BUSINESS IN THE ERA OF COVID-19

A GUIDE FOR MOVING YOUR BUSINESS FORWARD
BUSINESS IN THE ERA OF COVID-19: A GUIDE FOR MOVING YOUR BUSINESS FORWARD

This guide for moving your business forward in the era of COVID-19 includes best practices and guidance on the latest public health guidelines and rules and explains potential liability risks to help employers manage business operations during the COVID-19 pandemic. The topics covered include:

1. **Workplace Safety**: What Employers Need to Know to Keep Workplaces Safe and Reduce Risks of Exposure Liability
2. **Premises Liability**: What Employers Need to Know to Reduce Risks of Premises Liability
3. **Employment Practices**: What Employers Need to Know when Managing Employees
4. **Workers’ Compensation**: What Employers Need to Know about Workplace Injury Claims
5. **Manufacturing Personal Protective Equipment (PPE)**: What Manufacturers Need to Know to Make PPE and Reduce Products Liability Risks

The guidance provided in this handbook has been prepared by legal experts from several South Carolina law firms that are members of the South Carolina Chamber Legal Committee. Their expertise includes workplace safety and OSHA law, premises liability, employment law, workers’ compensation law, and products liability. The guide provides detailed and clear answers from our legal experts to the many questions employers have about the five topics listed above.

The SC Chamber acknowledges and thanks our legal experts for their time, effort, and expertise to develop this handbook and to help the business community in South Carolina navigate the many new and challenging workplace issues employers face as they re-open and ramp up operations amidst the coronavirus pandemic.

Legal guidance included in this handbook is based on guidelines and rules provided by federal and state public health and labor agencies including but not limited to Centers for Disease Control and Prevention (CDC), Occupational Safety and Health Administration (OSHA), U.S. Environmental Protection Agency (EPA), U.S. Food and Drug Administration (FDA), U.S. Department of Labor (DOL), S.C. Department of Health and Environmental Control (DHEC), S.C. Department of Employment and Workforce (DEW) and S.C. Department of Labor, Licensing and Regulation (LLR).

The best practices and guidance provided in this handbook do not constitute legal advice. Businesses should consult legal counsel on specific legal questions pertaining to your business or industry.

---

**THIS GUIDE IS COMPILED BY THE SOUTH CAROLINA CHAMBER OF COMMERCE**
Table of Contents

Workplace Safety: What Employers Need to Know to Keep Workplaces Safe and Reduce Risks of Exposure Liability
   Social Distancing and Spatial Changes in the Workplace ................................................................. 4
   Taking Temperatures of Employees and Third Parties in the Workplace ........................................ 5
   Cleaning a Workplace Prior to Reopening .......................................................................................... 6-7
   Suspected or Confirmed COVID-19 Case in the Workplace .............................................................. 7-8
   General OSHA Considerations on Reopening the Workplace ........................................................ 9
   Use of Personal Protective Equipment (PPE) in the Workplace ....................................................... 9-11
   Workplace Safety and Customers/Public ......................................................................................... 11-12
   Workplace Safety and Employee’s Refusal to Work ...................................................................... 12
      • Travis W. Vance, Fisher & Phillips, LLP
      • Michael D. McKnight, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Premises Liability: What Employers Need to Know to Reduce Risks of Premises Liability ........... 13
      • Adam N. Yount, Haynsworth Sinkler Boyd, P.A.

Employment Practices: What Employers Need to Know when Managing Employees
   General Employment Practice and Policy Recommendations .......................................................... 14-15
   Privacy in the Workplace .................................................................................................................. 15-16
   Trade Secret Protection Amidst COVID-19 ....................................................................................... 16-17
   Understanding State and Federal Unemployment Benefits ......................................................... 17-18
   Understanding Work From Home Issues ......................................................................................... 18-19
   Providing PPE to Employees ........................................................................................................... 19
   Families First Coronavirus Response Act (“FFCRA”) ................................................................. 19-20
   Employer Duties If Employee Tests Positive .................................................................................... 20-21
   Pay Reductions ............................................................................................................................... 21-22
   Testing and Checking Symptoms of Employees ............................................................................. 22-24
   Bonus and Hazard Pay ..................................................................................................................... 24-25
   ADA Considerations ....................................................................................................................... 25-26
      • Michael M. Shetterly, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
      • Tory Ian Summey and Jennifer K. Dunlap, Parker Poe Adams & Bernstein LLP
      • Pierce T. (Perry) Maclennan, Haynsworth Sinkler Boyd, P.A.
      • Stephen C. Mitchell, Fisher & Phillips, LLP

Workers’ Compensation: What Employers Need to Know about Workplace Injury Claims
   Workers’ Compensation Exclusivity ............................................................................................... 27
   What is Covered Under Workers’ Compensation ......................................................................... 27
   What is not Covered Under Workers’ Compensation .................................................................. 28-29
   Workers’ Compensation Presumptions ........................................................................................... 29-30

Manufacturing Personal Protective Equipment: What Manufacturers Need to Know to Make PPE and Reduce Products Liability Risks .................................................................................. 31-32
      • John F. Kuppens, Nelson Mullins Riley & Scarborough LLP
      • H. Clayton Walker, Jr., Haynsworth Sinkler Boyd, P.A.
Centers for Disease Control and Prevention (CDC) Checklist for Re-opening Workplaces
(issued May 14, 2020)

WORKPLACES DURING THE COVID-19 PANDEMIC

The purpose of this tool is to assist employers in making/reopening decisions during the COVID-19 pandemic, especially to protect vulnerable workers. It is important to check with state and local health officials and other partners to determine the most appropriate actions while adjusting to meet the unique needs and circumstances of the local community.

Should you consider opening?
✓ Will reopening be consistent with applicable state and local orders?
✓ Are you ready to protect employees at higher risk for severe illness?

Are recommended health and safety actions in place?
✓ Promote healthy hygiene practices such as hand washing and employees wearing a cloth face covering, as feasible
✓ Intensify cleaning, disinfection, and ventilation
  Encourage social distancing and enhance spacing between employees, including through physical barriers, changing layout of workspaces, encouraging telework, closing or limiting access to communal spaces, staggering shifts and breaks, and limiting large events, when and where feasible
✓ Consider modifying travel and commuting practices. Promote telework for employees who do not live in the local area, if feasible.
✓ Train all employees on health and safety protocols

Is ongoing monitoring in place?
✓ Develop and implement procedures to check for signs and symptoms of employees daily upon arrival, as feasible
✓ Encourage anyone who is sick to stay home
✓ Plan for if an employee gets sick
✓ Regularly communicate and monitor developments with local authorities and employees
✓ Monitor employee absences and have flexible leave policies and practices
✓ Be ready to consult with the local health authorities if there are cases in the facility or an increase in cases in the local area

ANY NO

OPEN AND MONITOR

ANY NO

MEET SAFEGUARDS FIRST

cdc.gov/coronavirus
Workplace Safety

What Employers Need to Know to Keep Workplaces Safe and Reduce Risks of Exposure Liability

Social Distancing and Spatial Changes in the Workplace

How should employers implement social distancing in the workplace?

1. Social distancing is defined to mean simply that employees should stay more than six feet apart from each other. This is much easier said than done in the workplace. Employers should consider adapting the physical workplace to permit social distancing to be implemented to the extent feasible. Employers should consider reconfiguring shared office arrangements and open floor worksites and consider closing common areas. Employers also should continue to encourage telework whenever possible and feasible with business operations.

