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KIRKLAND & ELLIS LLP

HANDBOOK FOR RETURNING TO WORK DURING THE COVID-19 PANDEMIC*

In the coming days and weeks, state and local governments are expected to release numerous orders and guidance as they begin to lift prior workplace restrictions. This document identifies considerations that employers should examine when reopening or expanding their operations. We also include links to external resources as well as template policies and other documents that Kirkland & Ellis LLP ("K&E") has prepared throughout the course of the COVID-19 pandemic. K&E has also created a set of Frequently Asked Questions (FAQs) that address these matters. These materials are part of K&E's Return to Work Toolkit.

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1. FRAMEWORK FOR RETURNING TO WORK

Employers should take into account the following considerations as they prepare for reopening their businesses: (a) when to reopen the workplace, (b) best practices on how to reopen the workplace, and (c) circumstances that may arise once the workplace is reopened and employees are back in the office.

The "when to reopen" analysis is determined primarily by state and local government orders. The White House has issued specific non-binding guidelines for states and localities to follow in making these determinations. This is discussed in more detail in Section 2 below. Certain regulatory agencies, including the Occupational Safety and Health Administration ("OSHA"), the Centers for Disease Control and Prevention (the "CDC") and the U.S. Equal Employment Opportunity Commission ("EEOC") have issued guidelines on how employers should proceed with reopening their workplaces. This is discussed in more detail in Section 3 below. Once reopened, there are a number of additional considerations that may arise when employees return to work. These considerations are discussed in more detail in Section 4 below.

2. WHEN TO REOPEN

a. ***Guidelines and Return-to-Work Orders***.

(i) State and Local Orders. Before restarting operations, employers should understand how their business is treated under federal, state and local orders, laws and regulations, and, in particular, they should make sure that the state in which they operate has issued an order, or other decision, providing that it will lift prior workplace restrictions. States have been, and will be, releasing executive orders and/or regulations to address the reopening of nonessential businesses (a regularly updated summary of such orders can be found in K&E's 50 State Survey on State and Major Cities Responses to COVID-19) and some of these materials may be specific to certain industries. Companies should also review state and local orders related to face coverings and personal protective equipment ("PPE") that may apply to their employees and/or customers once reopened.

(ii) White House Guidelines. While most applicable guidelines and orders will be at the state and local level, employers should also review the White House's Guidelines for Opening Up America Again (the "White House Guidelines"), which offer non-binding guidance to state governors and local officials to make individual determinations about relaxing return-to-work and non-essential business closure orders depending on several critical factors. The White House Guidelines recommend a 3-phased approach to reopening:

(1) *Phase 1*: All vulnerable individuals continue to stay at home. Physical distancing must be practiced in public places and non-essential travel must be minimized. If schools are closed, they should stay closed. Visiting senior living centers is still not allowed.

(2) *Phase 2*: Non-essential travel may resume. People should avoid public gatherings of 50 individuals or more, unless physical distancing is possible. Visits to senior centers would still be prohibited, but schools and day care centers could reopen.

(3) *Phase 3*: This would be the country's "new normal." Physical distancing in public places is still recommended, but vulnerable individuals can resume public activities. Visits to senior centers can resume.

Before proceeding to the phased comeback, the White House Guidelines provide for the following "gating criteria":

Symptoms	Cases	Hospitals
Downward trajectory of influenza-like illnesses (ILI) reported within a 14-day period	Downward trajectory of documented cases within a 14-day period	Treat all patients without crisis care
AND	*OR*	*AND*
Downward trajectory of COVID-like syndromic cases reported within a 14-day period	Downward trajectory of positive tests as a percentage of total tests within a 14-day period (flat or increasing volume of tests)	Robust testing program in place for at-risk healthcare workers, including emerging antibody testing

The guidelines acknowledge that state and local officials may need to tailor the application of these criteria to local circumstances (e.g., metropolitan areas that have suffered severe COVID-19 outbreaks, rural and suburban areas where outbreaks have not occurred or have been mild). Additionally, where appropriate, governors are urged to work on a regional basis to satisfy these criteria and to progress through the phases outlined above.

Kirkland Resources
• 50 State Survey on State and Major Cities Responses to COVID-19

Other Resources
• The White House: Guidelines for Opening Up America Again

3. HOW TO REOPEN

As noted above, the requirements of state and local orders and guidance, together with relevant OSHA, CDC and EEOC guidance, will inform how employers plan to reopen their businesses. **The implementation of the requirements and recommendations of federal, state and local orders should be calibrated to meet the needs of each specific workplace.** Federal regulatory regimes also provide guidance to help employers identify risk levels in workplace settings and determine what control measures to implement.

Before reopening, employers should assess their workplaces and work-related activities (e.g., commuting, business travel) for COVID-19 hazards and then develop and implement strategies to reasonably protect workers from any identified hazards. These strategies may include employing a combination of engineering and administrative controls, safe work practices, and PPE that meet the needs of each specific workplace and comply with relevant guidance, including OSHA's Guidance on Preparing Workplaces for COVID-19, Guidance on Returning to Work, Control and Prevention Interim Guidance, and COVID-19 Frequently Asked Questions, and the CDC's Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19) , as well as the guidance and return-to-work orders of state and local authorities. In addition, OSHA has issued interim guidance regarding COVID-19 control and prevention for certain critical sectors, including (a) healthcare, (b) dentistry, (c) emergency response and public safety, (d) postmortem care, (e) meat and poultry processing (developed jointly with the CDC), (f) laboratories, (g) airline operations, (h) retail operations, (i) border protection and transportation security, (j) correctional facility operations, (k) solid waste and wastewater management, (l) environmental (i.e., janitorial) services, (m) in-home repair services, (n) manufacturing (developed jointly with the CDC), (o) business travelers, (p) construction work, (q) farmworkers (developed jointly with the CDC), (r) seafood processing work (developed jointly with the CDC and in consultation with the U.S. Food and Drug Administration ("FDA")), and (s) oil and gas operations.

OSHA has also issued guidance in the form of OSHA Alerts for: (i) the construction workforce, (ii) the manufacturing workforce, (iii) the package delivery workforce, (iv) retail workers, (v) rideshare, taxi, and car services workers, (vi) nursing home and long term care facility workers, (vii) dental practitioners, (viii) retail pharmacies, (ix) restaurants and beverage vendors offering takeout or curbside pickup, and (x) stockroom and loading dock workers. OSHA has also issued OSHA Alerts on preventing worker exposure to coronavirus and social distancing at work.

In addition to providing a general resources page for businesses and workplaces and a resuming business toolkit, the CDC has also provided guidance and other publications with recommendations for planning, preparing, and responding to COVID-19 for a variety of sectors, including: (i) schools and child care, (ii) grocery and food retail, (iii) transportation and delivery, (iv) shared and congregate housing, (v) first responders and law enforcement, (vi) parks and recreational facilities, (vii) retirement communities, (viii) correctional and detention facilities, (ix) veterinary care, (x) healthcare professionals, (xi) laboratories, (xii) office building employers,

(xiii) construction, (xiv) miners, (xv) nail salon employees and employers, and (xvi) waste collectors and recyclers.

a. ***Identifying and Establishing a COVID-19 Reopening/Reentry Team***.

Employers should consider creating a multi-disciplinary team to prepare for and to monitor the reopening of the workplace (and the reentry of employees, personnel and customers). Members of such a team could include members of the human resources, facilities, operations/safety and legal teams, as well as a dedicated team member responsible for addressing potential employee inquiries across the workforce.

Such a team could be a dynamic unit capable of adjusting to fast-paced developments in the COVID-19 landscape, such as new federal, state and local orders or guidance or updated guidance from agencies such as the CDC, OSHA or the EEOC, and could be responsible for considering reopening/reentry issues and developing and implementing workplace specific approaches to reopening/reentry measures and procedures, including those covered in this handbook.

b. ***Modifying the Physical Workplace***.

Employers should refer to CDC and OSHA guidance, as well as state and local orders and guidance, to identify potential reconfigurations of the work environment that the employer may consider. These may include:

(i) Evaluating Whether Facilities are Ready to Resume Occupancy. Before employees return to work, employers should consider evaluating whether their facilities are ready for occupancy (e.g., by checking if the HVAC systems operate properly, if the circulation of outdoor air into the building has been increased, and if the building's mechanical and life safety systems have been evaluated). There are hazards associated with prolonged facility shutdown (e.g., mold growth, rodents, and stagnant water systems) that the employers should consider checking for and addressing as appropriate.

(ii) Remodeling the Workspace. Employers should consider redesigning or retooling their workspaces to provide greater spacing between employees to reduce the risk of transmission and to create barriers or greater spacing between employees and customers. The appropriateness of barriers will depend on the operations of the employer, and could include clear plastic sneeze guards, drive-through windows, curbside pick-up for customer service, remote delivery, and the use of multiple entrances to reduce traffic. It may be advisable to implement motion-control/touchless doors and other devices (e.g., contactless paper towel dispensers in restrooms) to reduce the number of potentially infected surface areas.

(iii) Break Rooms, Kitchens and Pantries. Break rooms, kitchens, pantries and other spaces where employees congregate should be examined to determine if reorganizing, relocating or closure is warranted (e.g., the removal of tables and/or chairs from such spaces to prevent employees from congregating). Employers can also consider hiring a trusted catering company to provide meals to employees,

thereby eliminating the need for employees to store and access food in a communal refrigerator.

