

Pandemic Transition

How to Reopen, Bring Staff Back to Work Safely



IF YOUR business is preparing to reopen after a relaxation of shelter-in-place orders, you should proceed with caution and make sure you have safeguards in place to protect your workers, as well as customers if they are entering your premises.

How can you take that first step back to a semblance of normalcy?

Here are some recommendations from the Los Angeles Department of Public Health and other sources that can apply to any municipality anywhere in the country.

The advice mainly applies to establishments that will have customers, but most of the recommendations are relevant across a wide swath of sectors.

Measures to protect employees

- If someone can continue working from home, let them do so.
- Tell employees not to come to work if sick.
- If any employee tests positive for, or has symptoms that are consistent with COVID-19, you should:
 - Ask that they isolate at home, and
 - Ask all employees who may have come in contact with that colleague to immediately self-quarantine at home.
- Check employees for symptoms or a fever before they enter. This must include a check-in concerning cough, shortness of breath or fever and any other symptoms the employee may be experiencing.
- These checks can be done remotely or in person upon the employee's arrival. A temperature check should be done at the worksite, if feasible.
- Offer at no cost to your employees cloth face coverings if they are going to have contact with the public during their shift. If they are disposable, masks should be thrown away at the end of every shift. If they are reusable, they should be washed after every shift in hot water.
- Instruct employees not to touch the exterior of their masks.
- Disinfect break rooms, restrooms and other common areas frequently.

- Place hand sanitizer in strategic locations.
- Allow employees to take frequent breaks to wash their hands.

Signage

Place signs at each public entrance of your facility to inform all employees and customers that they should:

- Avoid entering if they have a cough or fever.
- Maintain a minimum 6-foot distance from one another.
- Wear a mask for their own protection, as well as for the safety of others.

Controlling crowds, lines

Limit the number of customers on the premises at any one time, to allow customers and employees to easily maintain at least 6-foot distance from one another at all practicable times.

Post an employee at the door to ensure the maximum number of customers in the facility is not exceeded. If people are queuing up, mark the ground outside to ensure proper social distancing.

See 'Reconfigure' on page 2

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Workers' Compensation

Staff with COVID-19 Can File Illness Claims

GOV. GAVIN Newsom has issued an executive order requiring that essential workers who either test positive for COVID-19 or are diagnosed by a physician as having coronavirus are eligible for workers' compensation benefits.

The order means that it will automatically be presumed that the employee contracted the virus on the job if they test positive or receive a diagnosis within 14 days of their last shift.

Additionally, the employee must have been working at a worksite and not from home to qualify, and the diagnosis must be confirmed by testing within 30 days of the original diagnosis.

Essential workers are in a number of industries, including health care, emergency services, trucking, construction, food, warehousing, delivery, and more.

Under the order, it will be presumed that any case of COVID-19 infection by an essential worker is work-related and eligible for workers' comp benefits. That would include partial wage replacement for any missed time from work, as well as covering all related medical costs and death benefits for their family should the unthinkable happen.

If the employer believes an employee didn't contract the virus at work, they will have the burden of proving the individual contracted it elsewhere, which would be a difficult endeavor.

The rule is temporary and will cover cases dating back to March 19. It will sunset on July 6.

No adverse X-Mod effects

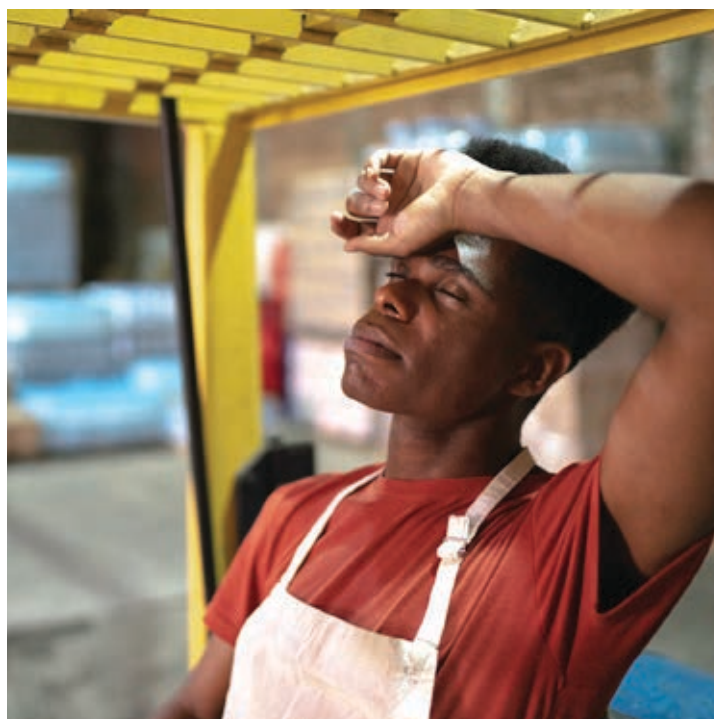
While the order will make it easier for essential workers to file workers' comp claims, employers do not have to worry about the effects on their workers' compensation claims experience.