2. Additional considerations for soft, nonpermanent, spatial changes in the workplace prior to reopening include the following:
   - Partitions between receptionists and others that may directly interact with the employees.
   - Separating employees who work in adjacent cubicle spaces.
   - Removing every other chair in break areas and lunchrooms.
   - Adding partitions to tables where employees congregate during breaks.
   - Requiring employees to walk in designated one-way lanes in hallways and corridors to avoid “head-on” pedestrian traffic.
   - Restrict movements between departments and/or functions (e.g. do not allow traffic between production and office workplaces).
   - Consulting with landlords about converting communal restrooms to single-seat bathrooms to avoid close contact between users.
   - Utilizing HVAC contractors to increase the number of air changes in your workplace.
   - Arrange for food trucks or other food delivery services to serve employees outside to separate employees during lunch breaks.
   - Providing hand sanitizer stations outside each restroom and each door that is commonly touched or used.
   - Upgrading your teleconference equipment to allow for more teleconferences; and
   - If possible, arrange for pick-up and drop-off delivery of packages to be done outside.
Taking Temperatures of Employees and Third Parties in the Workplace

*If employers are not required to do so, should they take employees’ temperatures?*

Unless required by a local or state order, taking temperatures is not required in most workplaces. Doing so will require extensive planning, training, and could even be quite expensive. In addition, many individuals infected with COVID-19 won’t exhibit any symptoms, and thus temperature screening likely won’t prevent all workers who can transmit the disease from entering your worksite. Although the CDC recommends screening employees for fevers of more than 100.4 degrees Fahrenheit, keep in mind some states or localities may recommend different thresholds. If you decide to screen your employees, also plan to check the temperatures of guests, clients, vendors, and contractors to ensure a safe work environment.

*What else should we keep in mind if we decide to take our employees’ temperatures?*

Besides ensuring that you have provided your workers with proper training and personal protective equipment (PPE), and have considered the relevant privacy aspects of the process (both of which are noted and discussed above), you should consider the following factors:

- **Maintaining Proper Social Distancing:** Not only should screening employees be protected, you should ensure safety measures are taken for workers waiting in line to be screened. This includes ensuring employees stand six feet or more from each other while they wait to have their temperature taken.

- **Logistics:** You may have to screen 50 or more employees prior to the beginning of each shift. This likely will cause delays and create disruption to normal production activities. Be prepared to create outdoor waiting areas (e.g. tents and other temporary structures) where employees must be in lengthy lines prior to entering the facility. Employee privacy, especially where screening takes place and results are announced, should be accounted for during this time.

- **Wage Issues:** Keep in mind that employees may claim that their time waiting in line or being screened for a fever before their shift is compensable and thus they should be paid for it. Although no case law or U.S. Department of Labor guidance on point currently exists on this topic, we recommend that you err on the side of paying employees throughout the screening process. This also requires you to implement a system to have employees “clock in” when they get in line for screening and to document their time.
Cleaning a Workplace Prior to Reopening

What steps should employers follow to clean workplaces prior to reopening?

1. Employers should follow CDC guidance for cleaning and disinfecting workplaces when implementing their cleaning procedures.

2. The CDC recommends that for areas outdoors, employers should maintain existing cleaning practices because viruses are killed more quickly by warmer temperatures and sunlight.

3. For indoor areas, the CDC recommends normal, routine cleaning for areas that have been unoccupied within the last seven days. For indoor areas that have been occupied within the last seven days, the CDC recommends that frequently touched surfaces and objects made of hard and non-porous materials (glass, metal, or plastic) be cleaned and disinfected more frequently. Frequently touched surfaces and objects made of soft and porous materials, such as carpet, rugs, or material in seating area, should be thoroughly cleaned or laundered. If possible, the CDC recommends considering removing soft and porous materials in high traffic areas. Surfaces and objects that are not frequently touched should be cleaned on a routine basis.

4. To clean and disinfect:
   - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (Note: “cleaning” will remove some germs, but “disinfection” is also necessary).
   - For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
   - Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer’s instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
   - Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
   - Gloves and gowns should be compatible with the disinfectant products being used.
   - Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash. Follow the manufacturer’s instructions regarding other protective measures recommended on the product labeling.
Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.

Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks. Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.

If you require gloves or masks or other PPE, prepare a simple half-page Job Safety Analysis (JSA): list the hazards and the PPE (gloves, masks, etc., as needed), and the person who drafts the JSA should sign and date it.

5. If employers are using cleaners other than household cleaners with more frequency than an employee would use at home, the employer must also ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA’s Hazard Communication standard (29 CFR 1910.1200). Simply download the manufacturer’s Safety Data Sheet (SDS) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of the Hazard Communication Program (which almost all employers maintain). Employers should maintain routine cleaning and disinfection procedures after reopening to reduce the potential for exposure.

Suspected or Confirmed COVID-19 Case in the Workplace

What should you do if an employee is suspected or confirmed to have COVID-19?

You should follow this four-step plan when addressing a suspected or confirmed COVID-19 case in your workplace:

1. Isolate/Quarantine Confirmed Employees
   - The suspected or confirmed to be infected employee should remain at home until released by a physician or public health official. If a medical note releasing the employee is unavailable, follow the CDC guidelines on when an employee may discontinue self-isolation, which contain specific requirements dependent upon whether the employee tested positive for COVID-19 and the symptoms exhibited.

2. Address and Isolate Employees Working Near an Infected Co-Worker
   - You should ask infected employees to identify all individuals who worked in close proximity (within six feet) for a prolonged period of time (10 minutes or more to 30 minutes or more depending upon particular circumstances, such as how close the employees worked and whether they shared tools or other items) with them during the 48-hour period before the onset of symptoms. Send home all employees who worked closely with the infected employee for 14 days under CDC Guidance to
ensure the infection does not spread. While quarantined, those employees should self-monitor for symptoms, avoid contact with high-risk individuals, and seek medical attention if symptoms develop.

- Please note that the CDC has developed alternative guidelines for critical workers. If you are an essential business, asymptomatic employees who have been directly exposed to a confirmed case of COVID-19 can continue to work if certain guidelines are met. The CDC may issue even further guidance once businesses begin to reopen, as evidenced by their new webpage devoted to reopened businesses.

3. Clean and Disinfect Your Workplace

- After a confirmed COVID-19 case, follow the CDC guidelines for cleaning and disinfecting the workplace. Your cleaning staff or a third-party sanitation contractor should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill person, focusing especially on frequently touched surfaces.
- If using cleaners other than household cleaners with more frequency than an employee would use at home, ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA’s Hazard Communication standard. Simply download the manufacturer’s Safety Data Sheet (SDS) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of a Hazard Communication Program.

4. Notify Your Employees

- Following a confirmed COVID-19 case, and as recommended by the CDC, notify all employees who work in the location or area where the employee works of the situation. You will want to do so without revealing any confidential medical information such as the name of the employee unless the employee has signed an authorization to disclose their diagnosis. Inform employees of the actions you have taken, including requiring employees who worked closely to the infected worker to go home. Let employees know about your sanitizing and cleaning efforts and remind them to seek medical attention if they exhibit symptoms. The failure to notify employees at your location of a confirmed case may be a violation of OSHA’s general duty clause, which requires all employers to provide employees with a safe work environment.

Prepared by Travis W. Vance, Fisher & Phillips, LLP
General OSHA Considerations on Reopening the Workplace

What are the general OSHA considerations for employers reopening their workplaces?

