

## Avoiding Costly Legal Mistakes When Re-Opening the Workplace For The Nonprofit Alliance

June 9, 2020

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Perlman & Perlman LLP**

*Please be advised that the information provided in the webinar is for general information purposes only and is not to be construed as legal advice.*

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Ms. Brauner has been recognized by her peers among *The Best Lawyers in America* and as a *SuperLawyer* in Labor & Employment Law, New York Metro area. She writes extensively and presents regularly before large audiences on workplace law-related topics and has been interviewed as a featured speaker on re-opening the workplace during a pandemic and #MeToo on Tony Martignetti's Non-Profit Radio. Ms. Brauner earned her Juris Doctor from Brooklyn Law School and a Bachelor of Arts Degree, *cum laude*, from Tufts University. See <https://www.linkedin.com/in/lisabrauner>

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### Overview

- ▶ Pre-Plan for Re-Opening
- ▶ Potential Workplace Legal Risks
- ▶ Ways to Help Minimize Legal Risks

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### Pre-Plan for Re-Opening

#### ▶ 3 Major Questions from CDC

##### 1. Should you consider re-opening workspace?

- a) Will re-opening be consistent with applicable state and local orders?
- b) Are you ready to protect employees at Higher risk for severe illness?

##### 2. Are recommended health and safety actions in place?

##### 3. Is ongoing monitoring in place?

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### Safe Re-Opening: "One size does not fit all"

Implement a plan that:

- ▶ Is specific to your workplace,
- ▶ identifies all areas and job tasks with potential exposures to COVID-19, and
- ▶ includes control measures to eliminate or reduce such exposures
- ▶ Includes measures to identify and isolate a person with symptoms of COVID-19
- ▶ Monitors ongoing cleaning/disinfecting/physical distancing measures

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### Pre-Plan for Re-Opening

- ▶ Adhere to CDC, State and Local Guidance
- ▶ Designate a COVID-19 Task Force to plan return-to-work
- ▶ Provide cloth face coverings to employees, clients, visitors
- ▶ Communicate, communicate, communicate

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### ▶ POLL QUESTION #1:

Has your organization formed a COVID-19 task force or designated group to plan/strategize on your organization's return-to-work?

- Yes
- No

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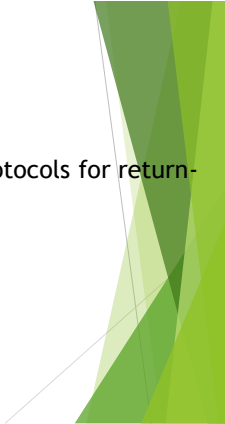
► **POLL QUESTION #2:**

Have you created safety protocols for return-to-work?

Yes

No

Working on it



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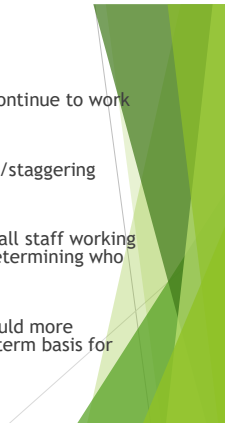
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**Employee Staffing**

- Consider whether employees can continue to work remotely
- Phased approach to return-to-work/staggering times/shifts/days
- Consider whether to keep some or all staff working remotely and neutral factors for determining who works remotely
- Consider whether remote work should more extensively replace office on long-term basis for workers



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**Avoiding Employment Law-Related Risks**



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### POLL QUESTION #3:

What are your greatest concerns regarding workplace legal risks?

- ▶ Reasonable Accommodation/Disability Discrimination
- ▶ Safety/OSHA Concerns/Workers' Comp
- ▶ NLRA/Union Organizing
- ▶ FMLA/Emergency Paid Leave/Paid Leave Laws
- ▶ Unlawful discrimination/harassment/retaliation
- ▶ Wage/Hour
- ▶ WARN Notices
- ▶ Cybersecurity
- ▶ Employee Privacy
- ▶ Other (please specify)




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13



### Avoiding Employment Law-Related Risks

- ▶ Reasonable Accommodation/Disability Discrimination
- ▶ Safety/OSHA Concerns/Workers' Comp
- ▶ NLRA/Union Organizing
- ▶ FMLA/Emergency Paid Leave
- ▶ Unlawful discrimination/harassment/retaliation
- ▶ Wage/Hour
- ▶ WARN Notices