(iv) Air Filtration and Ventilation. Employers should consider working with building maintenance staff to modify the workplace ventilation and filtration systems to reduce the risk of virus particles, such as by increasing ventilation rates and/or the percentage of outdoor air that circulates into the system, installing high-efficiency air filters, disabling demand-controlled ventilation, improving central air filtration to the highest level possible, running the ventilation system even during unoccupied times, and implementing specialized negative pressure ventilation in certain settings (e.g., those with aerosol generating procedures).

(v) Visual Cues. Consider placing visual cues such as markings or signs on floors, walls and interfaces to indicate safe distances to workers and customers.

(vi) Handwashing/Sanitizing Stations. Consider providing workers, customers, and worksite visitors with designated and easily accessible stations to wash their hands and no-touch trash receptacles. If designated hand-washing stations are not immediately available, employers should consider providing hand sanitizers containing at least 60% alcohol.

(vii) Isolation Rooms or Barriers. Employers should consider designating either a permanent barrier (e.g., wall or designated room) or temporary barrier (e.g., plastic sheeting) for use in isolating anyone suspected of having the virus until the affected individual can be safely removed from the worksite and transported home or to a healthcare provider.

(viii) Capacity Limits. Employers should also consider capacity limitations for customers, clients or other non-employees visiting the workplace for business purposes, including any mandates provided by applicable state or local orders or guidance or federal guidance. Employers may consider (1) providing wall or floor marking or signage indicating minimum spacing (6 feet or more) in areas where customers may typically gather (entrances, turnstiles, cash registers, product displays) as noted in Section 3.b(v) above; (2) reasonably reconfiguring movable elements within a workspace to increase customer flow and movement (and to avoid 'bottlenecking'); and (3) imposing limits on the number of customers permitted in particularly confined spaces at any given time (e.g., only allowing 1-2 persons in an elevator at any given time, as indicated by clear signage). Employers are encouraged to review federal guidance and state and local orders and guidance applicable to their businesses, which may provide for specific reductions in occupancy limits (e.g., as a percentage of maximum legal occupancy). Depending on the physical layout of a workplace, and in accordance with any such state or local orders or guidance or federal guidance, employers should also consider limiting the overall number of customers allowed in the workplace, whether on a per square footage basis (e.g., no more than five customers per 1,000 square feet at any time), time basis (e.g., no customer allowed to remain in-store for more than 15 minutes) or other such limitations.

(ix) Products and Services. To the extent applicable to a business, employers should consider delivering products through curbside pick-up or delivery and/or services remotely (e.g., by phone, video or web).

Kirkland Resources
• Policy on Social Distancing and Other Infection Control Measures *(See, e.g., Section 2 in the Policy)* • Notice to Employees of Return to Work • 50 State Survey on State and Local Responses to COVID-19

Other Resources
• OSHA: Guidance on Preparing Workplaces for COVID-19 • OSHA: Guidance on Returning to Work • CDC: Businesses and Workplaces • CDC: Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19) • CDC: Resuming Business Toolkit • CDC: COVID-19 Employer Information for Office Buildings

c. *Infection Control Measures*.

Employers should implement good hygiene and infection control practices before restarting operations as appropriate, including:

(i) Housekeeping Practices; Cleaning and Disinfecting. Employers should consider developing and maintaining regular housekeeping practices, such as routine scheduled cleaning and disinfecting and enhanced cleaning and disinfecting of surfaces, equipment and other high-contact surface areas in the work environment. These practices should align with the available CDC resources on cleaning and disinfecting, including the joint Guidance for Cleaning and Disinfecting from the CDC and the Environmental Protection Agency ("EPA"), as well as the CDC's additional guidance titled Cleaning and Disinfecting Your Facility. When choosing cleaning products, employers should consult the EPA's List of Disinfectants for Use Against SARS-CoV-2, as products with EPA-approved emerging viral pathogens claims are expected to be effective against SARS-CoV-2 (the virus that causes the COVID-19 respiratory disease) based on data for harder-to-kill viruses. Employers should follow the manufacturer's instructions for use of all cleaning and disinfection products. In the event of a suspected or confirmed COVID-19 case,

professional cleaning services can also be engaged to perform a deep clean and disinfection of the worksite.

(ii) Promotion of Good Hygiene. Promote frequent and thorough hand washing and proper respiratory etiquette (e.g., covering coughs, sneezing into elbows) through use of policies and procedures or signage around the worksite. As noted in Section 3.b(vi) above, if soap and running water are not immediately available, employers should consider providing hand sanitizers containing at least 60% alcohol. Employers should also consider promoting informational material as applicable.

(iii) Stay Home If Sick. Discourage workers from coming to work if they are sick, have a sick family member at home, or have any symptoms of illness (e.g., fever, cough or shortness of breath).

(iv) Discourage Sharing of Equipment. Discourage workers from sharing phones, desks, office or other work tools and equipment, when possible.

(v) Higher Risk Employees. Consider minimizing face-to-face contact between employees at higher risk for serious illness (e.g., older adults and those with chronic medical conditions) or assign work tasks that allow them to maintain social distancing, if possible.

(vi) Time Off for Sick Employees. Encourage employees to stay home and notify workplace administrators when ill and implement sick leave options to allow staff to stay home when ill. Consider relaxing more stringent sick leave policies that might discourage sick employees from staying away from the workplace.

(vii) Isolation and Removal of Symptomatic Employees. If an employee exhibits or reports symptoms of COVID-19 infection, the employee should be moved to a location away from other people. It will be important to designate specific rooms or areas to serve as isolation rooms until potentially sick people can be removed from the worksite. In accordance with the CDC's guidance, employers should require the symptomatic employee to leave the work site and not return until the criteria to discontinue home isolation are met (see Section 4.a for discussion of such criteria), in consultation with healthcare providers and state and local health departments.

(viii) Self-Monitoring. Employers should consider informing and encouraging employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure. Employers should also consider distributing contact information to all employees, so that an employee may notify the appropriate workplace administrator if the employee has symptoms of COVID-19 or believes they have been exposed to the coronavirus.

(ix) Commuting Employees. To the extent feasible, employers should consider offering support to employees who commute using public transport, such as offering incentives to use alternative forms of transportation that minimize close contact

with others (e.g. biking, walking, driving or riding by car either alone or with other household members) and/or allowing employees to shift hours to commute during less busy times. Employers should consider asking employees to follow relevant guidance on how to protect themselves when using transportation, and to wash their hands as soon as possible after the commute.

Kirkland Resources
• Policy on Social Distancing and Other Infection Control Measures (See, e.g., *Section 5 in the Policy*)

Other Resources
• CDC: Cleaning and Disinfecting • CDC: Guidance for Cleaning and Disinfecting • CDC: Steps for Cleaning and Disinfecting Your Facility • CDC: Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) • CDC: Resuming Business Toolkit • CDC: COVID-19 Employer Information for Office Buildings • EPA: List of Disinfectants for Use Against SARS-CoV-2 • OSHA: Guidance on Preparing Workplaces for COVID-19 • OSHA: Guidance on Returning to Work • OSHA: Prevent Worker Exposure to Coronavirus (COVID-19)

d. ***Social Distancing***.

Employers should consider implementing social distancing measures including one or more of the following: (i) encouraging telecommuting (discussed below), (ii) reducing in-person meetings, (iii) implementing flexible work hours such as staggered shifts and/or the use of dedicated sets of employees for designated shifts, (iv) discouraging use of public transportation (or otherwise encouraging employees to try to avoid rush-hour crowding on public transportation) where possible, (v) limiting travel (in compliance with any state laws that prohibit employers from infringing on an employee's right to engage in lawful, off-duty activities), (vi) limiting work-sponsored recreational activities and workshops, (vii) limiting the number of people who enter the worksite by prohibiting or restricting non-essential visitors and (viii) restricting unnecessary physical contact in the workplace, such as handshaking, hugs and fist bumps.

Kirkland Resources
• Policy on Social Distancing and Other Infection Control Measures

e. ***Remote Work / Telecommuting***.

(i) Flexible Worksites and Work Hours. Employers should consider establishing flexible worksites (e.g., telecommuting). Note that the White House Guidelines suggest that employers should continue to encourage telework, whenever possible and feasible with business operations.

(ii) Data Security. Employers should consider utilizing a Virtual Private Network (VPN) or other secure method of encrypting transmitted data and ensure that employees exclusively use such a connection when working remotely. Consider implementing a multi-factor authentication process when providing access to any areas of a network that contain especially sensitive information.

(iii) Insurance. Employers should consider confirming with their insurance providers that telework arrangements would not create exclusions or additional requirements (e.g., under a workers' compensation or employment practices liability insurance (EPLI) policy).

(iv) Expectations. Employers should consider addressing the following in remote working policies to the extent applicable to their business: (1) work hours and related expectations, (2) responsiveness to calls and emails, (3) whether employees are permitted to work from locations other than their homes, and (4) communication expectations (both internally and with external clients).

Kirkland Resources
• Policy on Telecommuting • Data Security Considerations for Businesses Allowing or Encouraging Employees to Work Remotely

f. ***Face Coverings/Personal Protective Equipment***.