1. There is no specific OSHA standard or regulation that requires employers to do anything regarding COVID-19.

2. As in all states, South Carolina’s General Duty Clause requires: “Employers shall maintain a place of employment which is free of recognized hazards which may cause death or serious physical harm to his employees.” Where an employer follows available guidance from OSHA, the CDC, and federal, state, and local health authorities to the extent feasible and has acted in accordance with any governmental orders related to re-opening, the likelihood that an employer would be cited under the General Duty Clause or that such a citation would be affirmed on appeal is likely slim.

3. Guidance provided by the South Carolina Department of Labor Licensing and Regulation (“LLR”) states that employers should provide “basic workplace hazard education about coronavirus and how to prevent transmission.” As a best practice, it is recommended that before re-opening, all employers develop and implement written safety protocols for each of their establishments and provide some level of training to employees on those protocols.

4. In determining what steps are necessary to protect employees in the workplace upon re-opening, OSHA has grouped employers in four categories ranging from lower risk for those with employees who have no contact with people known or suspected to be infected with COVID-19 to very high for those with employees who are exposed to individuals with known or suspected sources of virus in performing their job tasks. According to OSHA guidance, employers with the highest exposure include those in the health care, death care (mortuary), and sanitation fields. Employers should assess their operations to determine their risk profile and implement protocols to prevent the spread of the virus consistent with that risk profile.

5. Employers who have high risk profiles or unique operational structures should consider retaining an occupational health or medical specialist to advise with respect to specific steps that should be taken to protect employees from exposure to COVID-19.

Use of Personal Protective Equipment (PPE) in the Workplace

What are the rules with respect to the use of personal protective equipment (PPE), facemasks, and other supplies used in the workplace to protect employees from COVID-19?

1. Personal protective equipment, or “PPE,” is equipment worn to minimize exposure to hazards that cause serious workplace injuries and illnesses. Items such as gloves, safety
glasses and shoes, earplugs, hard hats, and respirators are examples of PPE that are commonly used in the workplace.

2. Employers should make appropriate PPE and other supplies available and in adequate supply where needed to protect employees from COVID-19. Any PPE used in the workplace by employees must be maintained in a sanitary and reliable condition.

3. There is understandably a great deal of confusion surrounding the use of face coverings, surgical masks, and filtering facepieces (respirators), all of which are sometimes referred to as “masks” in the workplace in relation to COVID-19. Except for filtering facepieces and surgical masks used in healthcare, face coverings and surgical masks are not considered PPE and are not regulated by OSHA. Only masks considered filtering facepieces are regulated by OSHA. The following chart summarizes the difference between the three primary categories of these items:

<table>
<thead>
<tr>
<th>Face Covering/Cloth or Paper Face Mask</th>
<th>Surgical Face Mask</th>
<th>Filtering Facepiece Respirator (e.g. N95, N100, P95 Halfmask)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loose fitting/not PPE</td>
<td>Loose fitting/not PPE outside of healthcare</td>
<td>Tight fitting/considered PPE</td>
</tr>
<tr>
<td>Not regulated by OSHA/no fit-testing or medical evaluation</td>
<td>Not regulated by OSHA outside of healthcare/no fit-testing or medical evaluation</td>
<td>Regulated by OSHA/fit-testing, medical evaluation, and respiratory program and training if use required/only Appendix D to 29 C.F.R. 1910.134 must be provided to employee if use voluntary</td>
</tr>
<tr>
<td>Prevents transmission of virus between people in close proximity</td>
<td>Protects wearer from large droplets, splashes, or sprays of bodily fluids</td>
<td>Reduces exposure to aerosols and large droplets</td>
</tr>
<tr>
<td>Recommended by CDC for use in public settings where social distancing is infeasible (e.g. grocery store, etc.)</td>
<td>Recommended for use in healthcare workers if no N95s available for patients with suspected and confirmed virus</td>
<td>Primarily for healthcare workers caring for patients with suspected and confirmed virus and other high-risk employers</td>
</tr>
</tbody>
</table>
4. Employers may require employees to wear face coverings, cloth or paper face masks, or surgical masks to help prevent the spread of COVID-19 among employees or customers so long as they have determined that doing so will not create a hazard given the nature of the employees’ job duties. These items, regardless of whether they are required or permitted, are not regulated by OSHA. There is no generally applicable OSHA directive requiring employers to provide these items to employees.

5. Employers who provide filtering facepiece respirators, including N95 masks, but do not require them must provide employees with a copy of Appendix D to OSHA’s Respiratory Protection Standard (29 C.F.R. 1910.134) and verify that the respirators do not pose an additional hazard to employees. Employers who require the use of filtering facepiece respirators must have a written respiratory protection program, including training, a medical evaluation, fit testing, and comply with other provisions.

6. Employers should ensure they have adequate supplies of items that are not considered PPE by OSHA but that may help prevent the spread of COVID-19 such as:
   
   - In non-healthcare settings, non-medical masks, and face coverings
   - Disposable (or washable) gloves
   - Disinfectant spray
   - Disinfectant wipes
   - Spray bottles
   - Hand soap and sanitizer
   - Eye/face protection
   - Other protective measures as recommended by safety or occupational medicine specialists.

7. When PPE is necessary, the employer should adopt a PPE program that addresses: (1) the hazards present; (2) the selection, maintenance, and use of PPE; (3) the training of employees on the use of the PPE; and (4) provide ongoing monitoring of the program to make sure it remains effective in protecting employees.

Workplace Safety and Customers/Public

How can employers address employee safety issues surrounding interactions with customers and the public?

Employers whose employees regularly interact with customers and members of the public will likely be in OSHA’s medium to high risk categories depending on the scope and degree of interaction required to perform their job duties. In these circumstances, employers should consider adopting many of the same strategies they would use to prevent the spread of COVID-19 among employees, including:
• Finding ways to increase physical space between customer and employees.
• Where social distancing is not possible, install physical barriers between customers and employees.
• Consider requiring face coverings in accordance with CDC recommendations for customers and members of the public interacting with employees or entering customer facilities.
• Enhanced cleaning and disinfection strategies consistent with CDC and state and local health department recommendations.
• Consider whether screening mechanisms may be appropriate, particularly where interactions between customers and members of the public with employees will last for prolonged periods of time (10 to 30 minutes, depending on the circumstances).

Workplace Safety and Employee’s Refusal to Work

What are the considerations from a workplace safety perspective if an employee refuses to work due to concerns about COVID-19?

1. OSHA prohibits employers from taking any adverse employment actions against an employee who exercises rights under the OSH Act. The definitions of “adverse action” and “exercise of rights” can be expansive.

2. Employees may file a retaliation complaint online, meaning that little effort is required to initiate a complaint. When this occurs, employers will receive a notice of complaint and request for documents/position statement. The LLR may choose to sue on behalf of employee.

3. An employee’s refusal to work due to COVID-19 may be protected if it is demonstrated that there is: (1) an immediate threat of serious harm; (2) perception of the threat is in good faith and objectively reasonable; (3) the employer refuses to correct hazard after request; and (4) there is inadequate time to involve OSHA. A generalized or speculative fear of harm is probably not sufficient. Depending on the complaint, consider whether it may be appropriate to call OSHA for clarification of correct procedures.

Prepared by Michael D. McKnight, Ogletree, Deakins, Nash, & Stewart, P.C.
Premises Liability

What Employers Need to Know to Reduce Risks of Premises Liability

In South Carolina, business owners have a duty to take reasonable measures to limit customers’ exposure to dangerous conditions. A business owner must take reasonable or due care to provide a safe environment to their customers. This duty of care generally requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in a safe condition, and to avoid creating the conditions that would render the premises unsafe.

