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Return to Work Toolkit

Introduction

Many counties in Washington State are moving closer, or have already moved, to Phase 2 of the Governor's Safe Start plan to return to the workplace after COVID-19 disruptions. This CH& Return to Work Toolkit is designed to help employers navigate the changing expectations and regulations related to welcoming employees back to the workplace. It pays special attention to the requirements for construction jobsites and office locations.

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Disclaimer

This Return to Work Toolkit represents the knowledge and recommendations of the authors based on the best information known as of the date of publication (June 2020). Information about implementation of the various re-entry Phases is consistently changing and may vary based on county and city policies. Businesses are strongly advised to stay independently abreast of the re-entry rules, policies, and procedures applicable to your industry and business location. The attorneys at Cairncross & Hempelmann remain ready to help you navigate this landscape. We encourage you to reach out with any questions.

About Cairncross & Hempelmann

Cairncross & Hempelmann is a full-service law firm with office in Seattle's historic Pioneer Square District. Founded in 1987, CH& advises companies and individuals in business, real estate, land use, and litigation. Our attorneys stand ready to help clients navigate through the workplace changes created by the COVID-19 pandemic and related announcements by government and health officials.

I. Prepare Your Policies and Facilities

Employers should prepare policies and facilities well in advance of employees returning to work. As part of the Phase 2 reopening, all workplaces will be required to have at each office or jobsite a COVID-19 Plan which states that policies should be carefully reviewed and cross-referenced against requirements provided by local agencies. Facilities may require additional supplies for cleaning or establishing safe return for employees, and delivery of these items may take longer than anticipated. It is wise to plan ahead.

A. Create Back to Work Taskforces

As employees begin returning to work, they will be looking for leadership and guidance to help them navigate your new policies. Designate Taskforce Leaders in advanced to ensure a smooth transition. Below are some proposed job descriptions and responsibilities for your Return to Work teams:

- ☐ **Return to Work Taskforce Leader**: One individual should be designated as the Head of your Return to Work Taskforce. This person should be responsible for coordinating the other teams and providing guidance to the other team members to ensure all safety protocols and needs are met.
- ☐ **Site Manager(s) (aka "COVID-19 Supervisor" for jobsite or office location)**: These individuals should be responsible for overseeing and coordinating safety protocols and Sanitation Leads, Social Distancing Leads, Inventory Managers, and HR Managers at each jobsite or office location.
- ☐ **Sanitation Lead(s)**: Have at least one individual at each jobsite or office location responsible for managing and implementing daily and periodic sanitation logistics, including routine and deep cleaning and disinfection processes in accord with the protocols. This person should oversee the sanitation teams and check the cleaning audit reports for compliance.
- ☐ **Social Distancing Lead(s)**: Designate at least one individual at each jobsite or office location who will manage the social distancing logistics with respect to employee scheduling, staggering shifts to ensure different arrival/departure times for employees and overseeing the arrival of visitors and other contractors. This person should also assist in preparing your reconfiguration plan for your office or workspace, so as to increase your employee's ability to maintain a six-foot distance.
- ☐ **Inventory Manager**: Have one individual responsible for purchasing and maintaining inventory for all necessary sanitation and other supplies to implement safety protocols.
- ☐ **Communications Lead**: Designate one individual responsible for managing all necessary employee communications regarding workplace safety protocols and for posting information and updates as needed.
- ☐ **Designated HR Managers:** You should designate a few of your HR professionals as your "Go To" COVID-19 specialists to handle employee questions regarding leaves of absences and other employee policies.

If you are a contractor looking to restart construction or begin a new construction project in Phase 2[1] or a subsequent phase, implementing the above task force leadership positions can certainly help you get your project underway. But it is important to note that contractors, specifically, are explicitly required by Governor Inslee's "Stay Home, Stay Healthy" plan to designate a site-specific **COVID-19 Supervisor**. The

[1] While King County applied for a modified Phase 1 plan, King County's approved plan allows construction to proceed under Phase 2 rules. Therefore, if you have new or resuming construction projects within King County, you should comply with the Phase 2 rules discussed herein.

COVID-19 Supervisor shall be responsible for monitoring the health of employees and enforcing the contractor's COVID-19 jobsite safety plan. With the exception of single-family residential jobsites with six or fewer people on-site, a site's designated COVID-19 Supervisor must be present at all times during the project's construction activities. Additionally, contractors are required to clearly post at the jobsite the name and contact information of their COVID-19 Supervisor.

