



THE NEW NORMAL – CONSTRUCTION INDUSTRY RETURN TO WORK UPDATE

Jason Tremblay is a business attorney and litigator who advises companies in a wide range of industries on employment law and commercial matters. Jason's breadth of experience as a litigator and problem solver enables him to be a trusted advisor and outside general counsel to his clients. His experience in employment matters includes counseling, negotiation and litigation on issues critical to the evolving workplace including wage and hour disputes, restrictive covenant matters, FMLA, ADA, ADEA and Title VII claims. Jason also provides his clients with an array of services including drafting and negotiating employment and independent contractor agreements, and counseling clients relating to employment and contract related issues. Beyond these services, Jason also draws on his experience to help business owners triage the issues they face and, when necessary, direct them to outside sources of assistance.

Now that shelter-in-place orders are being gradually lifted around the country, including recently in Illinois, companies in all industries are again opening for business. Employers, even those that did not close completely as a result of being deemed an "essential business," must be extra vigilant in making workplaces safe for the return of their workforces and the operation of their businesses. The construction industry which has largely remained open during the COVID-19 pandemic is not immune from these issues and should continually evaluate worker safety and make improvements to maximize the chances that all construction workers remain safe during this pandemic.

On May 26, 2020, and specifically related to the construction industry, the U.S. Department of Labor's Occupational and Safety and Health Administration ("OSHA") issued non-binding guidance specifically aimed at bolstering worker safety in the construction industry. The recent OSHA Guidance located at www.osha.gov/news/newsreleases/national/05262020 provides a number of recommendations to increase construction job safety. OSHA has also published an Alert entitled "COVID-19 Guidance for the Construction Workforce" available at <https://www.osha.gov/Publications/OSHA4000.pdf> which also outlines specific recommended steps to maintaining a safe construction worksite. Among other recommendations, OSHA suggests keeping in-person meetings (including toolbox talks and safety meetings) as short as possible,

limiting the number of workers in attendance at those meetings, using social distancing practices, and staggering shifts to minimize the number of workers on a particular worksite. OSHA also suggests implementing safety protocols for cleaning shared tools, such as wiping down shared tools with alcohol-based cleaners before and after use. OSHA also recommends screening calls when scheduling indoor construction work to assess potential exposures and circumstances in the work environment before worker entry and ensuring indoor workspaces have good air flow.

As companies and industries re-open, and as businesses return to the new normal, below are some recommend steps all companies should take.



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Checklist for Health and Safety Planning as Business Resumes

Review Available Guidance:

- Review available government guidance (particularly [OSHA](#) and [CDC](#))
- Review industry/third-party guidance (e.g., [National Association of Homebuilders](#), [Lear Corp.'s sample Safe Work Playbook](#))

Consider PPE: Facilities/Cleaning Protocols:

- Evaluate and communicate heightened cleaning requirements and expectations for employees and vendors with primary sanitation responsibilities
- Evaluate and/or renegotiate new or existing contracts with vendors
- Ensure cleaning is undertaken according to current [CDC](#) recommendations
- Ensure workplace common areas and/or customer-facing areas receive additional cleaning on a regular basis
- Communicate to employees and third parties who will appreciate reassuring communications regarding heightened sanitation efforts
- Make cleaning/sanitizing supplies available to employees and third parties (i.e., visitors/customers)
- Require employees to take personal responsibility for sanitation, even if it is not among their normal duties:
 - o Communicate protocols for shared areas, tools, and equipment
 - o Enforce sanitation and cleaning protocols
 - o Maintain flexibility to adapt to best practices
- Plan for potential supply shortages, at least in the short term
- Create and display signage reminding employees and third parties of the importance of regular and proper handwashing



Employee Monitoring and Screening:

- Review [EEOC guidance](#)
- Require employees experiencing COVID-19 symptoms ([CDC guidance](#)) to leave work, promptly seek testing, and report results (note paid leave requirements for [FFCRA-covered employers](#))
- Evaluate whether and how to screen and/or monitor employees and third parties
- ADA-covered employers may measure employee body temperature, so long as CDC and state health authorities continue to find heightened threat of transmission
 - o Implement any monitoring or screening protocols uniformly for similarly situated employees
 - o Screening or monitoring results and illness information must be kept confidential
 - o Records of testing may demonstrate employer took reasonable measures to prevent spread
 - o But testing is intrusive, time consuming, and may be of limited actual value (e.g., some with COVID-19 do not have a fever)
- Draft and promulgate policies and signage regarding staying home when feeling sick



Checklist for Health and Safety Planning as Business Resumes *(continued)*

Social Distancing Plan:

- Create and promulgate a written social distancing plan
- Evaluate employees' unique duties and the physical positioning of work locations
- Evaluate use of common areas, such as conference and break rooms and public spaces
- Create signage reminding employees and third parties need to maintain social distancing
- Re-evaluate social distancing plan on a regular basis as guidance evolves and to maintain consistency with federal (OSHA, CDC, etc.) and state-level guidance
- Consider staggered scheduling or "soft" opening
 - o Staggered schedules may allow time for testing and create less crowded locker rooms, entryways, or other common areas
 - o Opening or expanding operations incrementally will allow employers to test and adjust plans and procedures
- Consider modified employee schedules to reduce the number of employees present in the workplace (e.g., alternating teams, staggered shifts or start times, continued teleworking)

Remote Work

- Solicit feedback and evaluate what worked and what did not during recent closures and periods of teleworking
- If appropriate, continue telework for certain positions and evaluate whether teleworking is temporary or permanent, including alternating or staggered teleworking
- Evaluate what, if any, long-term restructuring of positions may be beneficial
- Employees may request to continue teleworking by choice temporarily or permanently



Communications, Training, and Monitoring

- Communication and training is key to effective planning and risk mitigation
- Internal communications should educate and encourage employees, while external communications reassure customers and other third parties
- Train managers and employees on new policies, procedures, and protocols
- Identify managers responsible for implementing plan and monitoring compliance
- Name point person(s) to whom employee questions and concerns may be directed
- Train managers on patience and risk of retaliation issues
- Monitor effectiveness and compliance on an ongoing basis, a plan that is not followed may actually create more risk than no plan at all

Flexibility

- Employers must continue to monitor applicable orders as they evolve or are lifted
- Orders will likely be lifted in phases and a patchwork of restrictions will continue
- Multi-state employers must take comply with evolving orders in multiple locations
- Monitor changing guidance and best practices
- Create planning materials that could be used if there is a second wave of infections and closures or a future pandemic or other event
- Evaluate relevance and application of existing policies in the wake of the COVID-19 shutdown, and, where relevant, create new policies arising based on plan
- Create, review, and revise pandemic preparedness plans to prepare for a second wave of COVID-19-related shutdowns or other future pandemics considering