(i) Cloth Face Coverings. The CDC recommends that all employees wear a cloth face covering to cover their nose and mouth in all areas of business (but not if they have trouble breathing, any inability to tolerate wearing it, or are unable to remove it without assistance), and OSHA generally recommends that employers encourage workers to wear face coverings. The CDC and OSHA do not consider cloth face coverings to be PPE because they do not protect the wearer (due to loose fit, lack of seal and/or inadequate filtration) from another person's potentially infectious

respiratory droplets, but they do help prevent a wearer who has COVID-19 from spreading potentially infectious respiratory droplets to others. Employers should consult relevant state and local orders and guidance to determine whether employees are required to wear cloth face coverings and, if so, whether employers must provide cloth face coverings to employees. Employers may also opt, as a result of their workplace hazard assessments, to require their employees to wear cloth face coverings as an administrative control to reduce the risk of transmission. Because cloth face coverings are not PPE, employers are not required under OSHA's PPE standard to train employees on the use, care, disposal and limitations of cloth face coverings; however, state and local orders and guidance may contain such training requirements, and OSHA recommends that employers train workers about wearing cloth face coverings in the workplace (including considerations for when cloth face coverings could cause or contribute to a workplace safety and health hazard).

(ii) PPE Standards and Guidance. Employers should determine the applicability of potentially relevant OSHA and/or state health and safety agency standards and regulations with respect to PPE. According to OSHA's PPE standard, employers must perform a workplace hazard assessment (e.g., assess all job tasks performed or job categories held by employees to determine which job tasks or job categories involve exposure to customers, visitors, coworkers and other individuals; consider current outbreak conditions in the community) and provide any PPE that is necessary to protect employees from hazards that are present or likely to be present. Depending on the potential exposures associated with a particular employee's job duties, the types of PPE required may include gloves, gowns, goggles, face shields, surgical masks[1] and respirators. OSHA's Respiratory Protection standard imposes additional requirements for respirators like the N95 respirator (see discussion below). Note that states with OSHA-approved State Plans may have different standards and regulations with respect to PPE; to determine whether a state has an OSHA-approved State Plan, refer to this website. **For the avoidance of doubt, employers should consult state and local return-to-work orders and guidance, which may include detailed PPE requirements that vary with respect to different types of businesses.**

(iii) Exposure Risk. OSHA has divided job tasks into four risk exposure levels: very high, high, medium, and lower exposure risk.

(1) *Very high* exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures (e.g., healthcare, laboratory, or morgue workers (i.e., those performing autopsies)).

[1] Surgical masks are considered PPE when used to protect workers against splashes and sprays containing potentially infectious materials, but are not considered PPE when used for source control.

(2) *High exposure* risk jobs are those with high potential for exposure to known or suspected sources of COVID-19 (e.g., healthcare delivery, medical transport, and mortuary workers (e.g., those preparing bodies for burial or cremation)).

a. PPE Considerations. Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a surgical mask or a respirator, depending on their job tasks and exposure risks. Workers in laboratories or morgue facilities may need additional protection; additional PPE may include medical/surgical gowns, fluid-resistant coveralls, aprons, or other disposable or reusable protective clothing.

(3) *Medium* exposure risk jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travelers who may return from international locations with widespread SARS-CoV-2 transmission. In areas where there is ongoing community transmission, workers in this category may have contact with the general public.

a. PPE Considerations. PPE ensembles for workers in the medium exposure risk category may include some combination of gloves, a gown, a surgical mask, a face shield and/or goggles, but the mix will vary by work task and should be based on the employer's assessment of the exposure risks workers have on the job.

(4) *Lower* exposure risk jobs are those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor in frequent close contact with the general public. Workers in this category have minimal occupational contact with the public and other coworkers.

a. PPE Considerations. Additional PPE is not recommended for workers in the lower exposure risk group. Workers should continue to use the PPE, if any, that they would ordinarily use for other job tasks.

(iv) PPE Requirements. All types of PPE must be:

(1) Selected based upon the hazard to the worker.

(2) Properly fitted and periodically refitted, as applicable (e.g., respirators).

(3) Consistently and properly worn when required.

(4) Regularly inspected, maintained, and replaced, as necessary.

(5) Properly removed, cleaned, and stored or disposed of, as applicable, to avoid contamination of self, others, or the environment.

(v) Training Employees in the Proper Use of PPE. Employers should train employees in the proper use of PPE as required by OSHA's PPE standard. This training should include:

(1) When PPE usage is necessary in the workplace.

(2) Which PPE items are necessary in the workplace.

(3) How to properly put on, take off, adjust and wear PPE.

(4) Limitations of PPE.

(5) Proper care, maintenance, useful life and disposal of PPE.

Employers should consult state and local return-to-work orders and guidance, which may include PPE training guidance, but also may consult OSHA's Personal Protective Equipment publication for more information.

(vi) Respiratory Considerations. OSHA's Respiratory Protection standard imposes additional requirements on employers who require employees to wear respirators (such as the N95 respirator (i.e., an air-purifying negative pressure respirator equipped with an N95 filter)), including a requirement to develop a written respiratory protection program with worksite-specific procedures for the selection of respirators, medical evaluations of employees required to use respirators, fit testing, proper use in emergencies, maintenance, training and evaluation of the effectiveness of the program. In response to PPE shortages during the COVID-19 pandemic, however, the CDC has published strategies to optimize the supply of PPE, and OSHA has issued temporary enforcement guidance for N95 respirators, including with respect to the annual fit-testing requirement, the extended use or reuse of N95 respirators, the use of expired N95 respirators, the emergency use of N95 respirator alternatives, and the decontamination of filtering facepiece respirators in healthcare settings.

Employers who permit employees to voluntarily wear a respirator must comply only with the Voluntary Use Requirements of OSHA's Respiratory Protection standard, which include requirements to establish and implement those elements of a written respiratory protection program necessary to ensure that any employee using a respirator voluntarily is medically able to use the respirator, and that the respirator is cleaned, stored and maintained so that its use does not present a health hazard to the user. According to CDC guidance, however, respirators with exhalation valves may not prevent SARS-CoV-2 from spreading from the wearer to others; therefore, whenever a respirator or any other form of face covering is required (or being used) for source control, respirators or other face coverings with exhalation valves should not be allowed.

(vii) Employee Accommodations and Modified Face Coverings/PPE. An employer may require employees to wear protective gear and observe infection control practices. However, where an employee with a disability requires a related reasonable accommodation under the Americans With Disabilities Act (the "ADA") (e.g., non-latex gloves, modified face coverings for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), the employer should discuss the request and provide the modification or an acceptable alternative to the extent that such modification does not represent an undue hardship (as discussed below) with respect to the employer's operation of its business.

Kirkland Resources
• 50 State Survey on State and Local Responses to COVID-19 • Employer Guidance on the Protection of Personnel

Other Resources
• OSHA: COVID-19 Frequently Asked Questions • OSHA: Control and Prevention Interim Guidance • OSHA: Guidance on Preparing Workplaces for COVID-19 • OSHA: Guidance on Returning to Work • OSHA: Expanded Temporary Enforcement Guidance on Respiratory Protection Fit-Testing for N95s • OSHA: Enforcement Guidance on Use of Respiratory Protection Equipment Certified under Standards of Other Countries or Jurisdictions • OSHA: Enforcement Guidance for Respiratory Protection and the N95 Shortage • OSHA: Enforcement Guidance on Decontamination of Filtering Facepiece Respirators • CDC: Personal Protective Equipment: Questions and Answers

g. ***Screening and Testing***.

(i) An Employer Is Permitted to Screen Its Workforce for COVID-19. The EEOC confirmed in its guidance that employers may screen their workforces for potential COVID-19 infection by asking about symptoms of COVID-19 and by measuring

employees' body temperatures to determine whether they have a fever.[23] Employers should consider implementing such a program. However, no one screening criteria can accurately identify COVID-19 infection, and employers should consider the array of COVID-19 symptoms (e.g., fever, respiratory illness, etc.) and other risk factors (e.g., travel) when designing and implementing a screening program. Additionally, employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in any decisions related to screening and exclusion.

(ii) Screening Program Design. Screening programs can be implemented in a number of ways. For example, employers can require employees to fill out attestations in which the employee attests that they do not have symptoms associated with COVID-19 and that, to the best of the employees' knowledge, they have not been in contact with someone who has COVID-19. See K&E's Employee Screening Attestation document for an example of such an attestation. Third parties are also offering mobile screening apps to assist in the process. Employers implementing a screening program should consider providing prior notice of the existence of the screening program to the workforce and others visiting the worksite, and explain that it is one of a number of measures that the employer is taking to protect its workforce and their family members from potential exposure. Employers should consider making employees aware that those with symptoms or other risk factors of COVID-19 will be asked to return or remain at home. Employers should consider setting out these items in a policy document. See K&E's Employee Screening Policy for an example of such a policy.

(iii) Temperature Screening Considerations.

(1) On-Site or At Home Screening. If temperature screening is implemented, employers may consider two basic options: (a) conducting on-site temperature checks, or (b) requiring the employees to check their temperatures at home each day prior to coming to work. Employers can screen employees at the workplace or ask employees to self-administer temperature tests on a daily basis before entering the facility.