That's because the Workers' Compensation Insurance Rating Bureau has proposed its own rules that would exempt any COVID-19 claims from

an employer's claims history, so that it would not affect their experience modifier (X-Mod).

That means if an employer has any workers who file COVID-19 claims, their premiums would not rise due to those claims.

The proposal will be reviewed by the Department of Insurance at a hearing on July 1. If approved, the rules will sunset 30 days after shelter-at-home orders are lifted. ❖



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Reconfigure Furniture in Offices, Public Seating Areas

Spacing between employees

- Require employees to work at least 6 feet apart. You may need to reorganize your office or workstations to ensure proper spacing.
- In jobs where workers are on their feet, mark spots on the floor where they should stand to ensure social distancing between your staff.
- Space out tables, chairs and microwaves in break rooms.
- Another option is to use partitions made of plexiglass so workers can communicate and make eye contact.
- In addition, you may want to abandon the popular open workspace concept and revert to using cubicles, which gained popularity in the 1980s and 1990s as a way to increase productivity by putting barriers between office workers. Having that divider will make your staff feel safer and can offer some protection.
- Reconfigure furniture placement in offices, public seating areas and other work areas to support physical distancing.

Cleaning and circulation

A recent study that analyzed superspreading events showed that closed environments with minimal ventilation strongly contributed to a characteristically high number of secondary infections.

Take steps to minimize air from fans blowing from one worker directly at another. Also consider opening windows for circulation.

Also important are:

- Disinfecting surfaces in workspaces, as well as doorknobs, buttons and controls. Pay special attention to areas that are frequented and touched more often.
- Providing workers and customers with tissues and trash receptacles.
- Employees who are cleaning and disinfecting should wear disposable gloves.
- Cleaning surfaces using soap and water, then using disinfectant.
- Sanitizing any other personal protective equipment such as hardhats after every shift. ❖

Retaliation Claims Against Businesses Growing

THE EQUAL Employment Opportunity Commission is seeing more and more retaliation complaints by U.S. employees, with such charges accounting for 54% of all charges in 2019. That's compared with 37% in 2011.

Employment law attorneys say that the increase is in part because employees who bring retaliation charges have a higher degree of success than those that bring a regular discrimination charge.

There is a lower standard of harm that must be proven for a successful retaliation lawsuit thanks to the U.S. Supreme Court case, *Burlington Northern & Santa Fe Railroad vs. White*.

While an employee alleging discrimination must prove that they suffered a "materially adverse employment action," a retaliation plaintiff only needs show that the employer undertook some conduct that may dissuade them from making or supporting a charge.

Also, juries inherently distrust employers and they wouldn't put it past one to retaliate, according to an article written by Daniel A. Kaplan of the law firm of Foley & Lardner.

Kaplan sets out three steps employers can take to avoid retaliation complaints (see box on right). ❖

NIPPING RETALIATION IN THE BUD

Set clear and unambiguous policies

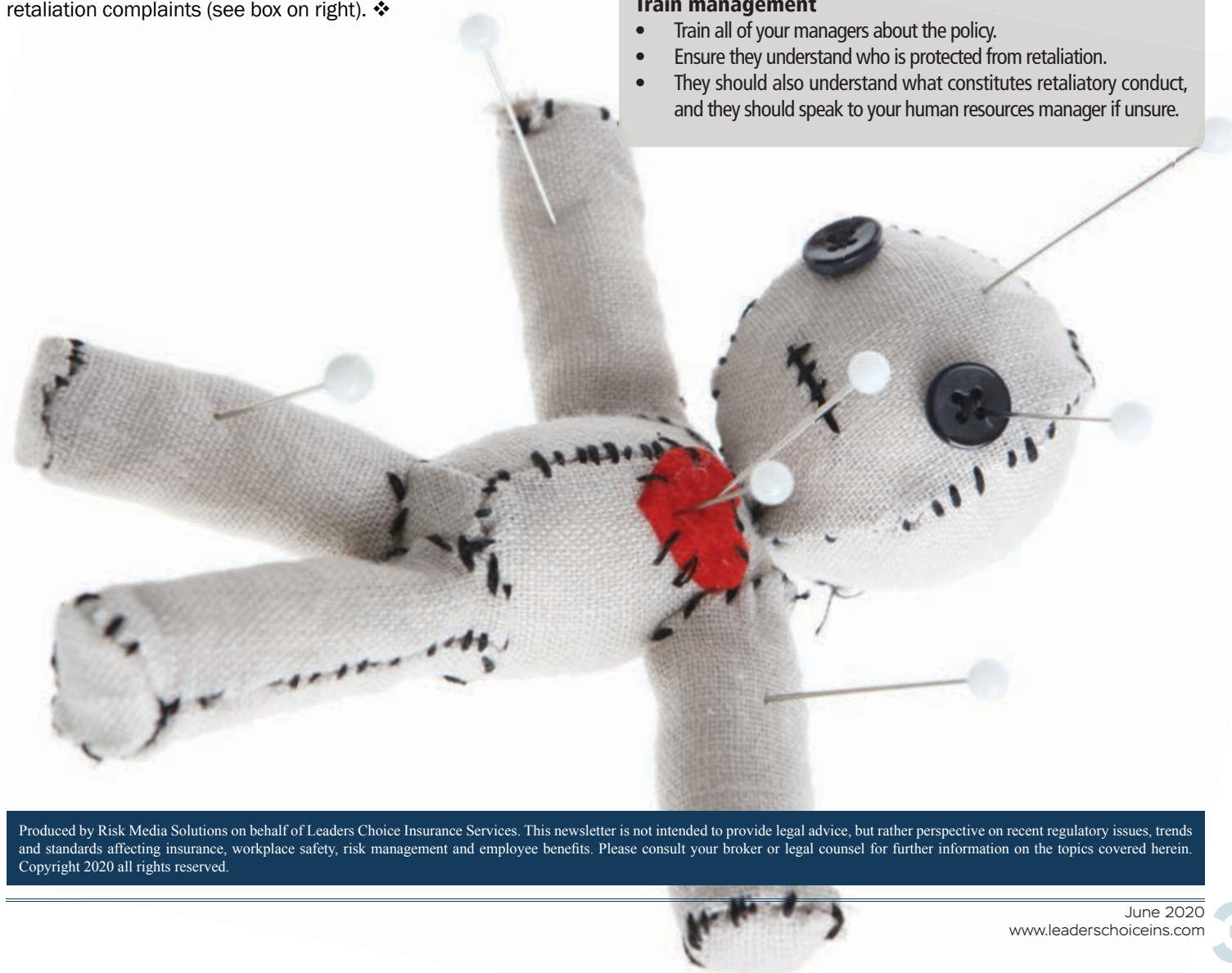
- Company policy should clearly state that retaliation is not permitted.
- The policy should describe the parameters of inappropriate conduct as well as you can define them.
- Put the policy in writing.
- Have a reporting and grievance procedure, including the person or persons to whom the employee can report a retaliation complaint.
- Have employees sign an acknowledgment of receipt of your policy.

