

Back-to-Work Toolkit

Helping Businesses
Protect Lives and
Livelihoods



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Companies and organizations worldwide are facing a difficult question: As the fight against the COVID-19 pandemic shifts gears from emergency to maintenance, how can we reopen and run our businesses — from Day One and beyond — in a manner that preserves jobs and generates revenue without risking the health and safety of our employees and customers? The answers to this question are not simple, nor is there a one-size-fits-all solution.

Despite these challenges, there is little time to waste: companies must be ready with solutions to address risk issues now, and as these issues arise and evolve in the weeks and months to come. They must be nimble, flexible, and prepared to refine their business models and operations quickly and with the best information available.

This **Back-to-Work Toolkit**, prepared by Jones Walker LLP, is a compendium of best practices that apply to many types of businesses and industries. Our goal is to provide a concise, issue-driven resource and a range of recommendations that can be used as a platform upon which you can stage an informed, practical return to partial or full business operations.

To create this toolkit, we have reviewed information and insights from multiple resources, including government agencies and independent think tanks, and have analyzed existing, recent, and proposed legislation that can affect business decisions. We have identified risks and mitigants to those risks that will help you gauge your readiness and response position.

In this toolkit, we provide information to respond to the following questions:

- “How can I make sure that my business reopens — and remains open — in a timely and safe manner and in accordance with appropriate guidelines?”
- “This pandemic has underscored the importance of my employees and managers. How can I establish flexible, meaningful employment policies and practices that will protect the health of staff and encourage them to do their best work?”
- “Agency guidance on federal, state, and local tax policy, employee benefits, and executive compensation, is being updated constantly in response to COVID-19. How can I ensure that my company’s tax and human resources operations and strategies support a reboot of my business?”
- “How can I determine whether my business is covered for COVID-19-related issues under existing insurance policies, and what options do I have for limiting future risks or liabilities?”
- “Now that my real estate property is to open to the public, what should I and the building occupiers consider to ensure a safe and healthy environment for reopening?”

As time progresses, new ideas and information will undoubtedly become available. While we all recognize that this is a process and our reactions must be fluid, we know that business disruption has been and will continue to be a certainty for the foreseeable future. Jones Walker is here to partner with you as we navigate this time and will utilize all resources available to assist you.

For more information and updates, visit our [COVID-19 Center](#).



Business Reopening

“How can I make sure that my business reopens — and remains open — in a timely and safe manner and in accordance with appropriate guidelines?”

Every business wants to reopen as quickly and safely as possible. Employees, customers, vendors, and other stakeholders must be reassured that their health is a primary consideration and that new ways of doing business (including working remotely, establishing social distancing practices when in-person encounters are required, and other options) will enable them to conduct business as usual under highly unusual circumstances.

To achieve these goals, you need reliable, timely information. The following resources offer guidance and constantly updated facts that can help you determine when and how to reopen your business while ensuring compliance with federal, state, and local requirements.

KEY CONCEPTS:



Reduce Transmission Among Employees



Maintain Healthy Business Operations



Maintain a Healthy Work Environment



Reduce Transmission Among Employees

■ ACTIVELY ENCOURAGE SICK EMPLOYEES TO STAY HOME.

- Employees with symptoms should stay home.
- Sick employees should follow CDC-recommended steps regarding home isolation.
- Employees who have a sick household member with COVID-19 should notify their supervisor and follow steps recommended by the Centers for Disease Control and Prevention (CDC).

■ IDENTIFY WHERE AND HOW WORKERS MIGHT BE EXPOSED TO COVID-19 AT WORK.

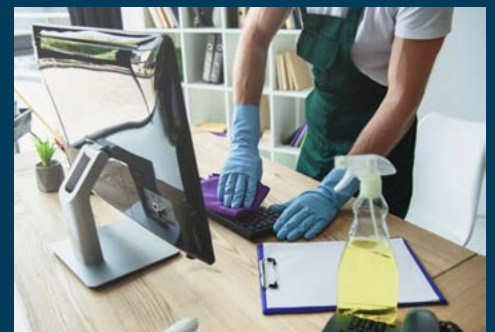
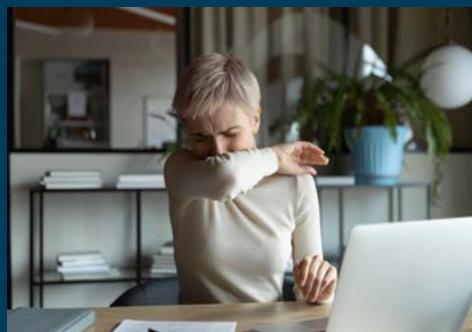
- Consider minimizing face-to-face contact with high-risk employees or assign work tasks that allow them to maintain a distance of six feet from other workers, customers, and visitors, or to telework if possible.
- Develop an Infectious Disease Preparedness and Response Plan. The plan should consider:
 1. Where, how, and to what sources workers may be exposed
 2. Non-occupational risk factors at home and in community settings
 3. Controls necessary to address risks

■ SEPARATE SICK EMPLOYEES.

- Employees who demonstrate symptoms at work should immediately be separated and sent home.
- If an employee tests positive for COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA).
- Employer should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure.

■ EDUCATE EMPLOYEES ABOUT HOW THEY CAN REDUCE THE SPREAD OF COVID-19.