There is currently no specific heightened or enhanced duty for a company to follow the Centers for Disease Control and Prevention’s (CDC) guidelines. However, it is best practice for businesses to follow CDC guidelines to avoid potential third-party liability claims given the abundance of information and guidance available to the public regarding social distancing and other preventative measures. Businesses should exercise reasonable diligence to understand the risks of failing to take reasonable, precautionary measures. Failure to do so may increase exposure to lawsuits from third parties.


Businesses should take reasonable precautions to limit their customers’ exposure to COVID-19 while at their premises. Businesses can follow the CDC guidelines by using reasonable mitigation strategies which include, but are not limited, to:

- separating sick employees;
- educating employees about how they can reduce the spread;
- using proper building ventilation, filtration and humidity control;
- practicing proper hand hygiene (e., providing sufficient hand sanitizer and soap);
- practicing proper respiratory hygiene (e., providing tissues and places to properly dispose of tissues);
- encouraging customers to stay at least six feet apart while at the company’s premises;
- discouraging handshaking; and
- routine cleaning and disinfection (e., high contact surfaces, dust, removing trash, cleaning restrooms).

*Prepared by Adam N. Yount, Haynsworth Sinkler Boyd, P.A.*
Employment Practices

What Employers Need to Know when Managing Employees

General Employment Practice and Policy Recommendations

What are the general rules for employers to follow to manage your employees during the pandemic?

1. Review recommended safety protocols (CDC, OSHA, State orders, local orders) and make sure the worksite can comply.

2. Recalling in Waves: If not recalling everyone, employers should make sure their recall procedures are fair. Recall obviously cannot be based on any protected class, but employers should remember that partial recalls can be subject to the same scrutiny as a partial reduction in force – meaning, employers should be prepared to show the legitimate business justification for its recall process.

3. Confirming Duties: Some employees may be coming back to new jobs, new roles, or modified roles. For employees who were previously classified as exempt, but coming back to modified roles, careful attention to whether their job is still exempt is appropriate.

4. Assessing Pay: If employees are not coming back to the same pay, employers should make sure they have complied with wage notification laws (E.g., in South Carolina, a reduction in pay requires 7 days advanced notice). If employees are being rehired (because they were officially terminated) employees are entitled to a new wage, pay and hours of work notification. Further, for exempt employees, if their pay is being reduced, an employer will want to make sure the reduced salary still complies with the salary basis test under the Fair Labor Standards Act (FLSA). Also, for H1B employees, special care should be made to analyze whether they will continue to be paid prevailing wages for the type of role.

5. Benefits: If benefits were cut-off or suspended during the furlough, employers will need to consider rolling employees back on to benefits. In most instances, the terms of the benefit plan should address recall/rehire, but to the extent they do not, employers should consider some common rules of thumb:
   - Qualified Plans – Generally, if a person is recalled within 12 months, they are immediately reinstated into the plan as a participant.
   - Non-Qualified Plans – Whether the employee steps back into the plan will depend upon whether the employee was technically separated under 409A. If, under 409A, the employee was separated, they likely cannot resume coverage and must wait for the new plan year to start.
6. Drug Testing: Employers should review their drug testing policies and determine whether those recalled would be subject to pre-hire drug screening, and if so, whether an exception should be made. Additionally, employers should expect responsiveness issues on drug testing as labs attempt to respond to COVID-19. If delays in drug testing related to pre-hire and post-accident occur, they should be documented, and alternative arrangements should be documented as well. For employers who have USDOT drivers on their workforce, careful attention to pandemic protocols should be consulted – USDOT COVID 19 Guidance.

7. Leave Policies: Consider adopting formal or informal leave of absence policies/practices related to COVID-19. Employers should be prepared to deal with considerable anxiety among workers being asked to return. Many will seek excuses from having to return to the worksite or having their telecommuting privileges end. Employers should be ready to deal with these issues by:

- understanding what the Family and Medical Leave Act (FMLA) covers and what it does not cover;
- understanding what the Americans with Disabilities Act (ADA) covers and what it does not cover;
- understanding the Families First Coronavirus Response Act (FFCRA) and whether it applies to the employer and, if so, what it covers.
- Additionally, employers should understand that the NLRA (National Labor Relations Act) and OSHA both afford protections to employees who are working concertedly to seek better protections in the workplace or who are not working out of concerns for the safety of the working environment. NLRA and OSHA issues can be nuanced. Protections may not be afforded to someone expressing generalized fears, but when employees get more specific about their concerns, legal protection may result. In short, all employers would be well served to take a liberal approach to absences by employees who are communicating well (reporting promptly).

Privacy in the Workplace

*What should employers know about employees’ privacy rights as it relates to COVID-19?*

While the ADA generally blocks an employer’s ability to make medical inquiries and to undergo medical exams, the Equal Employment Opportunity Commission (EEOC) has advised that the business necessity standard under the ADA is met as long as the inquiries and exams are directly related to stopping the spread of COVID-19. Meanwhile, state and local orders are seizing upon this loosening of federal standards by mandating testing or inquiries as part of their reopening orders. As employers navigate this, they will want to keep a few issues straight:
1. While the ADA will allow you to collect COVID-19 information from employees during the pandemic, the employees still enjoy a privacy right of not having their information shared with others (such as co-workers or the public). The EEOC recommends that employers designate an employer representative so that managers and supervisors know to whom they should report a COVID-19 diagnosis or presentation of symptoms associated with the virus. This person would theoretically be the person who interviews employees for contact tracing.

2. Employers should also implement procedures designed to make sure that screening protocols are done in a way that they are private. For example, technically, other people waiting to have their temperature taken should not be aware of those who tested positive for a fever.

3. While HIPAA generally does not apply to the collection of COVID-19 related information, once your employee wellness plan is involved, anything they do to treat an employee, or if they retain the information collected in the employee’s medical file, it may be HIPAA protected. So, recording medical screening data will likely increase compliance efforts.

**Trade Secret Protection Amidst COVID-19**

What should employers understand about teleworking/returning employees and trade secrets?

1. Restrictive Covenants: Employers may wish to have returning employees who have not previously executed restrictive covenant agreements do so upon returning to work. Alternatively, employers may want to have employees who signed an older version of such an agreement sign an updated version. State laws differ, but generally, such agreements can protect employers’ competitive position by deterring unfair competition, solicitation of customers, and disclosure of confidential information.

2. Trade Secret Protection: In the haste with which employers had to shut down physical workplaces, many employers were primarily (and properly) focused on employee safety and health, as well as other issues. Continuing employer programs to safeguard confidential information may not have been the highest priority. Similarly, in the rushed transition to working from home, special access may have been allowed and special arrangements may have been made that are contrary to the employer’s standard operating procedures, and these arrangements may not have been documented.

   - Employers should work with IT and document any deviations from standard operating procedures as well as the reasons for those deviations. Employers and IT should also determine whether the reasons continue to justify those deviations or whether the deviations should be modified or eliminated.
considering allowing continued telecommuting and work from home as part of social distancing measures should consider the following:

- Encrypt data and tighten down access to encrypted data.
- Deploy secure devices to remote employee.
- Enhance VPN Security, password strength and telephone/video conference protections.
- Limit access to games and websites on devices used to access employer system.
- Keep track of devices and secure physical workspaces.
- Prevent external device attachment.
- Beware of insecure wi-fi.
- Refresh phishing warnings and employee trainings.
- Formalize work from home arrangements and train employees.
- Prepare an incident response plan.


Understanding State and Federal Unemployment Benefits

What benefits are available for individuals out of work?

