, nor to any obligations under the HIPAA Security and Breach Notification Rules that are applicable to business associates and covered entities.

Data Sharing Being Emphasized in the Battle Against COVID-19

In an effort to combat the COVID-19 pandemic, we are beginning to see regulatory regimes increase the focus on data sharing with public health authorities, as well as some targeted loosening of privacy protections in the hope that better information-sharing will lead to slowing the outbreak and saving lives.

Effective March 15, 2020, HHS issued a "Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency," which waives certain provisions of the HIPAA Privacy Rule to enable better information-sharing in connection with COVID-19. Under the limited waiver, there will be no sanctions or penalties against covered entities that fail to comply with the following requirements of the HIPAA Privacy Rule:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care. *See* 45 CFR 164.510(b)
- the requirement to honor a request to opt out of the facility directory. *See* 45 CFR 164.510(a)
- the requirement to distribute a notice of privacy practices. *See* 45 CFR 164.520
- the patient's right to request privacy restrictions. *See* 45 CFR 164.522(a)
- the patient's right to request confidential communications. *See* 45 CFR 164.522(b)

The waiver only applies: (1) in the emergency area identified in the public health emergency declaration; (2) to hospitals that have instituted a disaster protocol; and (3) for up to 72 hours from the time the hospital implements its disaster protocol.

Privacy and Cybersecurity Laws

Federal

Collection, use and protection of PHI, including information concerning the health of individuals, is governed by the Federal Trade Act (FTA) and subject to investigation and enforcement by the Federal Trade Commission. In addition to the FTA, there are several sector-specific statutes and related regulations that govern data privacy and security at the federal level, including HIPAA. HIPAA, which regulates healthcare "covered entities," require healthcare providers and organizations, as well as their business associates, to develop and comply with procedures that protect the confidentiality and security of PHI when it is transferred, received, handled or shared. Under certain circumstances, an employer's handling of PHI also is regulated by HIPAA. If an employer requests information from a medical provider, at a minimum, a HIPAA authorization will be required. Use of health information obtained from the employee or from their medical provider for the purposes of employment decisions will need to be clearly disclosed.

State

Various state privacy and data security laws also apply to the collection, use and protection of personally identifiable information (PII). Depending upon the jurisdiction, these laws may applies to biometric data, personal health data, "private information" or PII. The requirements also may be created by statute, regulation or common law, and may have general application or industry-specific applications, including the Pennsylvania Supreme Court's decision in *Dittman v. UPMC*, New York's Department of Financial Services Cyber Regulations and SHIELD Act and the California Consumer Privacy Act (CCPA). Some of these laws can carry significant liability.

In general, these laws require organizations to have adequate and appropriate written data privacy and security programs (*i.e.*, policies and procedures) that have been designed and implemented with employee training and are enforced. Potential increased attention given to employee health status in connection with the COVID-19 outbreak, and workforce operations shifting between onsite and remote locations, can place additional strain and emphasis on these programs. The adequacy of such programs is related to the nature of the information collected and used. Health information in general is considered high-risk, sensitive information. It is important to provide clear notification to individuals – customers and employees, including through available privacy notices or policies.

Labor Relations

Every employer has an obligation to provide a safe workplace under OSHA and to abide by federal and state safety plans. As states lift stay-at-home restrictions, an increasing number of unions have called for changes in the workplace, including greater transparency about COVID-19-related safety measures, pre-shift testing and the continued quarantine of employees with underlying health conditions. In Washington, D.C., a federal employees union listed health and safety conditions that must be met before federal employees will return to the workplace, such as the lifting of stay-at-home orders, a policy of voluntary maximum telework and work spaces that accommodate safe physical distancing. In Philadelphia, a transport worker's union has threatened a "job action" if similar demands are not met. Los Angeles was the site for United Food and Commercial Workers' pickets on May Day protesting inadequate protections for grocery workers. It is clear that all employers across the country must take stock now of what should be done before employees return to work. This raises issues regarding employees' rights to strike and engage in work stoppages. Two federal labor laws may protect employees who stop work because of the COVID-19 pandemic: (1) Section 7 of the NLRA and (2) Section 502 of the Labor Management Relations Act (the LMRA).