B. Develop a COVID-19 and Phase 3 Safety Plan

Contractors Must Have A "COVID-19 Exposure Control, Mitigation, and Recovery Plan" in Place

As part of Governor Inslee's Safe Start reopening plan, safety criteria for the construction industry has been issued by the Governor's Construction Working Group. The construction COVID-19 jobsite requirements are available on the Governor's website. Protocols are necessary for construction to commence regardless of which phase a Washington State county is in. Contractors must develop a COVID-19 plan for each jobsite that addresses the following policies for control measures:

- ☐ PPE utilization
- ☐ On-site social distancing
- ☐ Hygiene
- ☐ Sanitation
- ☐ Symptom monitoring
- ☐ Incident reporting
- ☐ Site decontamination procedures
- ☐ COVID-19 safety training
- ☐ Exposure response procedures
- ☐ Post-exposure incident project wide recovery plan
- ☐ Job hazard analysis ("JHA")

All professional-service offices must also have a COVID-19 Plan that includes all the policies addressed above, except for JHA. The JHA requirement has been added as part of Phase 2's requirements for construction as a means to address necessary controls and protection measures for types of work where social distancing cannot be maintained. JHAs are only required for jobsites where workers will be working within six feet of one another. The JHA must cover what L&I has categorized as "medium" and "high" levels of transmission risk by identifying what types of work will fall within those two categories and how the workers will be protected and the risk of transmission be lessened.

- Medium transmission risk includes tasks that require workers to work within six feet of each other for several minutes, several times per shift.
- High transmission risk includes tasks performed by two or more people within confined spaces or work that requires workers to be less than three feet apart for more than ten minutes in an hour, multiple times per shift.

Template plans for Phases 1 and 2 construction are readily available online through many organizations including Master Builders Association and the Building Industry Association of Washington. However, it is always recommended that a careful review and legal consultation occur when adapting a template to fit your specific needs for any such plan or contract.

Create Phase 3 Safe Start Plan

Washington's Phase 3 of the Reopening Plan requires that all reopening employers develop a written Safety Plan outlining how its workplace will prevent COVID-19. Consider incorporating this Toolkit as part of your Safety Plan, but also fill out this template provided by the State.

C. Create Protocols for Sanitation and Cleaning Workspaces

Before bringing employees back to the office or jobsite, ensure that clear protocols are developed for properly sanitizing workspaces.

Create Regular Sanitation Schedules for Office Spaces

Assign responsibility for regular, regimented disinfection of shared-work areas, including:

- ☐ Scheduled sanitation of high-touch areas multiple times a day, such as bathrooms, handles, elevators, printers/scanners, rest areas
- ☐ Standard cleaning of entire office on daily basis
- ☐ Deep cleaning of entire office on weekly basis
- ☐ Increase frequency of HVAC system filter changing
- ☐ *See* Sample Cleaning Checklist provided in **Materials**

Create "Deep Cleaning" and Disinfection Protocol

In the event someone tests positive for COVID-19, be prepared with a deep cleaning plan of the shared workspace to limit the risk to other employees. You may choose, however, in lieu of "deep cleaning" the space, to shut down your office for 72 hours to allow for the natural deactivation of the virus, followed by your regular disinfection of the common areas. The CDC offers this guidance for deep cleaning procedures.

It is recommended to hire an outside professional cleaning firm to conduct any deep cleaning of your facilities. Put tight controls in place on who enters and exits the site during the cleaning shutdown. Only a select few authorized employees should be on-site to monitor the cleaners during this third-party deep clean process.

If you have other specific questions on how you can maintain a safe and healthy workplace, contact a Washington Department of Occupational Safety & Health consultant near you.

Take Steps to Ensure that the Office Space is Ready for Employees to Return

Many office spaces have been almost entirely shutdown since mid-March 2020. Be prepared for the likelihood that it will take additional cleaning to ready the space for your return. Here are a few things to consider in the days leading up to your office re-opening:

- ☐ Deep clean and disinfect entire office/facility prior to anyone returning.
- ☐ Replace or clean and disinfect HVAC air filters.
- ☐ Safely dispose of any food products that may have been left behind.
- ☐ Test your water lines. Unfortunately, the consequences of potential long-term water stagnation are relatively unknown. However, some experts have expressed concerns that the stagnant water left in the water lines of unattended offices can create hazards for returning occupants. The CDC offers this Water Management Program Toolkit to help reduce the risk of Legionella in your water system.

More information from the CDC with Guidance for Reopening your Workplace is available here.

D. Reconfigure Office Layout

For your office employees, you may need to reconfigure workstations and desks to allow adequate social distancing. Below are some recommendations for rethinking your office workspaces:

- ☐ Evaluate current arrangements of desks and consider facing employees away from each other and away from walking pathways.
- ☐ Stagger people where possible – spatially and temporally. In Washington, Phase 2 *requires* that indoor office spaces limit their office space occupancy **to 50% of their maximum occupancy**. King County, under its Phase 1.5 Plan, limits office occupancy **to 25% or less** of the space's maximum occupancy. Review employee schedules to ensure compliance with this limit.
- ☐ In high-traffic areas, such as near elevators, reception, and near printing/copying machines (or anywhere else where people may tend to queue), place floor decals six feet apart so as to remind visitors and employees to maintain distance. You can purchase Social Distance Floor Decals at Vistaprint and other online printing stores.
- ☐ Install touchless hand sanitation dispensers in these same high-traffic areas.
- ☐ Consider other "touchless" equipment (*e.g.*, sign-ins, garbage cans).
- ☐ Establish a single point of entry/exit.
- ☐ Consider installing physical barriers (*e.g.*, plexiglass) in meeting and reception areas.
- ☐ Establish designated areas for pick-ups and deliveries, limiting contact to the extent possible.
- ☐ Consider removal of extra seats in conference rooms, and meeting and reception areas.
- ☐ Replace multi-use utensils and drinkware with single-use dishes and utensils.