- South Carolina provides up to $326 per week for up to 20 weeks.
  - Benefits are determined week-to-week.
  - Any payment from employer to employee will be considered wages and will offset benefits.
- The CARES Act provides an additional $600 per week for individuals that are eligible for at least $1 in state benefits.
  - Also provides a benefit equal to the state benefit plus $600 per week for individuals that are not eligible for state benefits that meet COVID-19-related conditions.

Are individuals eligible for benefits if they are working reduced hours?

- Individuals working less than 30 hours and receiving less than the weekly benefit amount are eligible for state benefits

If an employee refuses to return from layoff or furlough, can they continue receiving benefits?

- Generally, no. Individuals are disqualified from receiving benefits if they leave work voluntarily without good cause or refuse to accept suitable work. “Suitable work” is work for which an individual is qualified and pays at least 90% of previous salary during the first 8 weeks of benefits, and 75% of salary after 8 weeks.
To facilitate bringing employees back to work, S.C. Department of Employment and Workforce (DEW) has asked that employers use the Employer Self Service Portal to report if they have offered an individual a job and they refused.

What changes has South Carolina made to unemployment in response to COVID-19?

- Waiver of one-week waiting period (Executive Order 2020-11)
- Online work search regulation waived (Executive Order 2020-10). “Actively seeking” requirement still applies, but will be satisfied if employee is actively (and reasonably) seeking to return to the same employer after a COVID-19-related layoff.
- DEW removed charges for COVID-19 claims. Will not affect an employer’s experience rating (tax class).
- UI tax payments for the first quarter of 2020 are now due June 1, 2020.
- Employers can make voluntary “COVID-19 Support Payments” to employees who are furloughed because of COVID-19 without affecting the employee’s eligibility (Executive Order 2020-22). Employers must submit a COVID-19 Support Payment Plan Application (found at https://dew.sc.gov/covid-hub/employerhub) before making any Support Payments and file for benefits on behalf of each employee who will receive the Support Payments. The Order defines “COVID-19 Support Payments” as:
  - A voluntary payment, or series of payments, made by an employer to an employee in response to furloughing the employees;
  - Which is for past services rendered;
  - Which the employee is not obligated to repay;
  - Which is provided without obligation for the employee to perform or not perform any act in connection with the individual’s status as an employee; and
  - Which is made pursuant to a plan provided by the DEW and on the COVID-19 Support Payment Plan Application.

Understanding Work from Home Issues

Am I required to permit employees to work from home?
- Generally, no unless as a reasonable accommodation for an employee with a disability.
- If an employee claims to have a disability which will prevent them from returning to the office, employers should engage in the interactive process to determine if teleworking is an effective accommodation and whether it would constitute an undue hardship on the business.

Should I allow employees in at-risk categories to work from home during the pandemic?
- If the employee’s responsibilities can be completed from home, then you should consider permitting temporary telework for the duration of the pandemic.

What rights does an employee who has been teleworking have to refuse to return to the office?
Generally, employees do not have a right to refuse to return to the office following a period of teleworking. Employers should clarify that their teleworking policies are temporary and subject to change at the employer’s discretion.

Providing PPE to Employees
(detailed explanation also found in Workplace Safety Section)

Am I required to provide employees with PPE when my business re-opens?

- PPE requirements are administered by OSHA. OSHA is regularly publishing guidance to assist specific industries in maintaining a safe and healthy workplace.
- There are no mandatory OSHA standards that cover employers’ COVID-19 response, but employers could be cited under the General Duty Clause for failing to provide a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

Families First Coronavirus Response Act (“FFCRA”)

How should employers manage the new federal paid leave law – FFCRA?

1. The Families First Coronavirus Response Act (“FFCRA”), the federal paid leave law passed in response to COVID-19, is in effect until December 31, 2020. Thus, businesses will still need to comply with its provisions even when workers return to work, and the economy starts to open back up.

2. Employers should first confirm whether they are subject to the FFCRA. The FFCRA covers employers with 500 or fewer employees. The rules for counting 500 employees are slightly different from those found in other recent programs such as the Paycheck Protection Program.

3. If your business employs less than fifty (50) employees, you are entitled to claim an exemption from FFCRA requirements. Nothing has to be filed to claim the exemption, but businesses should carefully document the reasons for claiming the exemption. Information concerning the exemption can be found on the U.S. Department of Labor’s website.

4. Employers are required to post the Model Notice/Poster in the same manner that you provide other employment notices such as rights under the workers’ compensation laws and anti-discrimination laws. Employers should also develop appropriate
processes/procedures for employees to request FFCRA leave to include submittal of appropriate documentation substantiating the need for leave.

5. Employees are only entitled to FFCRA benefits if they otherwise have work to perform for the business. In other words, they cannot get to work because of a qualifying reason. The FFCRA does not protect employees against lay-off, furlough, or wage reduction.

6. If an employee is not eligible for FFCRA, the business should consider leave options under the businesses vacation/sick/PTO plan, as well as consider whether the employee qualifies for normal FMLA of leave as an accommodation under the Americans with Disabilities Act.

7. The FFCRA has two primary components: Emergency FMLA and Emergency Paid Sick Leave. The only qualifying reason for EFMLA is an employee who is unable to work or telework to care for the employee’s child if the child’s school or childcare facility is closed. There are six qualifying reasons for Paid Sick Leave.

8. The amount of time off and the amount of money the employee will receive will depend upon the need for the leave and is subject to daily and per employee caps.

9. Tax Credit Reimbursement – payments made pursuant to the FFCRA are 100% refundable to the employer through payroll tax credits. Employers can be immediately reimbursed by reducing their required deposits of payroll taxes on IRS Form 941 filed quarterly. If employers’ tax deposits are not sufficient to cover the credits, employers may request an immediate payment from the IRS by submitting Form 7200.

10. Employers are advised to keep detailed, accurate records of all requests for leave, substantiating documentation, and payments made pursuant to the FFCRA.

**Employer Duties If Employee Tests Positive**  
(detailed explanation also found in Workplace Safety Section)

*What should an employer do if an employee tests positive for COVID-19?*

1. Employers do not have a legal obligation to report confirmed COVID-19 cases to SCDHEC – that obligation lies with providers.

2. Employers should follow current CDC/SCDHEC guidelines with respect to quarantining the individual and potential return to work. Generally, the infected individual should remain at home until released by a health care provider.
3. Employers should ask infected employees to identify all individuals that worked in close proximity to them during the 48-hour period prior to onset of symptoms. Employers should send home all employees who worked closely with the infected employee.

4. Employers should follow current CDC/SCDHEC guidance as to a potential closure of the work site and protocol for disinfecting/cleaning the workspace.

5. Employers should consider notifying other employees and/or customers. Many different laws are implicated by an employer’s decision on this front. For instance,
   - OSHA’s general duty clause requires that employers “furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.” Arguably, failure to notify employees of confirmed or suspected COVID-19 exposure could be in violation of this mandate, particularly for vulnerable workers.
   - Tort/negligence law requires that businesses act as a reasonably prudent person/business would under the circumstances. Employees may not be able to take advantage of tort remedies due to workers’ compensation exclusivity, but customers and other third parties like vendors or contractors certainly can. If a business fails to disclose confirmed (or perhaps suspected) cases of COVID-19, arguably they are not taking reasonably prudent steps to ensure the safety of customers and other third parties. Damages from tort lawsuits can be devastating, particularly if there is a death at issue.
   - When notifying other employees/customers, employers should not disclose any personal identifying information about the employee infected, but rather simply advise that the employee/customer has been in contact with someone that has tested positive/suspected positive for COVID-19.