- Follow the policies and procedures related to illness, cleaning and disinfecting, and work meetings and travel, including but not limited to the following:
 - (1) Stay home if you are sick, except to get medical care.
 - (2) Inform your supervisor if you have a sick family member at home with COVID-19.
 - (3) Wash your hands often with soap and water for at least 20 seconds. Use alcohol-based hand sanitizer with at least 60% alcohol if soap and water are not available.
 - (4) Avoid touching your eyes, nose, and mouth with unwashed hands.
 - (5) Cover your mouth and nose with a tissue when you cough or sneeze or use the inside of your elbow. Throw used tissues in the trash and immediately wash hands with soap and water for at least 20 seconds. If soap and water are not available, use hand sanitizer containing at least 60% alcohol.
 - (6) Clean and disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs.
 - (7) Avoid using other employees' phones, desks, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.
 - (8) Practice social distancing by avoiding large gatherings and maintaining distance (approximately 6 feet or 2 meters) from others when possible.





Maintain Healthy Business Operations

- **IDENTIFY A WORKPLACE COORDINATOR WHO WILL BE RESPONSIBLE FOR COVID-19 ISSUES AND THEIR IMPACT IN THE WORKPLACE.**
- **CONSIDER IMPLEMENTING FLEXIBLE SICK LEAVE AND SUPPORTIVE POLICIES AND PRACTICES.**
 - Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of and understand these policies.
 - Consider flexible policies that permit employees to stay home to care for a sick family member or take care of children due to school and childcare closures. Additional flexibilities might include giving advances on future sick leave and allowing employees to donate sick leave to each other.
 - Employers that do not currently offer sick leave to some or all of their employees may want to draft nonpunitive “emergency sick leave” policies.
 - Review human resources policies to make sure that policies and practices are consistent with public health recommendations and are consistent with existing state and federal workplace laws.
 - Connect employees to employee assistance program (EAP) resources (if available) and community resources as needed.
 - Provide for emergency communications.
- **ASSESS YOUR ESSENTIAL FUNCTIONS AND THE RELIANCE THAT OTHERS IN THE COMMUNITY HAVE ON YOUR SERVICES OR PRODUCTS.**
 - Be prepared to change your business practices if needed.
 - Identify alternate supply chains for critical goods and services.
 - Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
 - Talk with business partners about your response plans. Share best practices with other businesses in your communities (especially those in your supply chain), chambers of commerce, and associations to improve community response efforts.
- **DETERMINE HOW YOU WILL OPERATE IF ABSENTEEISM SPIKES FROM INCREASES IN SICK EMPLOYEES, those who stay home to care for sick family members, and those who must stay home to watch their children.**
 - Plan to monitor and respond to absenteeism in the workplace.
 - Implement plans to continue your essential business functions in case you experience higher than usual absenteeism.
 - Consider whether to institute flexible workplace and leave policies.
 - Cross-train employees to perform essential functions so the workplace can operate even if key employees are absent.
- **CONSIDER ESTABLISHING POLICIES AND PRACTICES FOR SOCIAL DISTANCING. Social distancing should be implemented if recommended by state and local health authorities. Strategies could include:**
 - Implementing flexible worksites (e.g., telework)
 - Implementing flexible work hours (e.g., staggered shifts)
 - Increasing physical space between employees at the worksite
 - Increasing physical space between employees and customers (e.g., drive-through, partitions)
 - Implementing flexible meeting and travel options (e.g., postpone nonessential meetings or events)
 - Downsizing operations
 - Delivering services remotely (e.g., phone, video, or web, video calling)
 - Delivering products through curbside pickup or delivery
- **EMPLOYERS WITH MORE THAN ONE BUSINESS LOCATION ARE ENCOURAGED TO PROVIDE LOCAL MANAGERS with the authority to take appropriate actions outlined in their COVID-19 response plan based on local conditions.**



Maintain a Healthy Work Environment

- **CONSIDER IMPROVING THE ENGINEERING CONTROLS USING THE BUILDING VENTILATION SYSTEM.**
This may include some or all of the following activities:
 - Increase ventilation rates.
 - Increase the percentage of outdoor air that circulates into the system.

- **SUPPORT RESPIRATORY ETIQUETTE AND HAND HYGIENE FOR EMPLOYEES, CUSTOMERS, AND WORKSITE VISITORS.**
 - Provide tissues and no-touch disposal receptacles.
 - Provide soap and water in the workplace. If soap and water are not readily available, use alcohol-based hand sanitizer that is at least 60% alcohol. If hands are visibly dirty, soap and water should be chosen over hand sanitizer. Ensure that adequate supplies are maintained.
 - Place hand sanitizer in multiple locations to encourage hygiene.
 - Place posters that encourage hand hygiene to help stop the spread of the virus, at the entrance to your workplace and in other workplace areas where they are likely to be seen.
 - Discourage handshaking.
 - Provide training to employees.
 - Provide safe and appropriate personal protective equipment (PPE); ensure it is properly fitted and consistently worn; and ensure it is maintained and replaced when appropriate.

- **PERFORM ROUTINE ENVIRONMENTAL CLEANING AND DISINFECTION.**
 - Routinely clean and disinfect all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs. If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
 - For disinfection, most common Environmental Protection Agency (EPA)-registered household disinfectants should be effective.
 - Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible. If use is unavoidable, clean and disinfect these items before and after use.
 - Provide disposable wipes so that commonly used surfaces (e.g., doorknobs, keyboards, remote controls, desks, other work tools and equipment) can be wiped down by employees before each use.

- **PERFORM ENHANCED CLEANING AND DISINFECTION AFTER PERSONS SUSPECTED/CONFIRMED TO HAVE COVID-19 HAVE BEEN IN THE FACILITY.**
 - If a sick employee is suspected or confirmed to have COVID-19, follow CDC cleaning and disinfection recommendations.