E. Adjust Existing Employee Policies for Leave and Accommodations

Leave and accommodation issues will be an ongoing challenge once businesses are permitted to reopen. Businesses will need to stay diligent about providing leave and accommodations once stay at home orders are lifted and employees begin to return to the jobsite or office. Doing so may require employers to adjust existing leave policies for the foreseeable future. Here are some primary considerations:

- ☐ The Families First Coronavirus Response Act (FFCRA) will remain in effect through at least December 31, 2020. This federal act provides up to 10 days of emergency paid sick leave for certain COVID-19 related circumstances, and an additional 10 weeks of leave for school and daycare closures related to COVID-19. Even if your employee has exhausted other types of leave, they may be eligible for FFCRA leave. *See* the April 2020 CH& Client Alert on this topic for more information.

- ☐ Remember your obligations under the Americans with Disabilities Act and related state law, such as the Washington Law Against Discrimination. Employees with COVID-19 disease or suffering from other effects of the disease may be entitled to leave as a reasonable accommodation. Employers must also be careful not to run afoul of the prohibitions against treating employees disparately because they are regarded or perceived as having a disability. This might arise where an employee is mistakenly thought to have COVID-19 and suffers adverse employment action as a result.

- ☐ Depending on the circumstances, employees may be entitled to leave under Washington's Paid Family & Medical Leave Act. If an employee requests time off due to COVID-19, be sure to discuss this option with them and provide information on how to apply, if applicable.

- ☐ Setting aside other leave entitlements, employers should consider implementing flexible leave policies. If employees have exhausted other paid leave entitlements, time off can be without pay. Depending on the reason the employee is taking time off, they *may* be eligible for unemployment benefits. The Washington State Employment Security Department has created an infographic to aid in determining an individual's eligibility for certain benefits.

- ☐ Consider flexible work schedules as an alternative to leave and/or as another form of accommodation.

- ☐ Review your vacation policy and consider limiting the number of employees permitted to be out on vacation at one time. As part of this policy adjustment, consider requiring employees to quarantine before returning to work, especially if traveling to high-risk areas.

- ☐ Consider updating your policies to *require* that employees remain home if they are sick or exhibiting symptoms consistent with COVID-19 or other infectious illness. Include that employees will be sent home from work if exhibiting signs of illness at work. Be cautious that you implement such practices fairly, however, to avoid claims of bias or discrimination.

- ☐ Be sure to comply with Governor Inslee's Proclamation 20-46: High-Risk Employees - Workers' Rights, which remains in effect until June 12, 2020, unless extended (which we expect it will be). Key points to remember: If alternate work arrangements and social distancing measures are not feasible, or if the employee declines, the employer must allow the high-risk employee to use any accrued leave or seek unemployment benefits, maintain the employee's health insurance benefits, and the employer is prohibited from permanently replacing high-risk employees.

F. Purchase Personal Protective Equipment ("PPE") and Sanitation Equipment for All Offices and Jobsites

Prior to reopening an office or jobsite, ensure that there are sufficient equipment and materials to maintain a regular sanitation schedule.

Supplies for Offices

- Confirm each office has an adequate supply of soap, disinfectant spray, sanitizing hand gel, paper towels and tissue.
- Set up portable disinfection stations for each work area, complete with disinfectant spray and wipes and hand sanitizer.
- Confirm your stock of face masks, gloves, and glasses or face shields on-site.
- Maintain an inventory of additional PPE and sanitation supplies with sufficient lead time, so as to account for likelihood of backorders and delays in receiving supplies.
- Sites should keep at least a 30-day supply of sanitation supplies and PPE.
- Ensure that posters and policies regarding hygienic practices are posted in clear view.

Recommended PPE and Sanitation Materials

- **Masks:** Disposable, single-use surgical masks.
- **Nitrile gloves:** TouchFlex/Surgical Nitrile Gloves.
- **Infrared thermometer:** Medical infrared thermometer / Measures ranges 32°C to 42.5°C meets ASTM E965-1998 (2003) (one per 100 employees or for each site locations).