6. Employers need to log the employees’ COVID-19 diagnosis on their OSHA 300 log if it is “work-related.” In addition, a COVID-19 infection could be a covered claim under workers’ compensation law.

Pay Reductions

_How should employers handle pay reductions?_

1. The South Carolina Payment of Wages Act mandates that employees receive seven (7) days’ written notice prior to any reduction in wages. If any of your employees are subject to employment contracts or collective bargaining agreements, consult those agreements prior to instituting any wage reduction, as often they will contain limitations on decreasing compensation.
2. For your hourly employees, a reduction in their hours is permissible provided the adequate notice is provided. Be mindful of any benefits adjustments that must be made if an employees’ hours go below a certain threshold (the same would be true for salaried employees). For instance, if an employee’s average weekly hours drop below twenty (20), they may not be eligible under certain benefit plans.

3. A reduction in compensation for salaried, exempt workers is a bit more complicated. Generally, to maintain an employee’s exempt status under the Fair Labor Standards Act (“Act”), an employee’s salary should not fluctuate based upon their hourly output. However, there is an exception based upon a legitimate downturn in business that will allow the employer to reduce the employee’s salary and maintain the exemption. Be careful to document the reasons for the reduction in case of any FLSA audit. When restoring wages for salaried, exempt employees to pre-COVID levels, be careful not to change the pay multiple times during a short period of time to avoid losing the FLSA exemption.

Prepared by Pierce T. (Perry) MacLennan, Haynsworth Sinkler Boyd, P.A.

Testing and Checking Symptoms of Employees

What should employers consider when testing employees coming into work?

1. Taking employee temperature when they come to work: Many employers are simply taking employee temperatures as they come to work—every day or several times a week. Some issues to consider here include:
   - Employers are not required to collect medical information from employees when taking their temperatures. While taking temperatures or conducting other screening of employees prior to their shift, if you collect or distribute any medical information about an employee, it makes the likelihood of a privacy-related claim concerning the storage of the information more likely. Maintaining documents with this information increases the likelihood of such a claim. Instead, use a real-time thermometer and immediately inform employees if their temperature is above 100.4 degrees Fahrenheit in a private setting. This can be accomplished by setting up a temporary tent or shelter for the employee to step into for the test. In large facilities, employers should make sure that they have enough stations to avoid unnecessary lines or delay that could cause wage and hour issues. Some employers are staggering start times for certain lines or areas to address this issue. Developing a policy with these considerations in mind is critical.
   - Several precautions are needed for individuals who are taking the temperatures of employees, applicants, or customers. For example, to protect the individual who is
taking the temperature, employers must first conduct an evaluation of reasonably anticipated safety and health hazards and assess the risk to which the individual may be exposed. The safest thing to do would be to assume the testers are going to be exposed potentially to someone who is infected who may cough or sneeze during their interaction.

- Based on that anticipated exposure, employees must then determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including PPE. Different types of devices can take temperature without exposure to bodily fluids. Further, the tester could have a face shield in case someone sneezes or coughs. Further information can be found at https://www.osha.gov, which provides additional guidance for healthcare employees (including recommendations on gowns, gloves, approved N95 respirators, and eye/face protection).
- Employers should consider using infrared thermometers to assist with social distancing and avoid contact with the employees. If contact is made, appropriate steps should be taken to sanitize the thermometer.

2. COVID-19 Testing: Employers starting up after a complete shutdown may consider COVID-19 testing for all returning employees to establish a baseline of having no known disease. This may provide some sense of security for returning employees. Some issues to consider include:

- The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” 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. That’s because an individual with the virus will pose a direct threat to the health of others.
- Consistent with the ADA standard, an employer should ensure that any tests it administers are accurate and reliable. For example, the employer may review guidance from the FDA about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Make sure to check for updates, as this is a rapidly developing field.
- Employers should also consider the incidence of false-positives or false-negatives associated with a test. Remember that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.
- Keep in mind, also, that these are medical exams that must be conducted in a confidential way and the results need to be maintained in a separated medical file.
- Further, PPE should be provided to employees administering the test, as well as training on how to properly use the PPE. For those that may have an exposure to bodily fluids as part of their job, you should provide proper training on blood borne pathogens.
It may be advisable to contract with vendors that can provide medically trained people to conduct testing.

**Bonus and Hazard Pay**

*What issues should employers consider when offering bonus and hazard pay to incentivize and reward employees who come to work during this pandemic?*

1. Many employers are offering employees bonus and hazard pay to come to work. Some find it necessary as employees could make more at another job or on unemployment with the $600 weekly federal government enhancement set to expire at the end of July. Others simply want to reward their employees for their loyalty and hard work.

2. This practice is widespread and effective for employers with adequate resources. It motivates employees to work, rewards them for their efforts and, hopefully avoids morale issues that would arise if employees were required to come to work for less money than they could make staying at home and collecting unemployment. Nevertheless, employers should be wary of several issues when they offer these rewards.

3. Regular rate of pay: Most bonuses must be factored into the “regular rate of pay” for purposes of overtime calculation because they are non-discretionary bonuses. Ideally, the employer allocates the payments proportionate to how or when it was earned (e.g. $100 bonus for perfect attendance in a week). If that is the case, the calculation of regular rate is straightforward (e.g. hours of work in week X hourly rate + weekly bonus ÷ hours of work in week = regular rate; hours over 40 = 1.5 X regular rate). Some employers, however, allocate the payments over a month. In that case, the calculation of regular rate can be more complicated. The main point is to keep FLSA issues in mind when implementing an incentive plan so that something an employer intends to be a positive gesture doesn’t turn into a class action lawsuit.

4. Discretionary Bonus: Discretionary bonuses do not have to be factored into overtime. But the threshold to establish a discretionary bonus is more challenging than you might think. Generally, it must be a pure “thank you” bonus that is not announced ahead of time. If there is a formula designed to drive performance or attendance, it is not discretionary. Simply retaining discretion as to whether the bonus will be paid is NOT enough to avoid the overtime obligation mentioned above.

5. Be Clear the Bonus is Not a Repayment: The employer should not characterize any bonus or other payment as a “re-payment” or some sort of payment of wages that were held back. This could create issues with past overtime calculations, contributions to retirement programs and other issues.
6. SC Wage Payment Notice: Remember that the SC Wage Payment notice requires employers to provide 7 days written notice of any pay decrease. If employers decide to increase the hourly rate during the pandemic, they will need to provide the proper notice before returning the hourly rate to the original rate. One way to address this is to notify employees, in writing, at the time the increase is implemented when the temporary wage increase will end.

7. Morale issues: Employers should also be prepared for employee morale issues when the time comes to return the employees rate to normal. The employer will need to communicate with employees at the outset that the increase is temporary, why it increased the pay and why it is necessary to return the pay rate to normal. Non-union employers can expect unions to try to characterize this return to normalcy as a takeaway, so employers need to prepare their managers and supervisors to communicate with the employees to counter the union’s false claims. Again, notifying employees at the outset when the temporary increase will end could help address this issue.

8. Unionized Employers: If employers are represented by a Union, the employer must bargain over any change in wages, benefits or working conditions. This includes increases as well as decreases. Midterm bargaining often depends on the contract language and, unfortunately, the conditions that precipitate the need to offer a sudden increase in wages or bonus to incentivize better attendance are not conducive to the normal, often lengthy, bargaining process. While most Unions are receptive to a mid-term increase, they may try to condition the increase on additional benefits that the employer is not willing to provide. In that case, the employer can only lawfully implement the increase if the Union and employer are at legal impasse. In most situations, reaching impasse can be difficult and take more time than an employer has in a crisis. Fortunately, some NLRB decisions recognize a streamlined route to impasse in emergencies. Moreover, when making the proposal for an increase, employers should ensure it includes language giving the employer the unilateral right to unilaterally reverse the changes – usually with some notice.