- **ADVISE EMPLOYEES TO MAKE ADDITIONAL PREPARATIONS BEFORE TRAVELING.**
 - Check the CDC's Traveler's Health Notices for the latest guidance and recommendations.
 - Advise employees to check themselves for symptoms of COVID-19 before starting travel and to notify their supervisor and stay home if they are sick.
 - Ensure employees who become sick while traveling or on temporary assignment understand that they should notify their supervisor and promptly call a healthcare provider for advice if needed.
 - If outside the United States, sick employees should follow company policy for obtaining medical care or contact a healthcare provider or overseas medical assistance company to assist them with finding an appropriate healthcare provider in that country.

- **TAKE CARE WHEN ATTENDING MEETINGS AND GATHERINGS.**
 - Carefully consider whether travel is necessary.
 - Consider using videoconferencing or teleconferencing when possible for work-related meetings and gatherings.
 - Consider canceling, adjusting, or postponing large work-related meetings or gatherings that can occur only in person.
 - When videoconferencing or teleconferencing is not possible, hold meetings in open, well-ventilated spaces.



Employment

“This pandemic has underscored the importance of my employees and managers. How can I establish flexible, meaningful employment policies and practices that will protect the health of staff and encourage them to do their best work?”

The COVID-19 pandemic and the fight against it have upended the workplace. Federal and state agencies have been issuing updated regulatory guidance that has a direct effect on employers' leave, compensation, benefits, and other policies. Salaried, hourly, and temporary workers alike have financial, healthcare, child- and dependent-care, privacy, and myriad other concerns.

The following checklists and insights can help you create a safe environment for your employees while also providing incentives that maximize efficiency and productivity.



Restarting the economy necessarily includes allowing businesses that were required to close (or limit operations) during this ongoing public health emergency to reopen and permit nonessential workers to return to work. There are many practical implications that employers must consider to prepare for reopening, to create a safe environment once employees return, and to ensure flexibility in the future. The checklist below can assist in identifying these issues and provide a guide for businesses during this process while taking into account the most current guidance from federal, state, and local authorities. Keep in mind that this guidance is constantly changing, and it is important to make sure that decisions are made based on the most recent guidance and/or in consultation with counsel.

READYING THE WORKPLACE

- Evaluate which employees will return to work and when
 - Are all employees needed?
 - Are all employees needed physically on site?
 - Can any employees work remotely?
 - Consider making the return to work voluntary or bringing employees back in phases
 - Watch out for bias to avoid possible discrimination claims
 - *Be transparent and have a rational basis for these decisions*
- Evaluate prior work schedules
 - Can schedules be adjusted to limit employee interaction (e.g., staggered start times or alternate workdays)?
- Develop an Infectious Disease Preparedness and Response Plan to keep employees safe
 - Implement social distancing to the extent possible
 - *Limit use of break rooms, conference rooms, and reception areas*
 - Evaluate options to increase physical space between employees and customers
 - *Can physical modifications to the workplace be made (e.g., erecting partitions, moving desks)?*
 - Promote and provide places for frequent hand-washing
 - Provide PPE, cleaning materials, and hand sanitizer
 - *Are employees required to wear masks? If so, provide them.*
 - Discourage sharing of equipment
 - Educate employees about these procedures and enforce them

MAINTAINING A HEALTHY WORKFORCE

- Develop protocols for cleaning and disinfecting the workplace consistent with the most current CDC, OSHA, and EPA recommendations
 - Implement before the workplace reopens as well as once employees return to work or operations are expanded
- Determine whether ventilation/air exchange in the workplace can be increased



- Determine whether to screen employees before they enter the worksite (e.g., temperature checks, visual inspections), implementing procedures that are consistent with current guidance from the EEOC
 - Make sure to protect the confidentiality of employees
- Develop and communicate a policy about employees who develop COVID-19 symptoms (fever, cough, shortness of breath, chills, repeated shaking with chills, muscle pain, headache, sore throat, and new loss of taste or smell)
 - If symptoms develop at home, employee should notify their supervisor or HR and stay home
 - If symptoms develop at work, employee should separate from others (employees/customers), notify their supervisor, and go home
- Develop a plan to limit third parties' presence at the worksite to the extent possible
 - Evaluate whether visitors should be limited to particular circumstances
 - Consider a health questionnaire for visitors entering the workplace
- Contact vendors and service providers to ensure safety protocols are sufficient

- If labor providers are used, ensure their safety protocols are consistent with yours

RESPONDING WHEN EMPLOYEE TESTS POSITIVE FOR COVID-19

- Gather information on the individual who has tested positive to determine extent of potential exposure
 - Instruct employee to stay home and self-quarantine consistent with the CDC guidelines and the treating physician's orders
 - Ask infected employee to identify all personnel with whom the employee came into close contact during the prior 14 days
 - If not known, gather information about the location(s) where the employee worked and personnel within the job site who would have reasonably accessed those areas and interacted with the employee
- Evaluate whether cleaning of areas where the infected individual worked is sufficient or whether certain areas (or the entire office) should be shut down for sanitization
- Notify co-workers that there was an individual physically present in the work area who has tested positive for COVID-19
 - Maintain confidentiality of identity of infected employee
 - Co-workers who were potentially exposed should be asked to remain at home for the following 14 days (at minimum, depending on whether symptoms appear or the co-worker tests positive)
- Notify contractors who visit the relevant location
- Implement a return-to-work policy for employees who have tested positive for COVID-19 or who are known to have been exposed to COVID-19, based on the most current guidance from the CDC and the treating physician's orders
 - Under the non-test-based strategy, the employee can leave home after all three of the following things have happened: (1) the employee has had no fever for at least 72 hours (without the use of medicine that reduces fever); (2) other symptoms have improved (e.g., cough or shortness of breath); and (3) at least 10 days have passed since the symptoms first appeared
 - Under the test-based strategy, the employee can leave home after all three of the following things have happened: (1) the employee has had no fever for at least 72 hours (without the use of medicine that reduces fever); (2) other symptoms have improved (e.g., cough or shortness of breath); and (3) the employee tested negative on two tests in a row, 24 hours apart (following CDC guidelines)