(2) Temperature Screening Threshold. If an employer implements a temperature screening program, the employer should also consider thresholds over which employees (and all others trying to enter the facility) will not be permitted to enter the workplace. Note that the CDC considers a

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[2] The ADA permits employers to make disability-related inquiries that are necessary to exclude employees with a medical condition that would pose a direct threat to health or safety. "Direct threat" is to be determined based on the best available objective medical evidence, such as guidance from the CDC or other public health authorities. The guidance explains that testing for COVID-19 is consistent with business necessity, because individuals with the virus pose a direct threat to the health of others.

[3] OSHA's Guidance on Returning to Work states that neither the OSH Act nor any OSHA standard prohibits employer screening for COVID-19, if applied in a transparent manner applicable to all employees (i.e., non-retaliatory).

person to have a fever when such person has a measured temperature of at least 100.4 degrees Fahrenheit. Employers may consider adopting screening thresholds in the 100-100.4° degrees Fahrenheit range.

(iv) Workforce Testing for COVID-19. Employers may choose to administer COVID-19 testing to employees before they enter the workplace to determine whether they have the virus, provided that the test is "job related and consistent with business necessity" as required by the ADA.[4] Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. Employers should review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from the CDC or other public health authorities, and routinely check these authorities' websites for updates related to testing. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. In light of the CDC's current guidance that antibody test results should not be used to make decisions about returning persons to the workplace, the EEOC has advised that an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee cannot contract the virus later.

(v) Additional Considerations.

(1) Nondiscriminatory Testing. Employers should implement safe and consistent testing and screening procedures that are applied consistently across the workforce, and are designed to reduce the risk of coronavirus exposure to both the individual administering the screening and those being screened. Employers should ensure that the screen applies consistently to all those *entering* the workplace, not just employees. Any differences in screening or testing across groups of employees or visitors entering the workplace must be supported by documented business justifications.

(2) Vulnerable Individuals. Employers may ask asymptomatic employees to disclose whether they have an underlying medical condition amid a pandemic that has been deemed a "direct threat" within the meaning of the ADA. The EEOC recently updated its pandemic guidelines to note that COVID-19 is presently a "direct threat," so it reasonably follows that such inquiries are permissible until this designation is lifted. It is worth noting,

[4] OSHA's Guidance on Returning to Work states that neither the OSH Act nor any OSHA standard prohibits employer testing for SARS-CoV-2, if applied in a transparent manner applicable to all employees (i.e., non-retaliatory).

however, that the recent updates did not *expressly* state that these inquiries are permissible amid the COVID-19 pandemic, so the most conservative approach would be to question employees in a generalized, non-disability focused survey. Surveys 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) are non-disability related. The inquiry should be structured so that the employee gives one answer of "yes" or "no" to the whole question without specifying the factor(s) that apply to the employee. The K&E Employee Survey is an example of such a survey. Employers also must treat any voluntary disclosures of underlying conditions as confidential medical records. In the event of such a disclosure, the employer may ask an employee to describe the type of assistance the employee thinks will be needed (e.g. telework or leave for a medical appointment). Note that employers should not assume that all disabilities increase the risk of COVID-19 complications. Many disabilities do not increase this risk (e.g., vision or mobility disabilities).

(3) Visitors Screening for COVID-19. Employers may consider implementing a uniform visitor screening process for all third parties entering the workplace. Employers should also take into consideration visitors' potential privacy rights (e.g., by posting clear notices of any screening policies, dealing with screening results discreetly, and storing disclosure forms securely).

(4) Confidentiality. The employer should retain screening and testing-related information in a confidential manner and convey to employees that the results will remain confidential and will not be shared with any outside party, including an employer-sponsored health plan.[5] The ADA requires that any documented results be recorded in a separate record, outside of the employee's personnel file. These results should be shared purely on a need-to-know basis and only when such disclosure is necessary to protect against the threat of exposure to coronavirus or as otherwise required by law. Note that there could be conflicts with OSHA reporting and recordkeeping requirements that might need to be further evaluated as well if an employee tests positive as a result of a workplace incident, and employers should consider consultation with counsel regarding such conflicts.

(5) Identify Legal Requirements. As orders and recommendations are developing rapidly, employers should consider tracking emerging federal, state and local guidance and laws applicable to their organizations.

[5] OSHA's Guidance on Returning to Work states that if an employer chooses to create records of health screening or temperature check information, those records might qualify as medical records under OSHA's Access to Employee Exposure and Medical Records standard (which the employer would be required to retain for the duration of the worker' employment plus 30 years and follow confidentiality requirements), but only if they are made or maintained by a physician, nurse, or other health care personnel or technician.

Additional risk mitigation measures could include paying non-exempt employees for the time spent waiting to be screened, which is compensable in some states, as well as making paid or unpaid leave available for employees who are sent home and are unable to work remotely. In California, for example, the law requires that the company provide not only prior notice to individuals before scanning their temperatures but also that the notice meet the requirements of a "Notice of Collection under the California Consumer Protection Act." Specifically, the notice must explain that the company will collect the employees' body temperature and describe each purpose for which the company will use that information. Multinational employers should seek advice with regard to locally applicable privacy laws, including the General Data Protection Regulation (EU) 2016/679 (GDPR).

(6) Requests for Alternative Screening Method due to a Medical Condition. A request from an employee entering the worksite for an alternative screening method is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act of 1973. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship. Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII of the Civil Rights Act ("Title VII").

(7) Insurance Coverage of Employment-Related COVID-19 Testing. According to FAQs from the Department of Labor ("DOL"), Section 6001 of the Families First Coronavirus Response Act ("FFCRA") requires coverage of items and services by group health plans only for diagnostic purposes. Clinical decisions about testing are made by the individual's attending health care provider and may include testing of individuals with signs or symptoms compatible with COVID-19, as well as asymptomatic individuals with known or suspected recent exposure to SARS-CoV-2, that is determined to be medically appropriate by the individual's health care provider. However, testing conducted to screen for general workplace health and safety, such as in connection with an employee's return to work, or for any other purpose not primarily intended for individualized diagnosis or treatment of COVID-19 or another health condition is beyond the scope of Section 6001 of the FFCRA.

Kirkland Resources
• Policy on Employee Screening for COVID-19 • Employee Screening Attestation for COVID-19 • K&E Employee Survey

h. ***Once Workplace Strategies Have Been Devised, What Are Next Steps?***

(i) Policies and Procedures Review and Preparation. As part of the preparation for reopening, employers should consider:

(1) Informing and encouraging employees to self-monitor for signs and symptoms of COVID-19.

(2) Reviewing and revising their policies, procedures, documents and practices to address COVID-related considerations and to ensure compliance with applicable law and public health guidance. Topics for such policies may include infectious disease preparedness and response, social distancing, infection control, communications, employee screening, travel restrictions and essential personnel, and must be tailored to the individual company. Employers should consider implementing procedures for employees to report when they are sick or experiencing symptoms of COVID-19 and for isolating people suspected of having COVID-19.

(3) Reviewing employment policies and practices to ensure compliance with applicable law and public health guidance.

(4) Considering feasibility of existing practices in the post-COVID-19 workplace (e.g., flexible policies that permit employees to stay home to care for sick family members).

(5) Making copies of policies and procedures easily accessible to the workforce.

(ii) Employee Engagement and Training. Prior to reopening, employers should also consider communicating the existence of new/revised policies and procedures to the workforce. Employers should consider whether employees have access to training, education, and informational material about business essential job functions and worker health and safety, including proper hygiene practices and the use of workplace controls (including, where necessary, face coverings and PPE). Employers should consider means of communicating to workers that those with symptoms or other risk factors of COVID-19 will be asked to return or remain at home. Communications and training materials should be made available in preferred languages spoken or read by the employees, where applicable.

(1) Large employers and employers that have employees with varying levels of technological proficiency may consider implementing a multimodal communications strategy. For example, an employer may host a toll-free number with a daily recorded message, send out a mass text message to employees that have opted into receiving text messages with a link to the correspondence, and send out an email with the same information to employee email addresses.

(2) In addition to providing training on any PPE, employers should consider providing training on topics such as: (i) policies to reduce the spread of COVID-19, (ii) general hygiene, (iii) COVID-19 sources, symptoms and risk factors, (iv) what to do if the employee is sick, (v) cleaning and disinfection, (v) cloth face coverings, (vi) social distancing, (vii) safe work practices, and (viii) stress management. Employers should also consult relevant state and local orders and federal, state and local guidance to determine whether they are required to provide training on any specific topics.

(iii) Review Benefit Plans. In advance of the employees' return to work, employers should consider reviewing all benefit plan terms to confirm proper treatment of returning workers and those that do not return. For 401(k) plans, employers should consider reviewing plan terms and consult with counsel as necessary to determine whether any service or break-in-service rules could impact returning employees' eligibility to participate or vesting, and how participant loan repayments should be treated. For welfare benefit plans, employers should consider determining whether an employee will be considered a "continuing employee" or a "rehired employee," in particular for purposes of health plan coverage under the plan's terms and the Affordable Care Act (the "ACA") - See "Welfare Benefit Plans" in Section 3.h(v)(6) for more detail. Employers should consider working with insurers to determine whether there can be any waiver of applicable waiting periods, actively-at-work requirements, or evidence of insurability requirements. Employers with defined benefit pension plans or multiemployer pension plan obligations who furloughed or terminated employees should consult with counsel regarding any potential withdrawal liability or other implications.