**ADA Considerations**

*What issues could arise under the Americans with Disabilities Act (ADA), outside of testing and what are some best practices for dealing with this issue?*

1. PPE: The restart of many operations will require employees to start wearing personal protective gear, such as masks and gloves, and engage in infection control practices. Some employees may request reasonable accommodations due to a need for modified protective gear. This may include disability related accommodations under the ADA (e.g. non-latex gloves, modified face masks for interpreters or others who communication with an
employee who uses lip reading, or gowns designed for individuals who use wheel chairs), or a religious accommodation under Title VII (e.g. modified equipment due to religious garb). Employers should discuss the requests and provide modifications or an alternative if feasible and not an undue hardship.

2. Interactive Process (physical illness): Employers may also receive pandemic-related reasonable accommodations requests from employees whose disabilities put them at greater risk for COVID-19. Examples of such conditions include high blood pressure, chronic lung disease, diabetes, obesity, asthma, and employees whose immune system is compromised (examples of such conditions include chemotherapy for cancer and other conditions requiring such therapy). Employers should follow ADA obligations and engage in the interactive process to determine pandemic-related reasonable accommodations. In its latest guidance, the EEOC permits employers to provide temporary accommodations for pandemic-related requests and start the interactive process with an employee prior to re-opening your workplace.

3. Interactive Process (mental conditions): It is important to note that physical illnesses are not the only conditions that the COVID-19 pandemic might exacerbate. EEOC guidance mentions that individuals with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic. These conditions could also qualify as a disability. Of course, as with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist the employee and enable the employee to keep working; explore alternative accommodations that may effectively meet the employee’s needs; and request medical documentation if needed.

4. Undue Hardship: EEOC guidance also recognizes that an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. Therefore, employers may consider their specific and current circumstances to determine whether an accommodation would create a “significant difficulty” or “significant expense.” The EEOC cautions that these considerations do not permit employers to reject any accommodation that costs money, but that employers must weigh the cost of the accommodation against its current budget while considering constraints created by this pandemic. Employers should be aware that denials of accommodation based on significant difficulty or expense are likely to be challenged in litigation.

Prepared by Stephen C. Mitchell and Phillips L. McWilliams, Fisher Phillips, LLP
Workers’ Compensation
What Employers Need to Know about Workplace Injury Claims

Workers’ Compensation Exclusivity

*Does workers’ compensation exclusivity prevent tort claims by employees who claim they contracted COVID-19 at work?*

Likely, yes. Generally speaking, if an employee wishes to file a claim against an employer for an accidental “injury” suffered on the job, their exclusive remedies are the benefits provided under the South Carolina Workers’ Compensation Act and are therefore adjudicated by the South Carolina Workers’ Compensation Commission (hereinafter “Commission”), not the courts. See S.C. Code § 42-1-540; Sabb v. South Carolina State Univ., 567 S.E.2d 231, 234 (S.C. 2002). This assumes the employee and the employer are covered by the Act at the time of the work-related event which allegedly resulted in COVID-19 infection. It also assumes no exception to coverage exists (discussed below).

Employers who face tort claims for COVID-19 exposure should immediately consider asserting workers’ compensation exclusivity as their first line of defense and seek dismissal of any case filed in Court. Whether or not there is ultimate liability on the claim is something that will be considered and decided by the Commission based on the facts and evidence in each case.

What is Covered Under Workers’ Compensation?

*Are all contagious diseases covered under the Act?*

It depends. Common contagious diseases are generally not covered except in two instances: 1) where the disease results naturally and unavoidably from a workplace accident (injury by accident); or 2) where the disease is compensable as an occupational disease under the provisions of Chapter 11 of Act. See S.C. Code § 42-1-160 (definition of “injury). Occupational diseases are generally those resulting directly and naturally from exposure to hazards peculiar to the occupation in which the employee is engaged and which are in excess of those ordinarily incidental to employment. S.C. Code § 42-11-10(A). Unlike other common diseases, COVID-19 is currently a known workplace hazard that has been met with unprecedented governmental response including specific, targeted guidance and directives about preventing its spread in the workplace and relief for employees negatively affected by the inability of certain businesses to operate given the potential for spread in the workplace. Therefore, absent one of the exceptions discussed below, whether COVID-19 claims arise from allegations of accidental exposure to the disease in the workplace despite an employer’s efforts to prevent it (injury by accident) or that result from increased exposure to the disease that is particular to the occupation at issue (occupational disease) both are likely to be considered claims of “injuries” under the Act and therefore subject to the exclusive jurisdiction of the Commission.
What Is Not Covered Under Workers’ Compensation?

Are there exceptions to workers’ compensation exclusivity?

Yes, there are three recognized exceptions to workers’ compensation exclusivity, assuming the employer and employee would otherwise be covered. For injuries that would otherwise be subject to the Act’s exclusive remedies and procedures, there are three exceptions that could possibly apply to COVID-19 cases: 1) “intentional acts” by an employer or its “alter ego”; 2) the “dual persona” doctrine; and 3) where the injury arises from the acts of a subcontractor who is not the employee’s direct employer.

Intentional Acts by Employers or “Alter Egos”: The first exception is where the injury or illness arises from an intentional act committed with the deliberate or specific intent to injure by the employer or someone who is considered an “alter ego” of the employer. See Edens v. Bellini, 597 S.E.2d 863 (S.C. Ct. App. 2004) (holding that “[i]t is well settled that a common law cause of action is not barred by Section 42–1–540 [exclusivity statute] if the employer acted with a deliberate or specific intent to injure the employee” but rejecting an invitation to extend that rule to conduct by an employer that was “substantially certain” to result in injury to an employee). For purposes of this exception, the term “alter ego” means “dominant corporate owners and officers” not merely supervisory employees of an employer. See Dickert v. v. Metro Life, Ins. Co., 428 S.E.2d 700, 701-702 (S.C. 1993). Where lawsuits across the country have been filed against employers seeking tort relief for employees allegedly exposed to COVID-19, this “intentional act” exception has been the primary means utilized to try to circumvent workers’ compensation exclusivity. Under South Carolina’s exception, however, that will be a very difficult exception to establish.

Dual Persona Doctrine: The second exception applies in only those narrow cases where injuries are alleged to have occurred under circumstances that are entirely independent of the defendant’s obligations as an employer. This is known as the “dual persona” doctrine. See Mendenhall v. Anderson Hardwood Floors, and Shaw Industries, 738 S.E.2d 251 (S.C. 2013). In Mendenhall, the South Carolina Supreme Court held: “The dual persona doctrine is a narrow exception, applicable only where the second set of obligations that forms the basis of the tort suit is entirely independent of the defendant’s obligations as an employer. [Internal citation omitted.] Where those sets of obligations are intertwined such that they cannot be logically separated, application of the dual persona doctrine is inappropriate.” The two examples referenced by the Mendenhall case were: 1) where an automobile manufacturer’s employee was allegedly injured by a defect in the employer’s vehicle; and 2) where a hospital employee was treated by the hospital for a work-related injury and sued the hospital for medical malpractice.