PLAN FOR FLEXIBILITY AND THE FUTURE

- Develop a plan for how to address concerns raised by employees about being at increased risk, or employees who request accommodations
- Evaluate whether existing leave policies need to be modified on a temporary basis to accommodate employees dealing with COVID-19 issues
- If existing policy requires a doctor's note before an employee can return to work (for a non-COVID-19 reason), consider a temporary change to that policy in light of the overtaxed healthcare system
- Evaluate whether work meetings can be limited and modified to be conducted remotely
- Consider necessity of business-related travel
 - Can travel be reduced or eliminated?
 - What alternatives exist?
 - Can client meetings be scheduled virtually?
- Develop or update your telecommuting policy to address remote work
 - Will it apply to all positions or only specific ones?
 - Keep in mind the post-COVID-19 landscape as well
- Evaluate other existing policies and procedures — workplace safety, accommodation requests, etc. — and determine whether any changes are needed

COMMUNICATE WITH EMPLOYEES

- Ensure employees understand changes to the workplace and expectations
- Provide frequent updates to employees
- Continue to inquire about travel outside of the country, signs and symptoms of respiratory distress, and contact with other individuals who have been in high-risk areas, had a COVID-19 diagnosis, or experienced respiratory problems
- Communicate with employees about next steps the company will take after an employee tests positive for COVID-19

COVID-19 has already drastically impacted all aspects of our society in a very short time. The protocols for treatment and the laws and regulations the government is implementing to deal with the virus are also rapidly changing. Jones Walker is prepared to assist in navigating these legal and business challenges. For additional information concerning how to handle COVID-19 issues, please contact our team members, who stand ready to provide up-to-date, solutions-focused legal guidance and advice.



Tax, Benefits, and Executive Compensation

“Agency guidance on federal, state, and local tax policy, employee benefits, and executive compensation, is being updated constantly in response to COVID-19. How can I ensure that my company’s tax and human resources operations and strategies support a reboot of my business?”

Tax policies have a major impact on national, state, and local economies, so it’s no surprise that governments are using the power of the purse to help businesses reopen, protect vulnerable workers, and increase (or redirect) tax revenues. The US Congress, the Department of Labor, and the Internal Revenue Service have also taken a number of steps to provide relief to participants in health, welfare and retirement plans, including extended deadlines and changes to plan administration requirements, all of which must be considered when updating plan documents and sending participant communications.

The following checklists and insights can help you identify and assess current tax, benefits, and executive compensation programs and strategies, bring your internal tax and HR departments up to speed, and ensure compliance with emerging regulations.



Tax, Benefits, and Executive Compensation

■ TAX CALENDAR/TAX TEAM REBOOTS:

- Reboot Tax Department:
 - Communicate/consult with Human Resources (HR), if necessary, in order to determine current Tax staff
 - Determine current/new duties/responsibilities for Tax staff (make sure no items/tasks/deadlines slip through the cracks)
- Update all internal contacts at company
- Update all external contacts at departments of revenue/collector's offices/assessor's offices
- Check all mail throughout entire company (including outside tax department) for any new notices, etc. (and check corresponding response deadlines)
- Check all relevant calendars for any upcoming dates/deadlines
- Check for any tax notices, etc. that may have come in (and related deadlines)
- Check/confirm any state-specific (or local-specific) deadline extensions and upcoming deadlines for any needed filings/submissions/reporting
- Confirm document retention policy and documentation of current impact/issues (for use with future audits, sampling, etc.)
- Contact all tax consultants/contractors for status of assigned matters

■ REMOTE WORKER NEXUS ISSUES:

- Communicate/consult with HR in order to:
 - Determine where all workers have been working and are currently working
 - Determine where workers will be working in the near-term and medium-term future following restart
 - Determine/analyze state-specific tax nexus issues (state-by-state analysis) based on employees' locations for purposes of:
 - Individual income tax nexus
 - Nexus re: income tax withholding for employers
 - Corporate income tax nexus
 - Corporate franchise tax nexus
 - Sales/use tax nexus
 - State unemployment insurance (UI) tax nexus/thresholds
 - Nexus for any other taxes
 - Confirm states' reporting and payment requirements in any new geographical areas based on employee activities
 - Determine state-specific reprieve provisions regarding remote worker tax nexus for each specific tax type
 - State-by-state analysis

■ INCENTIVE CONTRACTS/SALES CONTRACTS/OTHER BUSINESS CONTRACTS:

- Review contracts and check for applicable requirements and related timing deadlines
- Check incentive contracts
 - Review capital improvement requirements
 - Review investment requirements
 - Review job/employment requirements
 - Review other incentive contract requirements
- Possible renegotiation of incentive contract terms

■ PROPERTY TAX:

- Determine near-term property tax filing deadlines
 - Any extended deadlines about to come up following a grant of extension?
- Review possible current property valuation adjustments (current year)
 - Ex.: Louisiana — La. R.S. 47:1978.1
- Review possible obsolescence opportunities
 - Economic obsolescence
- Confirm where all inventory/equipment/etc. is located currently
- Determine where all inventory/equipment/etc. will be located in near term following restart of business

- Determine reason for any stalling/stacking/location of any personal property items
 - Constitutional (Commerce Clause) issues — is location of property due to restriction on transport/travel capabilities, etc., or is the location due to economic reasons?
- Communicate with local assessors/collectors
 - Determine availability of options to help impacted taxpayers re: submission of returns/reports, payments, etc.