- **Disinfectant spray/wipes:** 10% bleach (sodium hypochlorite) solution made fresh daily, or a hospital-grade disinfectant. Alcohol-based disinfectants must contain at least 60% alcohol.
- **Spray bottles:** 1-liter plastic spray containers.
- **No-touch hand sanitizer floor stand:** One for each high traffic area (e.g., elevators, reception, breakrooms).
- **Face shields:** Provide either safety glasses or polycarbonate face shields for additional protection for employees who may not be able to remain six feet from other people at all times.
- **Bio-hazard container:** Keep bags on hand that can be sealed and tagged as contaminated material.

Supplies for the Jobsite

- **Masks:**
  - For negligible and low transmission risk work: Reusable cloth face coverings that fully cover mouth and nose.
  - For medium transmission risk work: Non-cloth disposable masks such as dust masks, KN95 or other non-approved foreign-system NIOSH-style filtering facepiece respirators, or non-FDA approved procedure masks.
  - For high transmission risk work: (1) Elastomeric half- or full-face respirator with particulate filters; (2) Powered-air purifying respirator (PAPR) with particulate filter. (Tight-fitting respirators must be fit-tested and the wearer must be clean-shaven. No fit-testing is required for loose-fitting systems.); OR (3) Industrial use N95, R95 or P95 or foreign system non-NIOSH approved filtering facepiece respirator (or other particulate respirator).
- **Gloves:** Unlike in Phase 1 where workers had to wear gloves at all times on the jobsite, Phase 2 requires that workers only need to wear gloves in cases where employees are sharing tools or if normally needed for certain construction activities. The type of gloves should be appropriate to the task performed.
- **Eye protection:** Unlike in Phase 1 where workers must wear eye protection at all times on the jobsite, Phase 2 requires that eye protection be worn if normally required to safely perform certain construction work.
- **Handwashing stations:** Handwashing stations with soap and running water; portable washing stations and soap where no running water is available.
- **Thermometers:** "No touch" or "no contact" thermometers highly preferred.
- **Hand sanitizer:** Alcohol-based hand sanitizers with greater than 60% ethanol or 70% isopropanol.
- **Posted notices:** Posters and policies regarding hygienic practices should be posted in clear view.
- **Disinfectant spray/wipes/cleaning supplies:** Maintain an adequate supply of disinfectant spray, sanitization wipes, and cleaning supplies for regular use on the jobsite.

Where can I find Supplies?

- Review the Environmental Protection Agency (EPA) List for products that meet EPA's criteria for use against SARS-CoV-2 (COVID-19).
- BESS International is prioritizing PPE supplies for Washington businesses and residents.
- Touch-Free Floor Stand Hand Sanitizer Stands

G. Provide Trainings on HR Policies, Sanitation

HR Training Resources

HR Departments are likely to be inundated with questions and requests as employees return to the workplace. Make sure that your HR Team is abreast of updates and legal requirements for providing leave options for qualifying employees, and that they know of the various options for employees who do not feel comfortable returning to work. Ensure that your HR Department receives training and information so that they are prepared to address questions as they arise.

Webinars/Podcasts/Video Trainings for HR

- https://courses.jumpstart-hr.com/p/hr-and-people-operations-during-the-coronavirus-outbreak
- https://www.hr.com/en/resources/coronavirus
- https://www.thinkhr.com/covid19/

HR Communities

- https://www.facebook.com/groups/hropensource/
- https://hrforhr.org

Sanitation Training

For those assigned to designated sanitation teams, ensure that they are trained on appropriate cleaning methods and understand which products are approved for use against COVID-19. Below are some links to training resources and information for your sanitation team members:

- CDC Written Guidance on Sanitation of Facility
- EPA Written Guidance for Cleaning and Disinfecting Spaces
- Washington L&I Workplace Safety and Health Guidance
- Water Management Program Toolkit

Safety Training for *All* On-Site Employees

Phase 2 requires that *all* on-site employees be trained on new COVID-19 business policies, and sanitation and social distancing requirements. As part of the training, office employees should receive a copy of the Phase 2 Guidance for Professional Service Offices, along with the published workplace safety recommendations from OSHA and Washington Department of Labor, as provided in **Materials.**

Construction Jobsite Required Trainings

Like Phase 1's requirements, Phase 2 requires contractors to conduct a safety stand-down/toolbox talk/tailgate training session on all jobsites on the first day of returning to work or of a new project, and weekly thereafter, to go over the protective measures in place for all workers. The trainer will sign in each attendee, attendance will be communicated verbally, and social distancing must be maintained at all such trainings. While not required in Phase 1, contractors must ensure that they educate/train the workers about COVID-19 symptoms, how to prevent transmission, and the contractor's COVID-19 policies in the language understood best by the worker.

II. Review and Prepare Your Construction Contracts

Whether you are an owner, contractor, subcontractor or subconsultant, you undoubtedly have concerns about construction contracts and their implications because of this pandemic.