Acts of a Non-Employing Subcontractor: Finally, an exception to exclusivity also exists where the injury results from the act of a subcontractor who is not the injured person’s direct
employer. S.C. Code § 42-1-540; Cason v. Duke Energy Corp., 560 S.E.2d 891, 893 n. 2 (S.C. 2002). This concept would cover a situation (and those like it) where a company hires a contractor to come on-site and perform a service or complete a project. In those situations, if the subcontractor’s employees get hurt, the employer would likely enjoy workers’ compensation exclusivity from any related tort claims by the subcontractor’s employees, provided the contractor was performing work which is generally part of the employer’s business. On the other hand (this is the exception), if an individual employed by the company is hurt by the actions of a subcontractor the company hired (or its employees), this exception says the subcontractor does not enjoy workers’ compensation exclusivity from tort claims brought by the company’s employees.

Workers’ Compensation Presumptions

Does a rebuttable presumption exist in South Carolina for first responders and other frontline workers who contract COVID-19?

Not currently. Currently those considered “first responders” or “front line workers” (such as healthcare/hospital employees, police officers and fire fighters), do not enjoy a “rebuttable presumption” that if they contract COVID-19 they contracted it at work. However, that is not to say that there are not already some built in presumptions in the existing statute and how it has been interpreted by the courts.

Based on South Carolina’s existing occupational disease statute, employees who are exposed to greater risk of COVID-19 than the general public by reason of their occupation can recover workers’ compensation benefits by proving, by a preponderance of the evidence, that they contracted COVID-19 from the particular hazard faced in their employment. S.C. Code § 41-11-10(A). The case of Fox v. Newberry County Memorial Hospital1 is instructive and illustrative on how such a COVID-19 case might be proven as an occupational disease under existing interpretive case law.

In Fox, a nurse contracted a contagious disease and brought a claim for compensation under the Act as an occupational disease. The nurse presented evidence, from herself and a certified internist, that by virtue of her employment she was regularly in physical contact with patients having the disease she contracted. Based on that evidence, the Court of Appeals concluded that her occupation involved exposure to a hazard in excess of those hazards of ordinary living or ordinary occupations. Given that the nurse also testified that she was not otherwise exposed to anyone with herpes in her personal life, and the lack of any evidence from the employer to the contrary, the Court concluded her infection was a compensable occupational disease. The Court also noted that these particular circumstances which involved evidence of a single identifiable exposure or event that caused the injury, the claim may also qualify for coverage under the Act

as an injury by accident, but did not discuss it further as it was not raised at the Commission level.

In Fox, having met her burden of proving increased exposure by her occupation, the nurse’s claim was held to be compensable based on the absence of evidence from the employer to the contrary. Legislation creating a rebuttable presumption would, generally speaking, remove the requirement that certain types of first responders prove as an initial matter that their occupations exposed them to COVID-19 in excess of those ordinarily incidental to employment and leave it to the employer to prove that the disease was contracted by other exposure or for other reasons.

The challenge with such legislation is defining those who would be entitled to the presumption and avoiding unnecessarily broad coverage. For example, if all “nurses” are covered under the law, depending on how the term “nurse” is statutorily defined, nurses whose duties did not necessarily involve an increased exposure to the virus (say a nurse in the neonatal intensive care unit) would still be entitled to a presumption of work relatedness if they contract the virus. If even more broadly defined to include all employees of certain health care facilities, it would create a presumption applicable to administrative employees of such organizations that may not have any regular contact with patients or other individuals who have the virus.

As of May 12, 2020, South Carolina joined at least eighteen other states that have either issued or are considering governmental orders or legislation to provide a rebuttable presumption or other favorable causation standards for COVID-19 related workers’ compensation claims by “first responders” and/or “front-line workers.” Currently, such legislation is pending in South Carolina. Whether it passes and in exactly what form remains to be seen.

Manufacturing Personal Protective Equipment (PPE)
What Manufacturers Need to Know to Make PPE and Reduce Products Liability Risks

As the world faces the unprecedented spread of the COVID-19 virus, essential resources such as hand sanitizer, face masks, medical gowns, and ventilators are suddenly in short supply. In response to the dwindling availability of critical protective gear, manufacturers have a unique opportunity to serve by supplying the sudden demand for critical products.

However, manufacturers considering whether to convert their facilities to produce vital equipment and protective gear should be aware that many of the needed products involve critical safety issues and are regulated in the United States by a variety of federal and state statutes, regulations, and administrative policies. The regulations can be complex, and more than one agency may regulate a given product, including the Food and Drug Administration (FDA), Alcohol and Tobacco Tax and Trade Bureau (TTB), U.S. Department of Labor (DOL), Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), the Centers for Disease Control (CDC), and numerous state agencies.

Fortunately, in response to the critical need for COVID-19 related products, federal agencies in the U.S. are issuing guidance that temporarily alters the rules for the design, production, and approval of essential resources. Manufacturers need to be aware of the federal regulations and administrative rules that ordinarily govern certain products as well as the temporary guidelines, enforcement policies, and use authorizations that are being issued on an almost daily basis.

Below are some examples of recent guidance issued by relevant federal agencies. These issues often require analysis of the interaction of multiple sets of regulations, and the guidance is being continually updated. It is recommended that experienced counsel be consulted on these issues.

- **Hand Sanitizer**: The FDA and TTB have issued a series of documents that relax enforcement standards for entities that want to convert their facilities to produce hand sanitizers or the necessary ingredients to make hand sanitizers. Guidance from the TTB additionally allows alcohol to be delivered tax-free to certain approved locations for non-beverage purposes. See, e.g., [https://www.fda.gov/media/136289/download](https://www.fda.gov/media/136289/download) and [https://www.ttb.gov/public-guidance/ttb-pg-2020-1a](https://www.ttb.gov/public-guidance/ttb-pg-2020-1a).

- **Respirators and Masks**: The FDA, DOL, and OSHA have issued emergency use authorizations and temporary enforcement guidelines that expand upon which personal protective equipment can be used when no FDA-cleared masks are available. See, e.g., [https://www.fda.gov/media/135763/download](https://www.fda.gov/media/135763/download) and [https://www.dol.gov/newsroom/releases/osha/osha20200314](https://www.dol.gov/newsroom/releases/osha/osha20200314).
• **Ventilators:** The FDA and DOL have relaxed ventilator guidelines to permit the use of ventilators with hardware, software, and materials modifications that would otherwise not be approved. See, e.g., [https://www.fda.gov/media/136318/download](https://www.fda.gov/media/136318/download).

• **Gowns, Gloves, and Apparel:** The FDA has issued a temporary enforcement policy that broadens the definition of acceptable gowns, gloves, and healthcare apparel. See, e.g., [https://www.fda.gov/media/136318/download](https://www.fda.gov/media/136318/download).

• **Disinfectants:** The EPA has issued guidance to expedite the review of certain surface disinfectants. See, e.g. [https://www.epa.gov/pesticide-registration/emerging-viral-pathogen-claims-sars-cov-2-submission-information-registrants](https://www.epa.gov/pesticide-registration/emerging-viral-pathogen-claims-sars-cov-2-submission-information-registrants).

Manufacturers should also be aware of the limited liability immunity which is available to some manufacturers under the Public Readiness and Emergency Preparedness Act (PREP Act). Pursuant to the PREP Act, certain manufacturers of COVID-19 related products may qualify for liability immunity for losses caused by, arising out of, relating to, or resulting from the administration or use of a covered countermeasure, absent willful misconduct. Covered countermeasures include qualified pandemic or epidemic products; security countermeasures; or drugs, biological products, or devices authorized for investigational or emergency use. Manufacturers should consult the PREP Act and related administrative guidance to determine whether they qualify for the limited liability immunity established by the Act.