(iv) Infectious Disease Preparedness and Response Plans. OSHA issued COVID-19 planning guidance based on traditional infection prevention and industrial hygiene practices. Under this guidance, OSHA recommends that employers develop an infectious disease preparedness and response plan to guide protective actions against COVID-19. Any such plan may implement or incorporate the employer's new and existing policies and procedures and should take into account the individual employer's circumstances. We work with a number of technical consultants that can assist with the preparation and implementation of any infectious disease preparedness and response plans.

Kirkland Resources
• Pandemic / Major Infectious Disease Policy and Checklist • Policy on Social Distancing and Other Infection Control Measures • Policy on Travel Restrictions • Policy on Telecommuting During the COVID-19 Pandemic • Policy on Pandemic Response Team and Coordinator • Policy on Pandemic Communications • Policy on Employee Screening for COVID-19 • 50 State Survey on State and Local Responses to COVID-19

Other Resources
• CDC: Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) • OSHA: Guidance on Preparing Workplaces for COVID-19 • OSHA: Guidance on Returning to Work

(v) Employee Leave, Furlough Benefits and Compensation.

(1) Furloughed Employees. Employees returning from a furlough or temporary layoff generally do not need to be rehired. Employers can have these employees return to their prior positions at the same salary and benefits for ease of administration. Note that employers need not return employees at the same salary, so long as the employer does not reduce salaries below the minimum threshold for exempt employees and hourly wages are not reduced below minimum wage for non-exempt employees. Employers should also be mindful of state-specific salary and minimum wage thresholds. Employers should consider documenting the return-to-work date and promptly notifying employees of any changes to wages, hours, or fringe benefits (as applicable under state law). Employers are also not permitted to use an employee's request for FFCRA leave (or an assumption that an employee would make such a request) as a negative factor in any employment decision, including when deciding which employees to recall from furlough.

(2) Rehiring Employees. Terminated employees will need to be re-hired through a regular application processes, which may include criminal background and credit checks, drug tests, and post-offer/pre-employment

physical exams. Re-hired employees should execute all required new hire paper work.

(3) Accrued Leave. If an employee has accrued paid sick or family leave under state or local law, the accrued leave generally must be made available to the employee upon return to work. Note that with respect to terminated and re-hired employees, some state and local laws have restoration provisions that may be applicable to employees terminated within a certain period. If an employee has taken paid sick leave or expanded family and medical leave as permitted by the FFCRA prior to being furloughed, the employee is entitled to use the remaining hours of leave (up to 2 weeks of paid sick leave, and up to 12 weeks of expanded family and medical leave) after returning from furlough if the employee has a qualifying reason to do so.

(4) Updating Employment Policies. Before returning to work, employers should consider reviewing their employment policies and practices to ensure compliance with applicable law and consider feasibility of existing practices in the post-COVID-19 workplace (e.g., employers should consider drafting new or updating existing telework, disaster preparedness and employee leave policies). Employers should also consider creating a COVID-19 policy or addendum to their existing handbooks as a consolidated resource for employees (e.g., to the extent not already addressed in existing polices, employers may consider creating a COVID-19-specific policy or addendum that addresses social distancing, emergency response and notification procedures, and other infection control measures).

(5) Benefit Plans. All benefit plan terms and communications made to employees will need to be reviewed to confirm proper treatment of returning or terminated employees. Employers should review their plan documents and related insurance policies, including any recent amendments and agreements with insurers. See Section 3.h(iii) for further detail on the recommended review process with respect to benefit plans.

(6) Welfare Benefit Plans. Employers will need to determine whether an employee will be considered a "continuing employee" or a "rehired employee" for purposes of health plan coverage under the plan's terms and the ACA. Continuing employees (e.g., where insurance companies agreed to extend coverage regardless of eligibility, or for those employees in an ACA "stability period") will simply remain active participants. But rehired employees could be subject to additional waiting periods, depending in part on the application of complex ACA break in service rules. For all welfare plans, employers should consider working with their insurers to determine whether there can be any waiver of applicable waiting periods, actively-at-work requirements, or evidence of insurability requirements. Also, under new guidance issued by the Internal Revenue Service, employers may (but are not required to) amend their cafeteria plans to permit employees to make new prospective elections with respect to employer-sponsored health

coverage. Specifically, employees can make a new election to enroll in coverage if an employee initially declined it, revoke an existing election and enroll in different health coverage sponsored by the same employer, or revoke an existing coverage election provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer. In addition, employers may amend their flexible spending accounts ("FSA") to allow employees to revoke an election, make a new election, or decrease or increase an existing election applicable to a health FSA or dependent care assistance program on a prospective basis. Employers can also now permit unused amounts remaining in health or dependent care spending accounts as of the end of a plan year or grace period ending in 2020 to be used to reimburse eligible expenses incurred through December 31, 2020, and the IRS has increased the maximum carryover for the 2020 plan year to $550. Employees who do not return to work and are terminated will be eligible for temporary continuation of their health benefit plan coverage under COBRA. Note that the DOL has extended the time period for most COBRA deadlines until 60 days following the announced end of the National Emergency, including: the 60-day deadline for individuals to notify plan administrators of a COBRA-qualifying event (such as a divorce or loss of dependent status); the 60-day period for an individual to elect COBRA continuation coverage; the 45-day deadline in which to make a first COBRA premium payment; and the 30-day grace period for subsequent premium payments.

(7) 401(k) Plans. Employers should review 401(k) plan terms and consult with counsel as necessary to determine what impact a furlough or employment termination period has on an employee's eligibility to participate in and receive and vest in employer contributions under the plan. Depending on the plan's service crediting method and rules, it is possible that the service break could cause an employee to fail to become eligible to participate in, and receive, certain employer contributions or to complete a year in vesting service. Generally, participant loan repayments may be suspended for up to one year during an employee's leave of absence, and if a "qualified individual"[6] as defined in the Coronavirus Aid, Relief, and Economic Security ("CARES") Act has an outstanding loan then any installment payment that becomes due through December 31, 2020 is delayed for one year provided the employer elects to amend its plan to permit the delay. Plans can be amended to reinstate or raise the level of employer

[6] A "qualified individual" is an individual: (i) who is diagnosed with COVID-19 by a test approved by the Centers for Disease Control and Prevention, (ii) whose spouse or dependent is diagnosed with the virus, or (iii) who otherwise experiences adverse financial consequences as a result of: (1) being quarantined, being furloughed or laid off or having work hours reduced due to the virus, (2) being unable to work due to lack of child care as a result of the virus, (3) closing or reducing hours of a business owned or operated by the individual due to the virus, or (4) other factors as determined by the Secretary of the Treasury.

contributions that may have been modified or eliminated, except that certain restrictions will apply for safe harbor plans.

(8) Defined Benefit and Multiemployer Pension Plans. The treatment of furloughed and terminated employees who return to work under single employer defined benefit plans will require review of the plan's express terms to evaluate for issues such as whether the benefit computation was affected (for example, to the extent benefit accrual is compensation and/or service-based) and whether service will be credited for the break period for benefit accrual and/or vesting purposes. Employers with multiemployer pension plan obligations who furloughed or terminated employees should consult with counsel regarding any potential withdrawal liability implications. A complete withdrawal occurs only if an employer permanently ceases to contribute to a plan, and withdrawal liability abatement rules may apply if an employer who has ceased contributions subsequently reenters the plan.

4. CONSIDERATIONS ONCE REOPENED: WHAT HAPPENS IF…?

a. *What Happens if an Employee Tests or is Presumed Positive?*

(i) Employees with Positive or Presumed COVID-19 Should Self-Isolate In Accordance with the CDC's Guidelines. Employees who have tested positive or are presumed positive should be excluded from entering the workplace. If an employee is in the workplace at the time the employee informs the employer of having COVID-19, to the extent practical, the employee should be isolated in a location away from others (e.g., isolation room or behind an isolation barrier) until the employee can be safely removed from the workplace and transported home or to a healthcare provider, if necessary. If the employee tests positive away from the workplace, employers should request that employees notify the company by email or telephone and not report to work. Employers should consider designating an employee to oversee COVID-19 related employee reporting matters.

Employers outside of the healthcare and critical infrastructure industries should follow CDC's guidance entitled Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings. On July 20, the CDC revised this guidance with two notable changes: (i) reducing the required time without a fever under the Symptom-Based Strategy to 24 hours instead of 3 days and (ii) specifying that the Test-Based Strategy should be used only (x) for persons who are severely immunocompromised or (y) for persons who want to discontinue self-isolation earlier than recommended under the Symptom-Based Strategy. A summary of the CDC guidelines are as follows:

Symptomatic Individuals:

(1) ***Symptom-Based Criteria***: Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue home isolation under the following conditions:

a. At least 10 days have passed since symptoms first appeared;[7]

b. At least 24 hours have passed since resolution of fever without the use of fever-reducing medications; and

c. Other symptoms have improved.

By way of example, these revised criteria would permit an employee to return to work 11 days after symptoms first appear—even if they have a fever for 9 days—as long as they have no fever in the last 24 hours and have improvement in other symptoms. Employers can require that an individual's fever and/or symptoms have resolved for a longer time period than CDC's recommendations.