Subject to certain mandatory health and safety requirements and protections (detailed elsewhere herein), Phase 2 permits *new* construction projects to begin as well as certain existing projects to resume that were not permitted to resume in Phase 1. However, as we have seen, COVID-19 poses a multitude of challenges for project execution; that may continue for some time to some degree. So, if you have already executed contracts for construction projects that can resume in Phase 2, or are going to undertake contract negotiations for a new project, you should consider COVID-19's impacts to the following contractual provisions; this is true irrespective of whether or not you use a form contract. Revising construction contracts to address these issues will allow for maximum protection should a dispute arise. Discussing these contract issues and terms with an experienced construction lawyer is recommended.

Force Majeure

"Force majeure" is generally defined in the law as an event or effect that parties could not have anticipated or controlled that makes performance of a party's contract obligations impossible or impracticable. Standard examples include war, civil unrest, natural disaster, and the unavailability of labor, and can sometimes include pandemic. However, the current pandemic is shining new light on force majeure provisions, especially those related to construction projects. In the event of a dispute, a court will look at the specific contract language to see how the parties agreed to allocate such a risk. Legal counsel may be necessary to navigate the uncertain waters of a force majeure claim.

Unlike protections that may be afforded by force majeure provisions to construction projects that were already underway when the COVID-19 pandemic began, new contracts' force majeure provisions will likely be worded and interpreted differently. This is simply because of foreseeability issues associated with this pandemic – arguably, no party should be able to invoke the ongoing pandemic as an excuse to defer performance of its obligations for a new project. Therefore, parties should give more thought to force majeure definitions – this, of course, acknowledges that owners and contractors likely will want different terms within a force majeure provision. Should the definition of force majeure be more specific and/or set out assumptions establishing a baseline of infection? Then, for example, impacts on the workforce and supply chains beyond the set baseline could trigger the typical relief from a force majeure provision.

Changes in Law

Many construction contracts contain a clause requiring compliance with laws, codes and regulations. As we have already seen, governments may implement new legislation, executive orders and directives regarding COVID-19. Parties need to consider what amounts to a change in law under their contract. It is important to consider, for example, if such change gives rise to a possibility for an extension of time and additional cost claims for a new project.

Schedule

With the uncertainty created by the pandemic and its undeniable impacts to the workforce, productivity, and the supply chain, parties should give particular consideration to any schedule provided for, or incorporated into, a construction contract. Important issues to consider include (1) how social distancing

safety protocols decrease productivity; (2) if there are staggered shifts, how many workers will be on-site per staggered shift and how does that impact the schedule; (3) are certain parties in danger of not performing; (4) should procurement happen sooner; (5) what impacts will the pandemic have on delivery of equipment and materials to the site; and (6) will submittals and permits take longer because people are working from home?

Hold Harmless/Waiver of Liability

Construction contracts routinely include hold harmless and indemnification provisions. However, where a particular project will require physical interaction with a customer, you may want to be particularly proactive in risk mitigation. For example, if a contractor needs to go into an owner's building or home to perform your services, it is important to consider having the owner sign a contract that includes a hold harmless provision, or a separate and distinct liability waiver, to protect against possible future liability for coronavirus exposure claims.

Safety

Site safety is the sole responsibility of the contractor, but with the increased safety requirements associated with COVID-19, there are additional costs associated with sanitization and cleaning requirements, as well as the use of PPE by everyone on the jobsite, not to mention the severe penalties that could result from non-compliance. Owners, contractors, subcontractors and consultants will each need to ensure their respective contracts for new or existing projects address who will bear the additional costs for PPE and sanitization. The contractor should also consider whether it will contractually require its subcontractors to abide by and enforce the contractor's COVID-19 plan.

Insurance

One type of coverage to consider is business interruption insurance. Note that the language of the policy is key – it may or may not include coverage for having to shut down due to "stay at home" restrictions or other pandemic-related measures such as curfews and quarantines. That said, if it is available and applicable, it could be a viable option to protect company finances.

Notice

Notice provisions often are woven throughout a contract rather than being contained within a specific clause. Many rights, obligations and defenses under a construction contract are reliant upon some sort of notice. For example, notice may be required for claims stemming from delay damages, change orders, extension of time, and termination.

Review and understand all details in your contract associated with notice requirements – that is, when a notice is required, who should receive the notice, the time period in which the notice must be sent, and the form and manner in which the notice should take. If offices are being staffed remotely during the project because of the pandemic, can mailing a notice, where it might not be timely reviewed, suffice? Ensuring that you understand all details relating to the contract's notice provisions will help to ensure you maintain your potential claims and defenses.

Delay and Disruption Damages

Given the ongoing nature of the pandemic, there is almost no question that delays will occur on construction projects going forward. Thus, you'll want to know what your contract says regarding delay claims and disruption claims and understand which types of delays and disruptions are excusable and inexcusable.