■ INCOME TAX/FRANCHISE TAX:

- Determine near-term state income tax and franchise tax filing deadlines
 - Any extended deadlines about to come up following a grant of extension?
- Determine near-term state income tax and franchise tax filing/return issues
 - Return filing options
 - Mailbox rules
 - Electronic filing options/requirements
- Analyze state vs. federal income tax issues re: COVID-19 relief
 - Piggybacking vs. decoupling
- Find applicable point persons at respective departments of revenue (DORs)
 - Determine available programs/options with DORs to help impacted taxpayers
- Potential valuation adjustment options for tax calculation purposes

■ SALES/USE TAX:

- Communicate/consult with inventory management/contract personnel in order to:
 - Confirm where all inventory/equipment/etc. is located currently
 - Determine where all inventory/equipment/etc. will be located in near term following restart of business
 - Determine reason for any stalling/stacking/location of any tangible personal property items
 - Constitutional (Commerce Clause) issues — is location of property due to restriction on transport/travel capabilities, etc., or is the location due to economic reasons?
 - Confirm extent of (or plan for) any contract changes, which may impact taxability/nexus
 - Delivery terms, delivery locations, service locations
- Address “trust tax” issues and related “trust tax” accounts
 - Collected amounts in “trust tax” accounts need to be remitted timely to state and local collectors
- Determine near-term state and local sales/use/lease tax filing deadlines
 - Any extended deadlines about to come up following a grant of extension?
- Determine near-term tax filing/return issues
 - Return filing options
 - Mailbox rules
 - Electronic filing options/requirements

■ STATE-LEVEL WITHHOLDING:

- Address “trust tax” issues and related “trust tax” accounts
 - Collected amounts in “trust tax” accounts need to be remitted timely to state and local collectors
- Determine near-term tax filing deadlines
 - Any extended deadlines about to come up following a grant of extension?
- Determine near-term tax filing/return issues
 - Return filing options
 - Mailbox rules
 - Electronic filing options/requirements

■ STATE UI TAX:

- Determine near-term tax filing deadlines
 - Any extended deadlines about to come up following a grant of extension?
- Determine near-term tax filing/return issues
 - Return filing options
 - Mailbox rules
 - Electronic filing options/requirements

■ **WELFARE BENEFIT PLANS:**

If employees were terminated during a shutdown period:

- If group medical coverage was dropped, how will coverage be reinstated?
- Were COBRA notices provided timely?
- If employees received COBRA coverage, how will waiting periods, deductibles, and out-of-pocket costs be handled upon return to work?
- Can cafeteria plan elections be made, or must prior elections be reinstated?

If employees were furloughed or scheduled for reduced hours without a termination of employment:

- Will employees be allowed to reinstate previous cafeteria plan elections if eligibility continued but they did not make contributions during periods of leave?
- If employer paid premiums for coverage during leave, can such amounts be recouped upon return to work?
- If coverage was dropped during leave, can (or must) coverage and previous cafeteria plan elections be reinstated through re-enrollment or similar process?
- Were consents of insurance carriers and relevant third party administrator obtained if any practices deviated from the plan document or insurance policy?

Affordable Care Act considerations

- If employees were on unpaid leave and in a “stability period,” did the employer continue to offer “affordable” and “minimum value” coverage?
- If an employer uses the “look back” method to determine compliance, how were leave hours counted for purposes of the “measurement period” (to determine eligibility for coverage in the next succeeding plan year)?
- Did employer update the Summary of Benefits and Coverage to include diagnosis of COVID-19-related illnesses with no-cost sharing, and were any other changes made?
- Flexible spending accounts
- Dependent care accounts – Can elections and/or contributions be reinstated upon return to work if employees changed elections prior to leave or did not submit reimbursements during shutdown periods?
- Healthcare reimbursement accounts – If contributions were not made during periods of unpaid leave, how will contributions be handled upon return to work?

General

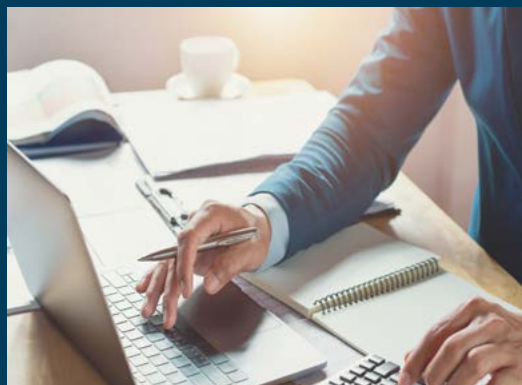
- Has employer amended the plan and the summary plan description to reflect diagnosis and testing for COVID-19 at no cost sharing, and any other changes resulting from the COVID-19 outbreak?
- Have processes been implemented to address the suspension of deadlines related to COBRA notices and elections, HIPAA special enrollment rights, and ERISA claims and appeals?