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### Avoiding Employment Law-Related Risks

- ▶ Cybersecurity
- ▶ Employee Privacy
- ▶ Other Potential Risks




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### Reasonable Accommodations

- ▶ Employer legal duty to reasonably accommodate disability
- ▶ Failure to reasonably accommodate
- ▶ Discrimination Claims of barring disabled, pregnant, older workers
- ▶ Retaliation claims

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### Reasonable Accommodation Issues

- ▶ Employees with underlying conditions or pregnancy requesting remote work as reasonable accommodation
- ▶ Employees with mental/psychological disability needing reasonable accommodations

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17



### Reasonable Accommodation Issues

- ▶ Employees needing reasonable accommodation while remote working
- ▶ Employees needing reasonable accommodations in “new normal” workplace
- ▶ Consider accommodations that will need to be made to disabled employees
  - Low sight (workspace reconfiguration)
  - Deaf/lip-reading/masks

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### Mitigating Risks: Reasonable Accommodations

- ▶ Follow EEOC, State, local anti-discrimination/reasonable accommodation guidance
- ▶ Be flexible in arriving at accommodations
- ▶ Document efforts to engage in good faith interactive process/cooperative dialogue

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### Mitigating Risks: Disability Discrimination/Reasonable Accommodations

- ▶ Document in detail the basis for any “undue hardship” defense where reasonable accommodation not provided
- ▶ Avoid assumptions about an employee’s inability to do a job based on underlying conditions: discrimination based on perceived disability may also be unlawful
- ▶ Health screening issues: conducting testing/taking temperatures/confidentiality

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### OSHA

- ▶ Safety/health complaints to OSHA/retaliation complaints
- ▶ State whistleblower laws
- ▶ “Sick outs”/worker strikes
- ▶ Litigation

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**OSHA**

- ▶ Employers have a “general duty” to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees
- ▶ Law prohibits employers from retaliating against employees for exercising their rights under OSHA, including complaining about health or safety to OSHA.

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**OSHA**

- ▶ Even though no private right of action, Secretary of Labor can bring a legal action seeking back pay, compensatory damages, punitive damages.
- ▶ OSHA retaliation claim can form basis of state whistleblower action.

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**new OSHA Recordkeeping Requirement: May 26**

- ▶ Under OSHA’s recordkeeping requirements, COVID-19 is a recordable illness, and covered employers are responsible for recording cases of COVID-19, if:
  - The case is a confirmed case of COVID-19;
  - The case is work-related;
  - The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7

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### new OSHA Recordkeeping Requirement: May 26

- ▶ “work-related” determined after reasonable investigation
- ▶ Not “work-related” if illness is solely result of another event or there is an alternative, nonwork explanation

Ex. illness involves signs or symptoms that surface at work but result solely from non-work-related event or exposure that occurred outside the work environment

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### new OSHA Recordkeeping Requirement: May 26

- ▶ Employers with 10 or fewer employees and certain employers in low-hazard industries don’t have recording obligations, but must report only work-related COVID-19 illnesses that result in fatality or an employee’s in-patient hospitalization, an amputation or the loss of an eye.
- ▶ Notify OSHA of work-related fatality within 8 hours or a work-related hospitalization, amputation, or loss of an eye within 24 hours.

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### Mitigating Risk of OSHA Claims

- ▶ Follow CDC, OSHA, and State/local guidance on safe and healthy workplace re: COVID-19.
- ▶ Document all safety/health/screening/cleaning measures taken
- ▶ Ensure effective mechanism for employees to raise safety/health concerns
- ▶ Document efforts to address specific employee concerns and accommodate

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### Union-organizing/NLRA

- ▶ Anticipated increase in union-organizing
- ▶ Anticipated increase in unfair labor practice charges (safety/health)
- ▶ NLRA: Refusal to return to work due to good faith safety concerns (legally protected “concerted activity”)

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### NLRA/Union-Organizing

- ▶ “Sick outs”
- ▶ Does NLRA protect employee refusing to return to work for safety reasons?

A: Employee engages in protected concerted activity when he or she takes action “with or on behalf of other employees” concerning the terms and conditions of their employment. This typically involves group activity (i.e., two or more employees), a single employee seeking to incite group action, or an individual employee “bringing truly group complaints to the attention of management.”