Escalation Clauses

With volatile markets, travel and transportation embargoes, and supply shortages, an escalation clause may protect contractors from price fluctuations for raw materials. But such a clause then shifts the burden of increased costs from the contractor to the client. Owners must be aware of whether such a clause is in play and consider its risks and cost implications for the project.

Termination

Each party to a construction contract may want to terminate a contract in the event the coronavirus pandemic gets worse. Therefore, each party will want to ensure the contract clearly provides the circumstances, notice requirements, and other relevant procedures to implement a termination for convenience. For example, a contractor will want to consider price protections as supply chain shortages and slowdowns usually cause added costs for contractors – a termination clause could allow a contractor an escape from this problem if it becomes too overwhelming. That being said, legal counsel should evaluate the termination clause and potential exposure to damages that could come with utilizing this clause.

III. Communicate with Employees and Crews

Employees are likely to be apprehensive about returning to work. You can help reduce some of their anxiety by offering a clear, caring message about the steps taken to ensure employee safety. Reinforce this message to employees through regular communication and posted notices in your offices and jobsites.

A. Prepare a Company-Wide Memorandum Regarding Safety Measures

We recommend sending a company-wide memorandum that outlines the plan and steps for reopening your workspaces. In general, a clear, sympathetic message from management should:

1. Acknowledge that employees may be feeling apprehensive about returning to work amidst the uncertainty;
2. Assure employees that it is the company's intention to be smart about its reopening processes and ensuring worker safety;
3. Outline in detail the protocols in place to ensure social distancing, routine sanitation, and symptom monitoring;
4. Affirm that CDC/OSHA guidelines are followed in your approach to reopening the workplace;
5. Offer options to high-risk employees (*e.g.*, allow certain employees the option to continue working from home, or use available PTO or other paid leave benefits if not ready to return to work); and
6. Invite employees to express concerns or ask questions about the process.

B. Post Notices and Distribute Communications to Employees

As you prepare the workplace to reopen, also make sure that all mandatory and recommended posters are posted in appropriate break areas. If some employees are continuing to work remotely, provide them with a copy of the notice via email.

Posters for Common Areas

The following Posters are saved as PDFs for your use in **Materials.**

- ☐ "Employee Rights Poster for the Families First Coronavirus Response Act (FFCRA)". For additional language posters, visit: https://www.dol.gov/agencies/whd/posters (**Mandatory)**
- ☐ "Handwashing Guide" **(Recommended)**
- ☐ "Don't Spread Germs at Work" **(Recommended)**
- ☐ "Mask Wearing Instructions" **(Recommended)**
- ☐ "Slow the Spread of Germs" **(Recommended)**

Forms to Distribute to Employees

Distribute guidance to your employees and advise them as to best practices and expectations for when they return to work. The following forms are saved as PDFs for your use in **Materials.**

- ☐ Employee Behavioral Expectations for the Office – Worksheet
- ☐ Daily Symptom Self-Check
- ☐ Cleaning your Workstation
- ☐ What to Do if You Are Sick – CDC Guidance

Provide Notice to Clients and Visitors to the Office

Be prepared to provide a notice to visitors that explains the company's social distancing and hygiene requirements. Additionally, in King County, the Phase 1.5 Plan *requires* that visitors and clients to an indoor professional office **must limit their visit to 30 minutes or less**. A sample notice of the "Visitor Notice" is provided at **Exhibit B** as well.

Posting Requirements for Construction Jobsites

Phase 2 comes with lessened requirements from Phase 1 as to what must be posted on the jobsite. Contractors are only required to post the following on jobsites:

- ☐ Hygienic practices
- ☐ Name and contact information for COVID-19 Supervisor

C. Distribute Forms for Cleaning Audits and Symptoms Reporting to Taskforce Leaders

Next, make sure that you have distributed forms for your Taskforce Leaders and managers to use to ensure a streamlined, consistent process for cleaning and reporting across the company. The following forms are saved as PDFs for your use in **Materials.**

- ☐ Data Collection Form – Symptomatic Individuals in the Workplace
- ☐ Manager Decision-Tree for Sick or Potentially Exposed Employees
- ☐ Sanitation Schedule Checklist

IV. Implementing Processes and Phasing Employees Back to Work

As offices and jobsites open for employees, it is important to remain flexible. Updates from health officials and government agencies are issued regularly, and employers may need to adjust to meet new expectations. Additionally, each company has a unique set of employees, jobsites, and other nuances to consider throughout the process.

A. Phasing and Identifying Which Employees to Prioritize Returning to Work

Bringing back all employees at the same time is not only unwise due to the risk of a second wave of the virus spreading, but it is against public health guidance. Strong protections are in place for particularly vulnerable populations – those protections must be understood and complied with. Therefore, you should undertake a multi-step process to identify *who* is eligible to return to work, and then adopt a phased approach for their return to work plan.