■ **RETIREMENT PLANS:**

- If employees received paid leave, were plan contributions properly withheld and remitted?
- If hardship withdrawals or enhanced loan features under the CARES Act were implemented, were employee communications sent out, and when will the plan be amended?
- Have required minimum distributions been suspended for 2020, and relevant communications sent to employees to satisfy the summary of material modification requirements?
- How will employer handle periods of leave affecting eligibility and vesting?
- Will employee experience a “break in service” at some point during 2020?
- If employer maintains a safe harbor plan and contributions were suspended, was notice timely sent to employees, and will contributions be reinstated during 2020?
- If employees were terminated, did any participants request a distribution of their benefits, and if so, can the distribution be processed once they are rehired?

■ **EMPLOYMENT AGREEMENTS:**

- How will bonuses based on productivity measures be handled (e.g., will shutdown periods be excluded in calculating bonuses)?
- Were “full time and attention” clauses fulfilled during periods of leave?
- If employees were terminated or are not returning to work, have termination provisions been followed, and any payment obligations fulfilled?
- Do employment agreements contain force majeure clauses that would allow employer to amend or modify agreements?
- If pay reductions have been implemented, were employment agreements amended to provide for the reduction?
- Will the board of directors or the compensation committee have to take action to approve or ratify any changes made as a result of COVID-19?





Insurance and Risk Transfer

“How can I determine whether my business is covered for COVID-19-related issues under existing insurance policies, and what options do I have for limiting future risks or liabilities?”

While insurance is a familiar and widely used tool to help mitigate business risks, many policies simply did not foresee or account for the COVID-19 pandemic. To get your company up and running again or to expand capacity and services, you’ll need to assess your current coverage, manage potential claims or disputes with insurers, and identify existing gaps. Looking ahead, you’ll want to explore business continuity, cybersecurity, life and health, directors and officers, and other insurance options that can help smooth potential bumps in the road.

The following checklists and insights can help you conduct an audit of your insurance coverage needs and take steps to decrease the risk of doing business in the COVID-19 era.



Businesses should continue to do their best to protect employees, customers, and the public from exposure to COVID-19. But, despite using best efforts and complying with the pertinent laws, regulations, and guidelines, a business owner still faces financial risks from business interruption, property damage, and claims by employees, customers, and the general public. The following includes guidance on specific COVID-19-related issues for business owners.

CONTRACTUAL RISK TRANSFER

Business owners can manage such risks in a number of ways, including risk transfer — that is, moving the risk of loss from the business owner to a third party such as through insurer, through an exculpatory or limitation of liability clause, through an indemnity agreement, or by law, such as when a statute provides a business owner with immunity from or protection against certain types of claims.

INSURANCE

When re-opening, business should examine insurance coverages in order to maximize protection from COVID-19 losses. First, obtain full copies of all insurance policies. Make sure the policies are still in effect and address renewals and replacements. Second, review the policies to determine coverage with respect to COVID-19 losses or claims. At a minimum, a business should have the following policies to protect it from the following claims or losses:

PROPERTY INSURANCE

Property insurance protects against direct property loss or damage to insured property, including equipment, from covered causes of loss. Determine whether covered causes of loss are “specified perils” or “all risks.” The latter provides the broadest level of protection, and may cover the costs to disinfect the insured property. Many property policies provide coverage for financial losses due to an impairment of business operations by a covered cause of loss, such as business interruption coverage, or when access to insured property is prohibited by order of a civil authority.

Additionally, when reopening a business, you should closely survey and examine the property. Since the shutdown, the insured property may have suffered “direct physical loss or damage” that now impairs the business operations. The inability to be present on the insured property allowed inventory to be damaged. Such post shutdown damage events may trigger “business interruption” coverage, even if the policy excludes a virus as a covered cause of loss.



GENERAL LIABILITY

General liability insurance protects a business from bodily injury claims by customers or other third parties who allege that they were negligently exposed to COVID-19. It also protects against personal injury claims, such as false detention, imprisonment, and trespass actions as well as advertising injury claims, such as a claim that an employee was disparaging a competitor by wrongfully asserting that the competitor’s property was infected.

EMPLOYER LIABILITY/WORKERS’ COMPENSATION

Employer liability/workers’ compensation insurance compensates most claims by employees suffering bodily injuries in the course and scope of work. It should cover a claim by an employee that he was infected while at work.

EMPLOYMENT PRACTICES LIABILITY

Employment practices liability insurance covers claims by employees for discrimination, harassment, infliction of emotional distress, or wrongful termination. Some policies also provide additional coverage for claims brought by third parties (customers, clients, suppliers, and service providers) for harassment and discrimination.

When examining a specific policy, look for exclusions, such as contamination exclusion, pollution exclusion, and bacteria or virus exclusion. Depending on the language, an exclusion may not preclude COVID-19 coverage. Also, an exclusion may not apply to all coverages under the policy. Also examine policy conditions, such as when and how notice of a claim is required.

Whether a specific policy covers any first-party loss or any claim against a business owner depends on the facts that caused the loss or claim, the actual terms and

conditions in the policy, and how the courts have applied such terms and conditions. This can be complicated and difficult. If you need any help in analyzing your policy and advice regarding coverage, please seek legal counsel.

INDEMNITY

Under the indemnity agreement, one party (the “indemnitor”) agrees to indemnify the other party (the “indemnitee”) from the liabilities that may arise out of the work, services, or goods that are the subject of the underlying contractual relationship. For example, a business owner may require a vendor, supplier, or service provider to indemnify it against any claims by employees of the vendor or service provider.