(2) ***Circumstances That May Warrant Testing in Symptomatic Individuals*:** Even though the CDC recommends the above symptom-based approach for most cases, there are two circumstances in which the CDC believes testing may be appropriate for symptomatic individuals:

a. Those with Mild to Moderate Symptoms Who Wish to Discontinue Isolation Early. CDC guidance notes that persons with confirmed or suspected COVID-19 who have mild or moderate symptoms and were directed to care for themselves at home may also discontinue home isolation if they obtain negative results using RT-PCR testing for detection of SARS-CoV-2 RNA under an FDA Emergency Use Authorization for COVID-19 from at least two consecutive respiratory specimens collected ≥ 24 hours apart (total of 2 negative specimens). This strategy is only recommended when used to discontinue isolation earlier than would occur under the symptom-based criteria above.

b. Those with Severely Compromised Immune Systems. CDC guidance also provides that persons with confirmed or suspected COVID-19 who are severely immunocompromised and have symptoms and were directed to care for themselves at home may also consider discontinuing home isolation if they obtain negative

[7] CDC guidelines provide that 20 days of isolation may be necessary for those with severe cases as well as for those who are immunocompromised. The CDC did not define what constitutes a "severe case" of COVID-19. The CDC definition of "immunocompromised" is *available at* https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html

results using the method in the preceding paragraph in consultation with infectious disease experts such as state and local public health departments.

Asymptomatic Individuals:

(1) Persons infected with SARS-CoV-2 who never develop symptoms may discontinue home isolation and other precautions 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA, assuming they have remained asymptomatic.

(ii) Doctor's Notes; Attestations from Returning Employees. When employees return to work, the ADA allows employers to require a doctor's note certifying fitness for duty. As a practical matter, however, doctors and other health care professionals may be too busy during this time to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have COVID-19. The CDC does not recommend that a doctor's note be required to allow an employee to return to work; however, employers should also take into account any applicable state and local regulations or guidance. An employer may also require a returning employee to complete an attestation in which the employee attests that the employee has satisfied the time-based or test-based strategy. See K&E Employee Screening Attestation for COVID-19 for an example of such an attestation.

(iii) Employers Should Avoid Identifying the Sick Employee by Name to Other Employees. To the extent possible and in compliance with the ADA and potentially other data privacy regulations, employers should refrain from identifying the infected employee by name to other employees. Care should also be given to complying with the privacy restrictions mandated by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") to the extent applicable.

(iv) Cleaning and Disinfecting. Businesses that are not healthcare facilities should clean and disinfect in accordance with the CDC's guidance on Cleaning and Disinfection for Community Facilities. In accordance with the guidance, employers should: (1) close off areas visited by the ill individual, (2) open outside doors and windows and use ventilating fans to increase air circulation in the area, and (3) wait 24 hours or as long as practical before beginning cleaning and disinfection. Hard (non-porous) surfaces, soft (porous) surfaces, electronics and linens/clothing should then be cleaned and disinfected in accordance with the CDC's guidance. Employers should consider training their workforces on these cleaning procedures. For cleaning and disinfecting in healthcare facilities, please refer to the CDC's guidance on Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed COVID-19 in Healthcare Settings.

(v) If the Company is Located in a Shared Office Building or Area. Employers should consider alerting building management of possible infections so they can respond

in whatever fashion they deem necessary to the presence of an infected individual in their building or area.

(vi) Reporting and Recording. Employers should consider and evaluate any reporting or recording obligations under OSHA and other relevant state and local regulations and review applicable state or local orders and guidance to determine whether there is a requirement to report such cases to state or local authorities. Under federal law, and many state laws, reporting is required if an employee contracts COVID-19 as a result of a work-related incident and is then hospitalized within 24 hours or dies within 30 days of the incident. Employers who are required to keep injury and illness records may also be responsible for recording cases of COVID-19 under OSHA. OSHA guidance states that, in determining whether a specific COVID-19 illness is work-related, the employer should evaluate the employee's work duties and work environment to decide whether an exposure in the work environment caused the employee to contract COVID-19. Relevant factors include: (1) the nature of the work; (2) the safeguards that the employer has put in place to mitigate the risk of exposure to SARS-CoV-2; and (3) the prevalence of COVID-19 in the broader community when compared to the prevalence in an employer's workforce.

Recognizing that it is difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace, OSHA has issued enforcement guidance for recording (but not reporting) cases of COVID-19.

Under its revised enforcement guidance for recording cases of COVID-19, which went into effect on May 26, 2020 (rescinding OSHA's initial enforcement guidance on this topic that was issued on April 10, 2020) and will remain in effect until further notice, all employers with recordkeeping obligations must make work-relatedness determinations for confirmed cases of COVID-19. If the employer cannot determine, after conducting a reasonable and good faith inquiry, that it is *more likely than not* that an exposure in the workplace caused a particular case of COVID-19, the employer does not need to record that COVID-19 illness. In assessing whether an employer has made a reasonable determination of work-relatedness, OSHA will consider the following factors:

(1) ***Reasonableness of the Employer's Investigation into Work-Relatedness.*** According to the revised enforcement guidance, it is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (a) to ask the employee how they believe they contracted the COVID-19 illness; (b) while respecting employee privacy, discuss with the employee their work and out-of-work activities that may have led to the COVID-19 illness; and (c) review the employee's work environment for potential SARS-CoV-2 exposure, taking into account any other instances of workers in that environment contracting COVID-19 illness.

(2) ***Evidence Available to the Employer.*** OSHA will consider the information reasonably available to the employer at the time it made its work-relatedness

determination, but if the employer later learns more information related to an employee's COVID-19 illness, that information will also be taken into account in evaluating the reasonableness of an employer's work-relatedness determination.

(3) ***Evidence That COVID-19 Illness Was Contracted at Work.*** According to the revised enforcement guidance, COVID-19 illnesses are likely work-related (a) when several cases develop among workers who work closely together and there is no alternative explanation, (b) if they are contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation, or (c) if the employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation. The revised enforcement guidance then states that an employee's COVID-19 illness is likely not work-related (x) if they are the only worker to contract COVID-19 in their vicinity and their job duties do not include having frequent contact with the general public, regardless of the rate of community spread, or (y) if they, outside the workplace, closely and frequently associate with someone (e.g., a family member, significant other, or close friend) who (A) has COVID-19; (B) is not a coworker, and (C) exposes the employee during the period in which the individual is likely infectious. The revised enforcement guidance also states that OSHA's Compliance Safety and Health Officers should give due weight to any evidence of causation provided by the employee, medical providers, or public health authorities.

Employers should consult with counsel when evaluating OSHA reporting and recording obligations for a confirmed case of COVID-19 because an employer's recording of an illness or reporting of a hospitalization or death can have implications that extend beyond OSHA compliance (e.g., workers compensation claims, lawsuits).

Kirkland Resources
• Policy on Employee Screening for COVID-19 • Physician Clearance Attestation • Employee Screening Attestation for COVID-19

Other Resources
• CDC: Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings • CDC: Cleaning and Disinfecting Your Facility

Other Resources
• CDC: Guidance on Cleaning and Disinfection for Community Facilities • CDC: Guidance on Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed COVID-19 in Healthcare Settings • OSHA: Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019

b. ***What Happens if Employees Are Exposed?***

(i) Considerations After Confirming a Positive Employee. Employers should consider asking infected employees (and visitors) to identify all individuals with whom they have had "close contact" for a "prolonged period of time" at the workplace. This includes individuals that the infected employee interacted with while they were symptomatic as well as those they interacted with during the 48-hour period *before* the onset of symptoms. **If the employer can confirm such contact, then the exposed employee should self-quarantine for a period of 14 days (or such other period as may be prescribed by the CDC at the time)**. "Close contact" generally involves contact within 6 feet, but can vary depending on the facts and circumstances. What constitutes a "prolonged period of time" is also fact-specific and can vary depending on the employer's industry and the circumstances of the interaction with the infected (or presumed infected) employee. Employers should refer to the applicable guidance set forth below:

(1) General Businesses. Generally, when an employee is neither a healthcare worker nor an essential critical infrastructure worker, the applicable guidance is the CDC's guidance on Public Health Recommendations for Community-Related Exposure. Under that guidance, the CDC recognizes that "close contact" is generally within the 6 foot range but that it can vary based on a number of factors including whether the individual has symptoms (e.g., coughing likely increases exposure risk) and whether the individual was wearing a face mask (which can efficiently block respiratory secretions from contaminating others and the environment). Likewise, the CDC currently concludes that the data is insufficient to precisely define the duration of time that constitutes a prolonged exposure, but 15 minutes of close exposure over a 24-hour period can be used as an operational definition.

(2) Healthcare Facilities. Healthcare facilities should generally follow the CDC's Interim U.S. Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with Coronavirus Disease 2019 (COVID-19). In that guidance, the CDC states that data is insufficient to precisely define the duration of time that constitutes a prolonged exposure. Until more is known about transmission risks, the CDC believes it is reasonable to

consider an exposure of 15 minutes or more over a 24-hour period as a prolonged exposure. However, an exposure of any duration should be considered a prolonged exposure if the exposure occurred during the performance of an aerosol generating procedure. Brief interactions are less likely to result in transmission; however, clinical symptoms of the patient and the type of interaction (e.g., did the patient cough directly into the face of the healthcare professional) remain important.