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### NLRA and Union-Organizing Activities

- ▶ Under the NLRA, activity is considered concerted where it is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”
- ▶ Retaliation against employee for participating in “sick out” could be violation of NLRA
- ▶ Other potential NLRA Violations: prohibited retaliation against employees complaining about reduced pay or essential workers seeking hazard pay

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### Workers' Compensation Claims

- ▶ Workers' compensation claims
- ▶ States amend laws to allow presumption that COVID-19 caused at work for certain high-risk industries
- ▶ Gross negligence

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### Families First Coronavirus Response Act: < 500 Ees

- ▶ Covers employers with fewer than 500 employees and certain public employers
- ▶ Paid sick leave benefits
- ▶ Expanded Family and Medical Leave Act ("FMLA") benefits: 12 weeks of leave

Law in effect until Dec. 31, 2020

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### Families First Coronavirus Response Act

#### ▶ Small Business exception

Employers with fewer than 50 employees can elect to be exempt from providing paid sick or family leave to care for a son or daughter whose school or childcare is closed due to COVID-19.

This exception applies only if providing FFCRA paid leave would jeopardize the viability of the business.

33

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### FFCRA Legal Risks

- ▶ Failure to provide required paid leave
- ▶ Misuse of small business exception
- ▶ Improper application of FFCRA with other paid leave laws, other PTO

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### Potential Legal Risks/Liability: EPSLA/FMLA/EFMLEA

- ▶ Interference with FMLA
- ▶ Failure to provide state or local paid sick leave
- ▶ Retaliation claims for seeking or taking paid leave

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### Families First Coronavirus Response Act

Employer may not discipline, discharge, discriminate or retaliate against an employee under FFCRA

#### Violations

- ▶ EPSLA: subject to damages and penalties as under the FLSA for minimum wage violations, including unpaid wages, an additional equal amount as liquidated damages, and attorneys' fees and costs.
- ▶ EFMLEA: Back pay and liquidated damages
- ▶ Civil penalties for willful or repeat conduct
- ▶ Loss of payroll tax credit

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Mitigate Risks: EPSLA/FMLA/EFMLEA

- ▶ Ensure you're providing the paid leave and doing so in correct amounts
- ▶ Properly document small business exception to providing leave where employee's child's school is closed (it doesn't apply to paid sick leave for reasons other than employee's child's school is closed)
- ▶ Document Failure to provide EPSLA or FMLEA under FFCRA
- ▶ Understand interplay between the law and state and local paid sick leave laws
- ▶ Train managers to ensure no retaliation

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Mitigate Risk: Paid Leave Laws

- ▶ Be aware of State and Local COVID-19 Paid Sick leave laws
- ▶ Implement written policies addressing paid sick leave

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38



Legal Issues: Staffing and Deciding Who Returns to Office

- ▶ Recall vs. Remote
- ▶ Furlough/Layoff
- ▶ Salary/Hours Reduction
- ▶ Full-time to part-time

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### Unlawful Discrimination

- ▶ Discrimination claims in connection with adverse employment action (furlough/layoff/term)
- ▶ Discrimination with respect to who you select to recall to workplace and who gets to work remotely
- ▶ Discrimination with respect to salary cuts

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### Unlawful Workplace Discrimination

- ▶ EEOC Guidance on Pandemics: Increase in bias against Asians
- ▶ Sexual and other unlawful harassment
- ▶ Retaliation

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### Mitigate Risk of Unlawful Discrimination Claims

- ▶ Objective, legitimate, nondiscriminatory basis for decisions
- ▶ Document and probe basis for decision
- ▶ For recall, document, based on operational needs, categories prioritized for return
- ▶ Ensure consistency to reduce risk of discrimination claim
- ▶ Ensure compliance with EEOC guidance, ADA and State and local anti-discrimination laws

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### Mitigate Employment Law Risks

- ▶ Conduct disparate impact analysis of adverse employment actions
- ▶ Consider in advance the impact of staffing changes/salary reductions/pay equity
- ▶ Be consistent and fair in application of decisions (no favoritism)

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### Mitigate Legal Risk of Discrimination Claim Re: Salary Reduction

- ▶ Salary reductions: across the board at certain salary level (no "cherry picking")
- ▶ Salary reduction based on legitimate, nondiscriminatory business reasons and using neutral criteria
- ▶ May be applied based on hierarchy level (i.e., those earning most at top of organization get higher % pay cut than others)
- ▶ Document neutral basis for salary reduction

44

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### Wage/Hour Issues: Furloughs/Salary Reduction/Hours Reduction

- ▶ Non-exempt employees: Can't reduce below minimum wage (be mindful of State min. wage that's higher than fed. Min. wage)
- ▶ A state may have specific instructions for reducing nonexempt employees' pay.
- ▶ Exempt employees= full pay for any workweek in which they do any work. Must continue to meet salary threshold and duties test to maintain exemption.