In most states, an indemnitee can be indemnified for its own negligence, even if the loss was the result of the indemnitee’s sole negligence. But to be enforceable, such an indemnity obligation should be in writing, be signed by an authorized representative of the indemnitor, and be conspicuous (highlighted; in bold font, large font, all capitals, under a specific caption, etc.), and should clearly and explicitly state that the indemnitor will indemnify the indemnitee for any and all claims, including claims arising out of the sole negligence or sole fault of the indemnitee.



Each state’s laws regarding when and how a party can be indemnified for its own negligence are different; thus owners should seek legal counsel help to advise whether such clauses are effective and how they should be written and executed.

EXCULPATORY/LIMITATION OF LIABILITY CLAUSES

An exculpatory clause, sometimes called a “limitation of liability,” “waiver of liability,” “release of liability,” or “release,” is designed to relieve a party in advance from liability for a negligent act that injures or damages the releasing party. That is, an exculpatory clause is a contractual waiver of one party’s right to sue, before that party suffers a loss. For example, a business owner may require a customer or other third party to sign a waiver of any claims for bodily injury or property damages before allowing the party entry onto the business premises.

Each state treats exculpatory clauses differently, and while a properly drafted exculpatory clause may be enforceable in some states, such clauses are the least effective risk transfer tool. Most exculpatory clauses maintain an absence of bargaining power on the part of the party waiving his claim, which may preclude enforceability. In most states, such exculpatory clauses do not apply to injuries or damages caused by gross negligence or intentional acts. Also, in some states, such clauses are ineffective against claims by or on behalf of minors.

Requiring an employee of a service provider to execute a waiver that surrenders his tort rights in order to gain entry onto the property to do his or her job may be frowned upon by a judge, and particularly by a jury. Also, it may not be practical or a good business practice to have customers, clients, or other visitors sign waivers in order to enter the premises. The adverse impact on goodwill and negative publicity probably does not outweigh the value of the exculpatory clause, assuming the clause is enforceable and effective. The value of an exculpatory clause is greatly reduced if a liability insurance policy would cover the claim that is the subject of the exculpatory clause.

But to better ensure enforceability in those states where such clauses are effective, an exculpatory clause should be in writing, be signed by the person waiving his claim, be conspicuous (highlighted; in bold font, large font, all capitals, under a specific caption; etc.), and should clearly and explicitly state that the releasing party is waiving all claims for bodily injury, disease, sickness, or death, even if the claim arises out of the sole negligence or sole fault of the party being released. **Please note that each state’s laws regarding exculpatory clauses are different, and thus owners should seek legal counsel to advise whether such clauses are effective and how they should be written and executed.*

FINAL OBSERVATIONS AND GUIDANCE

It is important to continue to emphasize safe practices and follow the applicable laws, regulations, and guidelines, and to do so as if you had no ability to transfer risk. In the meantime, analyze your coverage and enhance your ability to transfer risks brought on by the pandemic, particularly through insurance policies.

If and when possible, enter into favorable indemnity agreements with those companies whose employees may be present on your property. As noted above, exculpatory clauses are the least effective contractual risk transfer tool. Even if such clauses are effective, it may not be practical to have customers, clients, or other visitors sign a waiver to enter the premises. The adverse impact on goodwill and negative publicity probably outweighs the value of the exculpatory clause, assuming enforceable and effective. This is especially true if your liability policy will cover such exposure claims.



Real Estate

“Now that my real estate property is to open to the public, what should I and the building occupiers consider to ensure a safe and healthy environment for reopening?”

For some owners and occupiers, the COVID-19 pandemic has changed the need for and use of their office, manufacturing, retail, and other space. Some businesses may need less real estate than before, while others may need additional room to accommodate social distancing.

The following section provides considerations for your real estate property to welcome back tenants, customers, and guests.



INTRODUCTION

The pandemic caused by the novel coronavirus has triggered a global shockwave, reminding governments, businesses and citizens of the pervasive and disruptive power of infectious diseases. Economies both large and small, Fortune 100 corporations and neighborhood shops, have all struggled to adapt to shelter-in-place and quarantine orders, all of which have combined to significantly slow the worldwide economy.

As infection, hospitalization and death rates begin to moderate, state and local governments in the United States are beginning to develop plans for reopening their respective economies. Perhaps no segment of the business world is tasked with more responsibility to plan for and implement safe returns to work than real estate owners and occupiers. From office building owners, hotel operators, restaurateurs, and retailers, everyone is likely asking similar questions – how to repopulate real estate assets and restart the businesses conducted therein.

LEGAL CONSIDERATIONS

Generally speaking, acknowledging that property law is often jurisdiction-specific, owners and occupiers of premises have a duty to protect guests and customers from unreasonable risk of physical harm. What is “unreasonable” is often fact driven and depends on unique circumstances. Owners and occupiers should always endeavor to provide a standard of care that a guest or customer would reasonably expect in terms of safety and services during their stay or visit.

A vexing dilemma triggered by the novel coronavirus is embedded in its name. Defining reasonableness in the weeks and months to come will require novel approaches to safely welcoming back tenants, customers and guests without crippling the underlying businesses. With so much uncertainty still looming, it’s hard to plan with confidence. Real estate occupiers can benefit from detailed, location-by-location reopening readiness efforts. Everyone should benefit from open, proactive and practical dialogue.