(3) Essential Critical Infrastructure Workers. Employers should review the U.S. Department of Homeland Security's Cybersecurity & Infrastructure Security Agency's ("CISA's") Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response. For employees that fall under the list provided in CISA's memorandum, employers should refer to the CDC's interim guidance entitled Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19. Unlike workers in other sectors, this guidance allows for expedited return to work for critical infrastructure workers who have had an exposure, but remain asymptomatic, provided that the following criteria outlined in this guidance are satisfied:

a. *Pre-Screen*: Employers should measure the employee's temperature and assess symptoms prior to the employee starting work. Ideally, temperature checks should happen before the individual enters the facility.

b. *Regular Monitoring*: As long as the employee does not have a fever or symptoms, the employee should self-monitor under the supervision of the employer's occupational health program.

c. *Wear a Mas*k: The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue face masks or can approve employee-supplied cloth face coverings in the event of shortages.

d. *Social Distance*: The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.

e. *Disinfect and Clean Work Space*s: Clean and disinfect all areas such as offices, bathrooms, common areas, and shared electronic equipment routinely.

f. *Isolating and Removing Symptomatic Employees*: If the employee is in the workplace at the time the employee becomes sick, to the extent practical, the employee should be isolated in a location away from others (e.g., isolation room or behind an isolation barrier) until the employee can safely leave the workplace. Surfaces in the

employer's workspace should be cleaned and disinfected per the CDC's Guidance on Cleaning and Disinfecting Workplace Facilities. Information on persons who had contact with the ill employee during the time the employee had symptoms and 2 days prior to symptom onset should be compiled. Others at the facility who had prolonged close contact with the ill employee (as defined in relevant guidance) should be considered exposed.

(ii) Returning to Work. Employers should consider implementing a process by which returning employees attest to, among other things, having remained quarantined in accordance with applicable CDC or other health authority guidance. Additionally, if an employee uses paid sick leave under the FFCRA to care for an individual who was advised by a healthcare provider to self-quarantine because of symptoms of COVID-19, the employer may temporarily reinstate the returning employee to an equivalent position which requires less interaction with co-workers, or require that the employee work remotely. However, an employer may not require an employee to work remotely or be tested for COVID-19 simply because the employee took leave under the FFCRA.

Kirkland Resources
• Notice to Personnel of Possible Exposure • Notice to Customer of Possible Exposure • Notice to Patient of Possible Exposure (applicable to those in the healthcare industry). • Employee Screening Attestation for COVID-19

Other Resources
• CDC: Guidance on Public Health Recommendations for Community-Related Exposure • CISA: Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response • CDC: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 • CDC: What to Do If You Are Sick • CDC: Guidance on Cleaning and Disinfecting Workplace Facilities

c. ***What Happens if an Employee Requests a Reasonable Accommodation?***

Employers should determine whether an employee has a qualifying disability and is requesting a reasonable accommodation under the ADA, or is merely expressing a preference (e.g., a preference for telecommuting rather than reporting to the workplace). If the former, there may be reasonable accommodations that could offer protection to an individual whose disability puts such individual at greater risk from COVID-19, and who therefore requests a reasonable accommodation to eliminate possible exposure. Note that employers do not need to wait for employees to request accommodations, but may ask employees with disabilities to request accommodations that they believe they may need when the workplace reopens.

For an employee to request a reasonable accommodation from an employer, the employee – or a third party, such as the employee's doctor – generally must let the employer know that the employee needs a change for a reason related to a medical condition. Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, the employee may do so. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship that can be provided. Note that employers do not need to wait for employees to request accommodations, but may ask employees with disabilities to request accommodations that they believe they may need when the workplace reopens.

Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom the employee is associated. For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure. Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

(i) Mental Illness & Physical Disability. Employers may face reasonable accommodation requests from employees with a range of disabilities, such as preexisting mental illnesses or disorders exacerbated by the COVID-19 pandemic or substantially limiting physical impairments (e.g., deafness or blindness). With respect to accommodation requests regarding both physical and mental disabilities, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist them and enable them to keep working; explore alternative accommodations that may effectively meet their needs; and request medical documentation if needed.

(ii) Pregnancy. An employer may not exclude an employee from the workplace involuntarily due to pregnancy. Sex discrimination under Title VII includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for

adverse employment actions, including involuntary leave, layoff, or furlough. Further, there are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy. First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules. Second, Title VII as amended by the Pregnancy Discrimination Act of 1978 specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

(iii) Undue Hardship. An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace.

(iv) Significant Expenses. Prior to the COVID-19 pandemic, most accommodations did not pose a "significant expense" with respect to an employer's overall budget and resources. However, the sudden loss of some or all of an employer's income stream because of the COVID-19 pandemic is a relevant consideration, as is the availability of discretionary funds and whether there is an expected date that current restrictions on an employer's operations will be lifted (or whether new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by the COVID-19 pandemic.

(v) Postponing Requests. In workplaces where all employees are required to telework during stay-home requests or orders, employers should not necessarily postpone discussing a request from an employee with a disability for an accommodation that will not be needed until the employee returns to the workplace when mandatory telework ends. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer should consider starting to discuss return-to-work accommodation requests now.

(vi) Altered or Additional Accommodations. An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

(vii) Temporary Accommodations. Given the COVID-19 pandemic, some employers may choose to forgo or shorten the exchange of information between an employer

and employee known as the "interactive process" and grant the request. An employer may also choose to place an end date on the accommodation. Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

(viii) Inviting Employees to Request Flexibility in Work Arrangements. The ADA and the Rehabilitation Act of 1973 permit employers to make information available in advance to all employees about who to contact – if they wish – to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions. An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities. Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

(ix) Age Discrimination in Employment Act ("ADEA"). The ADEA prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19. Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison. Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

d. ***What Happens If Employees Have A Medical Condition That May Jeopardize Their Health Upon Returning To The Workplace, But The Employees Have Not Requested Accommodation?***

The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they contract COVID-19 (e.g., asthma, chronic lung disease, chronic kidney disease being treated with dialysis, serious heart conditions, diabetes, severe obesity, and liver disease, and people aged 65 years and older, people in nursing homes or long term care facilities, and people who are immunocompromised). In certain instances, an employer may know that an employee has one of these conditions, and may be concerned that the employee's health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. Under such circumstances, the ADA does not mandate that the employer take action.

However, if the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing the employee at "higher risk for severe illness" if the employee contracts COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to the employee's health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to the employee's own health. A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about the relevant employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his or her particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to the employee's own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA requires an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (e.g., to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar employees from the workplace if, after going through all these steps, the facts support the conclusion that the relevant employees pose a significant risk

of substantial harm to themselves that cannot be reduced or eliminated by reasonable accommodation.

(i) Sample accommodations. Accommodations that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). Accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. The Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations.

e. *What Happens if an Employee Refuses to Return to Work?*

(i) OSHA Considerations. Employers should assess whether the employee is more susceptible to the virus due to age, pregnancy, or an underlying medical condition (importantly, the White House's *Opening Up America Again Guidelines* currently instruct all vulnerable individuals to continue to shelter in place), and whether the employee's refusal to work is reasonable. OSHA has not issued COVID-19-specific guidance on this point to date, but according to OSHA's general guidance, an employee has a legal right to refuse to work if (a) the employee believes reasonably and in good faith that there is a real danger of death or serious injury, (b) the employee has asked the employer (where possible) to eliminate the danger and the employer has failed to do so, and (c) there is not enough time to correct the danger through regular enforcement channels (e.g., an OSHA inspection). If the employee's concerns are not reasonable, absent the need to provide a reasonable accommodation (see above), the employer may insist that the employee report to work and may take appropriate disciplinary action against those who refuse to do so, including termination of employment; however, employers in this situation should consult with counsel who can help formulate an appropriate response that takes into account OSHA whistleblower protections. While employees with disabilities that put them at a high risk for complications of COVID-19 or pre-existing mental illness exacerbated by the COVID-19 pandemic may be entitled to reasonable accommodations (absent undue hardship, as discussed above),

employees generally cannot refuse to come to work because of garden-variety fear and anxiety.

(ii) Leave and PTO. Employers that do not wish to terminate employees for refusing to return to work may consider various options including paid leave or unused paid time off to cover extended absences. To the extent paid leave is not available, employers may consider placing employees on unpaid leaves of absence.

(iii) NLRA. If several employees express common concerns as a group, or one employee speaks on behalf of a group, it may be considered protected concerted activity under the National Labor Relations Act. Employees in both unionized and non-unionized workplaces need only have a "reasonable held, good-faith belief that the health or safety conditions being protested are unsafe," and the conditions need not actually be unsafe. Employees engaging in such concerted activity remain protected even where they are honestly mistaken about the conditions believed to be unsafe. Therefore, employers may not discipline employees engaging in protected concerted activity who refuse to work based on the reasonably held, good-faith belief that working conditions are unsafe.