Investigate complaints promptly

- Anyone interviewed in an investigation is protected from retaliation (the worker who makes the complaint and witnesses too).
- Communicate the results of the investigation to the grievant.
- Take effective remedial measures, including carefully reviewing all disciplinary measures before imposing them. You should also ensure that disciplinary actions are consistent with past practices.

Train management

- Train all of your managers about the policy.
- Ensure they understand who is protected from retaliation.
- They should also understand what constitutes retaliatory conduct, and they should speak to your human resources manager if unsure.



Testing Workers for COVID-19 Raises Liability Issues

EMPLOYERS WHOSE businesses continue to operate are obviously concerned about the coronavirus spreading through their worksites, so many have started testing their workers.

Recent Equal Employment Opportunity Commission guidance authorized employers to conduct COVID-19 testing and check temperatures of employees. But doing so could expose a business to a number of employee legal actions from invasion of privacy to discrimination and wage and hour charges, say employment law attorneys.

While the EEOC guidance refers to existing Americans with Disabilities Act regulations requiring that any mandatory medical test of employees be "job related and consistent with business necessity," it left many questions unanswered. So, if you decide to start testing workers, you will have to navigate a number of issues.

YOUR FIRST CONSIDERATIONS

- Which tests are appropriate?
- What are the standards for protecting workers' privacy?
- Should staff be paid for the time they wait in line to be tested?
- Should you get written consent?
- How will you ensure that the policy is applied consistently?

Employment law experts say there is often a surge in employee lawsuits when new rules or guidance are being issued, and more so with such a sensitive issue as one's health during a pandemic.

POTENTIAL TYPES OF ACTION

- Invasion of privacy
- Failure to protect employees' personal health information
- Discrimination
- Retaliation
- Wage and hour actions if waiting for testing takes time.

What you can do

Most lawyers are interpreting the EEOC guidance as meaning that employers may take steps to determine whether employees entering the workplace have COVID-19, because an individual with the coronavirus 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.

To cover your bases, you should plan your testing in detail, including:

- How you will be conducting tests (providing at-home test swab kits, testing upon arrival, or offsite).
- Designate a person who is authorized to conduct tests.
- Document how you will be administering tests.
- Plan for how to account for false positives or negatives.
- Decide how often you should be testing.
- Budget for the testing.
- What will you do if a worker tests positive or has a fever (if you are just checking temperatures)?
- Don't have exceptions to the policy or, if you do, keep them to a minimum. The more exceptions there are, the more likely you are to be sued.
- The policy should comply with guidance from the Centers for Disease Control and Prevention, such as using non-contact thermometers and ensuring social distancing during the process.

Insurance

You should do everything you can to make sure your testing is carried out fairly and consistently while safeguarding your employees' privacy. But even if you do everything by the book, you can still be sued.

One type of policy that could step in to protect you is employment practices liability insurance. EPLI will cover awards and legal costs in employee-initiated lawsuits. Each policy is different though, so it's best to consult with us first.

If you are testing or are considering testing your staff, you may want to consider it. ❖