This section attempts to provide a comprehensive guide and collection of best practices to assist real estate owners and occupiers in their collective efforts to determine what the applicable real environment — from the downtown office tower to the boutique retailer — needs to look like for a safe and healthy return to work.

STRATEGIC CONSIDERATIONS

STAYING INFORMED

Guidance from public health officials, governments and industry groups will undoubtedly continue to evolve as businesses begin to reopen. Owners and occupiers of all real estate environments should regularly monitor (a) federal resources such as the Center for Disease Control’s (CDC) COVID-19 Summary Page or OSHA’s Guidance on Preparing Workplaces for COVID-19 and (b) state and local proclamations detailing reopening requirements. Similarly, many real estate trade associations — from the National Restaurant Association to the International Council of Shopping Centers — are publishing specific reopening suggestions. Several national real estate advisory firms are also circulating white papers outlining recommended reopening practices. Finally, real estate owners and occupiers should take a moment to review relevant language in insurance policies and leases to determine if they are subject to any existing requirements regarding preparedness, response and remediation costs, including, without limitation, any contractual obligations regarding janitorial and sanitation services.



PLANNING

Once fully informed, real estate owners and occupiers will need to understand – and communicate to their respective stakeholders – that there is no such thing as zero risk when reopening in the midst of the current pandemic. The goal is to minimize risk by implementing thoughtful plans requiring the input of owners, managers, employees, and third party-professionals such as insurance agents, accountants and attorneys. More than ever, the health, safety and well-being of guests and employees are at the top of the real estate agenda. Businesses should prepare for a more discerning customer-base and workforce that will expect continuous, credible assurances they are visiting or working in safe environments. Keep in mind that the planning process never really ends. Be prepared to continually review and adopt best practices and new ideas to demonstrate an active and ongoing commitment to a safe and healthy environment.

COMMUNICATION

The success of a sound recovery plan will hinge on how effectively it is communicated to all key players in the real estate ecosystem. For instance, an effective plan should include clear displays of updated safety, health and wellness information, and provide resources for employees, visitors and occupants at key locations throughout the premises. Internally, review all communication and preparedness plans and ensure that all employees and building staff are informed, know their role in keeping the property and its guests safe, and aware of all communication and reporting protocols. Also consider ongoing communication with landlords, co-tenants, and vendors (maintenance, security and sanitation) to inform them of the steps being taken to address the pandemic, all in an attempt to foster a healthy real estate environment.

IMPLEMENTATION

Planning without action is just daydreaming. A sound plan should be readily translatable into concrete, short-term objectives and achieved through specific functional areas. In the real estate arena, both large and small business can benefit from certain engineering and administrative controls. Areas of focus should include, but are not limited to, (a) reconfiguring space to achieve social distancing; (b) inspecting key building systems; and, where possible, increasing natural ventilation and air filtration; (c) developing targeted cleaning protocols and conducting comprehensive deep cleaning and assessment of the premises; (d) investigating “touch-free” standards and potential technologies for building entry and high traffic areas; and (e) inventorying and confirming a sustainable supply of hand sanitizers, gloves, face coverings and related items. Always be mindful, however, that no one policy or protocol is sufficient. Think in terms of a well-documented, layered defense strategy designed to minimize risk and provide employees, guests and customers with a standard of care that they would reasonably expect.

EXPECTING THE UNEXPECTED

Once a real estate space has been reoccupied and business resumes, owners and occupiers should remain hyper-vigilant and prepared to quickly respond to unexpected or changing circumstances. Responding to the new normal will continue to challenge all owners and occupiers of commercial real estate and building a team of trusted advisors is more important than ever before.



We are here to help.

While COVID-19 will be with us for the foreseeable future, we expect the situation to remain fluid as new information, policy, and guidance is released by government agencies and industry groups. For ongoing updates, we encourage you to visit our [COVID-19 Center](#) on our Disaster Prep and Recovery Blog.

For answers to your specific questions and solutions that address your specific needs and circumstances, please reach out to one of the designated Jones Walker attorneys below. You may also contact the firm at info@joneswalker.com.

Business Reopening:

J. Marshall Page, III
D: 504.582.8248
mpage@joneswalker.com

Leslie LaCoste
D: 504.582.8146
llacoste@joneswalker.com

Seth A. Levine
D: 504.582.8268
slevine@joneswalker.com

Employment:

Sidney F. Lewis, V
D: 504.582.8352
slewis@joneswalker.com

Mary Margaret Spell
D: 504.582.8262
mspell@joneswalker.com

Christopher S. Mann
D: 504.582.8332
cmann@joneswalker.com

Jane Henican Heidingsfelder
D: 504.582.8306
jheidingsfelder@joneswalker.com

Insurance/Risk Transfer:

Covert J. Geary
D: 504.582.8276
cgeary@joneswalker.com

Robert L. Walsh
D: 504.582.8598
rwalsh@joneswalker.com

Tax:

Timothy P. Brechtel
D: 504.582.8236
tbrechtel@joneswalker.com

Alex H. Glaser
D: 504.582.8312
aglaser@joneswalker.com

William M. Backstrom, Jr
D: 504.582.8228
bbackstrom@joneswalker.com

Matthew Mantle
D: 504.582.8418
mmantle@joneswalker.com

Real Estate:

Henry F. O'Connor, III
D: 251.439.7517
hoconnor@joneswalker.com

Mark T. Davis
D: 601.949.4909
mdavis@joneswalker.com

Remy J. Donnelly
D: 504.582.8254
rdonnelly@joneswalker.com