(iv) Retaliation. Employers *cannot retaliate* against employees who express concerns about workplace safety during the COVID-19 pandemic. OSHA's Guidance on Returning to Work states that an employer's reopening plans should address anti-retaliation (e.g., by ensuring workers understand their rights to a safe and healthful work environment, who to contact with questions or concerns about workplace safety and health, and prohibitions against retaliation for raising workplace safety and health concerns, and by ensuring that supervisors are familiar with workplace flexibilities and other human resources policies and procedures, as well as with workers' rights in general).

(v) Unemployment Insurance. If an employee refuses to return to work when called, or declines to take the number of hours offered, the employer may have an obligation to notify a state unemployment insurance agency of the failure to return to work. We recommend checking state-specific unemployment insurance guidelines and/or K&E summary materials regularly as these requirements are being updated. Under the CARES Act, employees may refuse to return to work when called, or decline to take the number of hours offered, and continue to collect unemployment insurance benefits if they have a medical condition that puts them at an increased risk of harm from COVID-19 or other specific circumstance related to COVID-19 (such as being diagnosed with COVID-19, required COVID-19 quarantines and caring for family members as a result of COVID-19). Employees may not, however, refuse work and continue to collect unemployment insurance benefits solely because they are fearful of contracting COVID-19. The DOL is continuing to encourage states to maintain the integrity of the unemployment insurance system through guidance that reminds states that employees are not eligible for continued unemployment insurance benefits if they have been offered suitable work. The guidance also strongly encourages states to request employers to provide information when employees refuse to return to their jobs for reasons that do not

support their continued eligibility for benefits. Because states are still developing the processes, procedures and documentation they may seek to require in order to substantiate whether an employee remains qualified to collect unemployment insurance compensation following a failure to return to work, we recommend that employers notify state unemployment insurance agencies promptly following any refusal to return to work even in states in which there is no obligation to notify. The unemployment insurance agency will then proceed with a process to assess whether continued unemployment insurance benefits are properly warranted under the circumstances.

Kirkland Resources
• Unemployment Insurance 50 State Survey of Reemployment and Refusal to Work Procedures

Other Resources
• OSHA: Refusal-To-Work Guidance • The White House: Guidelines for Opening Up America Again • Unemployment Insurance 50 State Survey of Reemployment and Refusal to Work Procedures • OSHA: Guidance on Returning to Work

f. ***What Happens if an Employee Asks to Continue Working Remotely?***

(i) Decision Framework. If an employee is requesting accommodation and is a qualified individual with a disability (as defined under applicable federal, state or local laws) or a "vulnerable individual" under the White House Guidelines:

(1) Consider whether requested accommodation constitutes undue hardship on the company. Undue hardship means "significant difficulty or expense" to the employer.

(2) Though companies that have the ability to run their business effectively while allowing employees to telework are generally encouraged to continue doing so, if the employee's request to continue working remotely is not rooted in reasonable safety concerns, and absent the need to provide a reasonable accommodation, the employer may still insist that the employee report to work in person (be sure to consider state orders and federal guidance related to working remotely).

(3) Employers may take appropriate disciplinary action against such employees should they insist upon working remotely, including termination of employment.

(ii) Employees with Disabilities That Put Them at a High Risk for Complications of COVID-19 May Request Telework as a Reasonable Accommodation. Employees with a preexisting mental illness that has been exacerbated by the COVID-19 pandemic may also be entitled to a reasonable accommodation (absent undue hardship). See Section 4.c for a further discussion of reasonable accommodation.

g. *What Happens if an Employee Makes a COVID-19 Related Claim?*

(i) Types of Claims. Employees infected with COVID-19 while working may seek to prove that the employer was responsible for their infection. Such claims could vary by state, but could take the shape of lawsuits or arbitrations alleging that the employer caused the infection through its actions by, for example, failing to provide a safe workplace or placing an employee in harm's way.

(ii) Mitigation Strategies. To mitigate potential claims, employers should consider: (a) complying with state and local orders and applicable health and safety guidance issued by local, state, and federal authorities; (b) documenting and implementing best practices for the protection of worker health and safety, including provision of face coverings/PPE (as appropriate), social distancing policies, regular disinfecting, and a deployable response plan in the event of a workplace exposure; (c) documenting steps taken to detect, isolate, and trace COVID-19 cases; (d) developing and implementing an effective strategy for communicating policies and practices and (e) engaging governmental agencies in an active dialogue to ensure the sufficiency of their processes. Additionally, and while not a mitigation strategy per se, employers should consider reviewing applicable insurance policies for appropriate coverage and indemnification.

(iii) Possible Defenses. The primary defense to such claims would be that there is not a sufficient nexus between infection and any specific employer-related conduct (i.e., that an employee did not contract the disease at work). Employers also can demonstrate that they took all necessary precautions outlined in state and local orders and applicable federal, state, and local guidance, providing a valid defense to a negligence action. The more an employer adheres to all state and local orders and applicable federal, state and local health and safety requirements and guidance (as well as CDC and OSHA guidance) relating to COVID-19, the stronger their defense will be.

(iv) Workers' Compensation. The key inquiry for workers will be whether the employee contracted the virus at work and whether the contraction of the disease was "peculiar" to the employee's employment. The degree to which employees might bring successful workers compensation claims will typically be dependent on state law. If an employee is covered by workers' compensation insurance, other liabilities may be cut off; however, failure to adhere to health and safety

requirements may result in fines and penalties. Workers' compensation is the most likely remedy, and the degree to which employees might bring successful workers compensation claims will typically be dependent on state law. Generally, absent proof of the deliberate intent of the employer to injure an employee or, where applicable, gross negligence or negligence on behalf of the employer, workers' compensation is the exclusive remedy.

(v) OSHA and Governmental Guidance. Non-compliance with OSHA and/or state-level equivalent requirements may result in civil fines and/or penalties from regulators, and has formed the basis for claims of negligence and wrongful death. Willful OSHA violations that result in employee fatalities can result in criminal enforcement.

h. ***What Happens If We Want to Hire During the COVID-19 Pandemic?***

(i) Screening Applicants. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.

(ii) Applicants with COVID-19 Symptoms. An employer may delay the start date of an applicant who has COVID-19 or associated symptoms. An employer may also withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or associated symptoms. Employers may not postpone a start date or withdraw a job offer because the candidate is 65 years old or pregnant, despite the fact that both characteristics place such candidate at higher risk from COVID-19.

i. ***Privacy Considerations***.

(i) Confidentiality of Medical Information. The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file. An employer may store all medical information related to COVID-19 in existing medical files. If an employer requires all employees to have a daily temperature screening before entering the workplace, the employer may maintain a log of the results, but must maintain the confidentiality of such information.

(ii) Protected Health Information. Information obtained from an employer's group health plan regarding whether an employee or any of such employee's family members has been tested for COVID-19 or has been treated for COVID-19 (or symptoms associated with COVID-19) should be treated as "protected health information" (PHI). As such, this information generally cannot be used or disclosed by an employer without the individual's authorization, subject to limited exceptions.

(iii) HIPAA Restrictions. Privacy restrictions mandated by HIPAA only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if an employer has medical information in

employment records, it is not subject to HIPAA restrictions. However, employers should treat all medical information as confidential and afford it the same protections as those granted by HIPAA in connection with any applicable group health plan. Disclosures should be made only to authorized personnel and employers should take proper precautions not to release information to someone until proper identification is provided and reviewed.

(iv) HIPAA Training. Employers should have their human resources personnel review the HIPAA policies and procedures to ensure they understand the circumstances under which employee/participant information from the group health plan can be used or disclosed to the employer or to third parties. HIPAA training should be updated to ensure that all current employees who work with the employer's group health plan are aware of the ongoing legal responsibilities involved (particularly as personnel may be tempted to use health plan claim data to obtain information about employees' COVID-19 testing or treatment).

(v) Requests by Public Health Authorities. If requested by a public health official, HIPAA permits a group health plan to disclose any records or information it may have related to COVID-19 testing and treatment. However, disclosures for a public health purpose must be the minimum necessary to respond to the specific request and the public health purpose.

(vi) Workplace Decisions Based on Health Plan Information. Employers should work with counsel to determine in what form (if any) and the extent to which information from the group health plan regarding employees' or their family members' COVID-19 testing and/or treatment could be used to make employment policy and/or workplace safety-related decisions.

(vii) Restrictions/Screening Visitors. Employers should take into consideration visitors' potential privacy rights (e.g., by posting clear notices of any screening policies, dealing with screening results discreetly, and storing disclosure forms securely). If employers use any screening tools that capture biometric identifiers, they should also be mindful of enhanced privacy rights under state laws, such as the Illinois Biometric Information Privacy Act.

(viii) State Laws. Information about whether an employee or any of such employee's family members has been tested for COVID-19 or has been treated for COVID-19 (or symptoms associated with COVID-19) might be subject to state laws that regulate the privacy of individually identifiable information. For example, some state laws require employers to implement reasonable security procedures and practices to protect such information against unauthorized access, theft, and disclosure. Some states also have specific laws related to health data and records. Accordingly, employers should review applicable state-specific privacy laws to identify any limits or other obligations that apply to COVID-19 related information obtained by employers.

Resources
• EEOC: What You Should Know About COVID-19, the ADA, the Rehabilitation Act, and Other EEO Laws • EEOC: Guidance on Pandemic Preparedness in the Workplace and the ADA