NLRA

In general, Section 7 of the NLRA gives employees in unionized and non-unionized settings the right to engage in a concerted activity, including a strike or work stoppage, because of a labor dispute involving employee demands over safety as well as other terms of employment, such as safety policies and practices during a pandemic and because of an employer's unfair labor practice, such as retaliation against employees who protest over health and safety. Specifically, Section 7 protects the rights of employees to strike over what they honestly believe to be unsafe and unhealthy working conditions. The NLRB has long held that Section 7 protects these employees who bring to the attention of management complaints of dangerous conditions in the workplace on behalf of his or her co-workers. With the exception of when a unionized employer's collective bargaining agreement contains a no-strike provision, it is likely the NLRB would conclude that Section 7 protects employees' concerted refusals to work in protest of an employee's perceived violations by the employer of social distancing guidelines.

LMRA

Section 502 of the LMRA protects employees who, in good faith, stop work because of abnormally dangerous working conditions. Unlike Section 7, Section 502 protects even a single employee from stopping work because of abnormally dangerous conditions. Section 502 also imposes a heavier burden on employees to establish dangerous conditions. Under Section 502, an employee "must present ascertainable, objective evidence supporting…[a] conclusion that an abnormally dangerous condition for work exists." Finally, no-strike provisions in collective bargaining agreements may not prevent these Section 502 work stoppages as it has been interpreted by the NLRB to be a limited exception to a no-strike provision in a collective bargaining agreement.

Short of a strike or work stoppage, even non-union employers should be aware of potential issues under the NLRA related to COVID-19. As noted above, the NLRA provides protections to any employees engaged in protected, concerted activity. Raising issues about safety has consistently been found to be protected activity. To be concerted activity, the activity needs to be done by more than two or more people acting in concert with each other. In order to find that an employee has engaged in concerted activity, it must be shown that:

1. the activity was engaged in with or on the authority of other employees; or
2. the activity was designed to initiate or to induce or to prepare for group action; and
3. the activity was engaged in for the purpose of "mutual aid or protection.

Therefore, employees raising concerns about return-to-work issues, company safety protocols, etc., or employees stating that they do not believe that the safety measures go far enough, are likely to be found to be engaging in protected, concerted activity and will be afforded protections under the NLRA.

Conclusion

In the final analysis, the term “return to work” is clearly misleading. It suggests a completed act, which can be quickly concluded. But employers should realize that the concept of “returning to normal” will be a long and complicated process that will likely evolve over time. It may even be reversed if circumstances change. Employers who ignore this, may suffer significant consequences. But those that are flexible, and plan ahead, will make the transition during this difficult time, both safer and more successful. We will continue to do our best to monitor this novel area and keep you abreast of all important developments.

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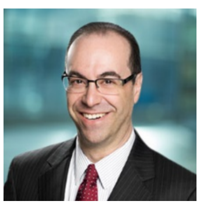

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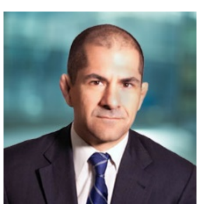

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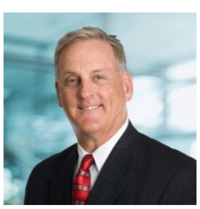

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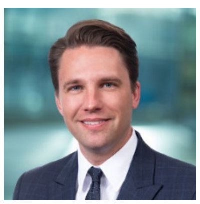

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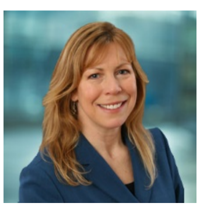

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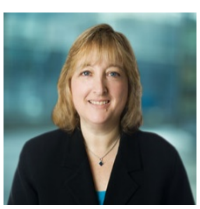

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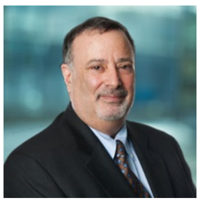

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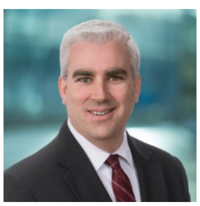

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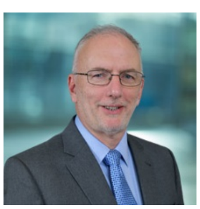

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