At the outset, determine *who* is eligible to come back to work and then establish a tier of those employees so as to form the best phased approach for returning to work. For example, classify workers as essential and non-essential, including by geographic location and role. Likewise, workers who are required on-site should be categorized differently than those able to work remotely. While tiering these employees, also identify those employees that are high-risk individuals, including those who have, or are caring for, high-risk family members, including healthcare workers. Remember that employers should also provide reasonable accommodations for others by keeping in mind an employee's wellbeing and state-of-mind about returning to the workplace, as well as other factors such as childcare and transportation constraints.

Once it has been defined who is eligible to return to the workplace, create a plan utilizing a phased approach for getting workers back to the workplace. This should take into consideration workflow, physical office spatial density and limitations due to mandatory social distancing, business needs, customer demand, availability of PPE, and the ability to stagger start and end times – all of which is further discussed in the sections below.

B. Evaluate Leave Options for Employees Who Cannot Return to Work

Even as stay-at-home orders are lifted and businesses reopen, there will be employees who cannot – or will not – return to the workplace. We recommend that employers remain flexible and work with employees on alternative work arrangements and leaves of absence. Of course, keep in mind that you may be obligated to provide an employee with a leave of absence, depending on the circumstances. Things to consider:

- ☐ Does the employee qualify for leave under the Families First Coronavirus Response Act (FFCRA)? If so, have they already used this leave benefit?
- ☐ Does the employee qualify for leave under the emergency expanded FMLA rules?
- ☐ Does the employee qualify for leave under standard FMLA?
- ☐ Does the employee qualify for leave under the Washington Paid Family & Medical Leave Act?
- ☐ Does the employee require leave as a reasonable accommodation under the Americans with Disabilities Act or the Washington Law Against Discrimination?
- ☐ Does the employee have accrued and unused vacation, PTO, or sick/safe leave?

- ☐ Does the employee qualify for unemployment benefits if they choose to stay home?
- ☐ Can the employee take an unpaid leave of absence until such time that they are comfortable returning to work?

C. Social Distancing on Jobsite

In Phase 1, social distancing is mandatory on jobsites. Employers must ensure all employees keep at least six feet away from coworkers and the public. However, in Phase 2, while social distancing is urged, construction work can be performed even if workers must be within six feet of one another to accomplish that work so long as specific exposure control measures are taken. Importantly, specific types of work that will be performed by employees within a six-foot distance of one another must be identified within a contractor's Job Hazard Analysis along with the exposure control and mitigation measures for each of those activities.

Identify areas of the jobsite where workers typically congregate and determine ways to control those choke points and higher-risk areas to ensure that social distancing is always maintained. Here are some additional recommendations:

- Workers should minimize interactions when equipment or materials are delivered or picked up from the site;
- Workers should take breaks and lunches in shifts and should be encouraged to eat lunch in their vehicles or off-site to maintain six feet of separation;
- Staging points and/or a one-at-a-time drop off/pickup zone should be established for materials or work items that must be transported between workers;
- Workers should take separate vehicles if travel is necessary;
- Meetings should be held outdoors and/or conducted by telephone, Zoom, or Skype whenever possible, particularly for groups of more than 10 people;
- Stagger trades work and work shifts;
- Use stairs instead of lifts or hoists when possible; and
- One person in an elevator at a time.

Additionally, it is important that supervisors model ideal social distancing behavior at all times. L&I also recommends that jobsites have an established "social distance monitor" – that is, a person whose job it is to reinforce the six-foot distance.

Active communication and cooperation amongst the owner, contractor, consultants and subcontractors is key to ensure that everyone on the jobsite maintains the appropriate social distance and precautionary measures while performing their respective services. **Remember, the jobsite can be shut down if social distancing is not maintained and exposure control measures are not utilized**.

D. Jobsite Visitors

Per the Washington State Department of Health, employers must follow certain guidelines for all jobsite visitors during Phase 1 only – this requirement was eliminated for Phase 2 of Governor Inslee's proclamation. If your construction project is located in a county still within Phase 1, then visitors must be listed on the jobsite's daily attendance log (their full name, email address and telephone number), which should be maintained by a site supervisor or other specific designee for 4-weeks after the log's date. While

on-site, visitors must also maintain six feet of separation from other people and should wear the appropriate PPE.

V. Monitor Employees for Compliance with Safety Procedures and Possible Symptoms

A. Monitor Employee Symptoms

A critical step in protecting employees, customers, visitors and others at a jobsite is the prompt identification and isolation of potentially infectious individuals. While employees should self-monitor and self-report for symptoms of COVID-19, employers should also have policies and procedures in place for identifying someone who may be sick with COVID-19.

Perform daily COVID-19 screening of employees. Before the start of each work shift, a supervisor or designated individual should ask each person upon arrival to the workplace if he or she has developed any of the following symptoms since their last day at the workplace:

- Cough
- Shortness of breath or difficulty breathing
- Or at least two of these symptoms:
    - Fever
    - Chills
    - Repeated shaking with chills
    - Muscle pain
    - Headache
    - Sore throat
    - New loss of taste or smell

If the answer is "yes" to any of those questions, the employee should not be permitted to enter the workplace, or the jobsite, and should return home. In addition, Governor Inslee's Construction Working Group Recommendations for Phase 2 call for construction personnel to take their temperature before they enter the jobsite – either at their home before they head to the jobsite or upon their arrival at the jobsite. The workers can call in to their supervisor to report their temperatures and the screening questions can also be asked over the phone. Any worker with a temperature of 100.4°F or higher must be sent home.

If, during the course of the workday, an employee becomes ill or begins to experience symptoms of COVID-19, that person should report to their supervisor or other designated individual and be isolated away from other workers, customers, and visitors. The area for isolation should be a designated area with closable doors; the number of personnel entering the isolation area should be restricted. As soon as reasonably practical, the sick employee should go home and remain isolated until all of the following conditions are met: (1) more than seven days have passed since symptoms started; (2) more than 72 hours with no fever, no cough, and resolution of other symptoms; and (3) if seen by medical provider, cleared to return to work.

In addition to monitoring employee symptoms, it is also important to monitor whether your employees have been in close proximity to someone who tested positive or is presumed positive for COVID-19. Close proximity is defined as being inside six feet for more than five minutes. If an employee has been in close

proximity to someone with COVID-19, then that employee should self-quarantine for 14 days from their last contact. That employee should not return to the workplace during that timeframe.

Likewise, if a worker comes to work on a construction site in Washington from any non-contiguous state, then that worker must self-quarantine for 14 days to be eligible to perform construction work on a site in Washington.

Employers should also consider implementing a recordkeeping policy and practice for any individuals who become symptomatic while at the workplace. This could be, for example, by use of a data collection form that tracks the individual's name, contact information, symptoms, and date and time of which the symptoms were reported. *See* Data Collection Form located in **Materials.** As discussed below, these records will require special handling.

B. Ensure Compliance with ADA

One significant challenge for employers will be balancing the need to collect information to keep your employees safe, while also complying with the Americans with Disabilities Act (ADA) and Washington Law Against Discrimination (WLAD) (which mirrors the ADA in most respects), to ensure that the company is not overstepping in terms of the types of questions you pose to employees.

The ADA protects job applicants and employees from disability discrimination. This law is relevant to pandemic preparation in at least three major ways. First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (*i.e.*, a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of their employees, except under limited circumstances. "Disability-related" questions include any questions that are likely to elicit information about an underlying disability. For example, the Equal Employment Opportunity Commission (EEOC) has instructed that asking someone whether his or her immune system is compromised is disability related, as it is closely related with conditions such as cancer or HIV/AIDS. Whereas asking someone about their current symptoms for flu or cold is not likely to elicit information about a disability.

Employers may ask current employees "disability-related" questions or require a medical exam of their employees when the inquiry is job related and consistent with business necessity. This generally requires objective evidence that:

1. The employee's ability to perform essential job functions will be impaired by a medical condition; or
2. The employee will pose a direct threat due to a medical condition.

The EEOC has concluded that, based on CDC guidelines, as of March 20, 2020, the COVID-19 pandemic meets the "direct threat" standard. Health agencies may revise this assessment at a later time, but currently, the EEOC has taken the position that these circumstances warrant allowing employers to ask employees COVID-19-related questions in order to maintain a safe workplace.

Be Careful: All information that you obtain from your employees regarding their medical conditions must be kept strictly confidential. Such information must be collected and maintained on separate forms and in separate medical files from other personnel records.

Below are some of the common questions that an employer may confront:

How much information may I request from an employee who calls in sick, in order to protect the rest of my workforce?

EEOC recommendations provide that you may ask employees who report feeling ill about their symptoms to determine whether they have COVID-19. Currently, those symptoms include, fever, chills, cough, shortness of breath, sore throat, red toes, and loss of smell.

When am I allowed to take a body temperature scan of my employees during this pandemic?

Generally, under the ADA, taking body temperature is considered a medical exam. However, given the current COVID-19 crisis, the EEOC recommends that employers be allowed to generally take temperatures to ensure workplace safety during this pandemic. Be sure to keep any record or information regarding employee body temperature or symptoms confidential, as with any other ADA-related information.

When employees do return to work, does the ADA allow me to require a doctor's note certifying their fitness to return?

Yes, you may require an employee to provide you with a doctor's note certifying that they are ready to return to work. As a practical matter, health care professionals may be too busy during the outbreak to provide their typical fitness-for-duty documentation. Thus, you may allow some flexibility here, by allowing an email or other informal form of confirmation from the employee's provider to confirm that they are no longer contagious or are otherwise cleared for work.

For more information, you can view a full version of the EEOC's ADA Guidance here.