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Wage/Hour Issues

- ▶ Improper inadvertent reclassification from exempt to nonexempt
- ▶ Off-the-clock work and overtime pay
- ▶ Compensable time for taking temperature or testing?
- ▶ Notice, posting, recordkeeping violations
- ▶ Failure to give proper pay rate and/or give termination notices/posting/recordkeeping
- ▶ Retaliation prohibited

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Salary Reductions/Reduced Hours

- ▶ Breach of employment agreement
- ▶ Collective bargaining agreement
- ▶ State notice of pay change requirements
- ▶ Reduced hours may mean UI benefits
- ▶ Benefits Issues
- ▶ Immigration/visa Issues

47

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WARN ACT

- ▶ Federal Worker Adjustment and Retraining Notification Act ("WARN"): requires employers of 100 or more employees to provide:
  - ▶ 60 days' notice to affected employees or their representatives, State Dislocated Worker Units and local chief elected government officials of a "plant closing" or "mass layoff" that results in an "employment loss" to at least 50 employees (or layoff of 500 or more in 30-day period).
- ▶ Layoff or furlough does not become an "employment loss" for an individual until it lasts for more than 6 months.
- ▶ Penalties where required notice not provided or not properly provided: Employers may be liable for up to 60 days of pay and benefits, plus civil penalties and attorney's fees.

48

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### WARN ACT

- ▶ If furlough extends beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at time of initial layoff, notice must be given when it becomes reasonably foreseeable that the extension is required

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49

### Mitigate Risk of WARN ACT violations

- ▶ Know events triggering WARN Act notification
- ▶ Know whether your State law has its own mini-WARN statute (and whether it's been suspended during COVID-19):
- ▶ States may require more notice than federal WARN, notice affecting fewer employees, and impose more severe penalties.

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### Mitigate Wage/Hour Risk

- ▶ Ensure decisions comply with FLSA and State wage/hour laws
- ▶ On continuation of benefits during furlough, confer with health insurance company
- ▶ Review agreements

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### Remote Work

- ▶ Wage/hour obligations
- ▶ Cybersecurity risks
- ▶ Workers' compensation
- ▶ Payroll Tax
- ▶ Expense Reimbursement
- ▶ Sexual Harassment

52

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### Mitigating risk: Wage/Hour and Remote Work

#### Wage/Hour

- Implement attendance/timekeeping system for nonexempt workers
- Train managers on wage/hour laws and re-issue policies on no "off-the-clock" work
- Implement system for tracking time/breaks
- Remind managers of prohibition on retaliation
- \* Be mindful if any employee who was exempt is now nonexempt

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### Mitigating risk: Remote Work

- Remind managers and employees of policies prohibiting "off-the-clock work"
- Implement timekeeping/time-tracking system
- Ensure non-exempt report hours worked each day and breaks
- Ensure workers' compensation policy covers employees working remotely
- Consider tax withholding implications and labor posting requirements

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### Sexual Harassment in Remote Work Environment

- ▶ DANGER: More casual environment may yield employee mistaken belief that it's okay to loosen workplace norms for appropriate workplace behavior
- ▶ Lack of accountability and ability to monitor behavior




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### Sexual Harassment in Remote Work Environment

- ▶ EEOC Task Report high-risk factors:
  - Decentralized workplaces
  - Isolated or remote workspaces
  - Workplaces where alcohol is permitted
- ▶ Email/text
- ▶ Inability to monitor




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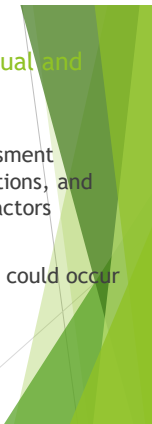
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### Mitigating Discrimination and Sexual and Other Harassment:

- ▶ Retrain managers and staff on harassment prevention policy (reissue), expectations, and complaint reporting, and high-risk factors
- ▶ Ensure policies address conduct that could occur remotely




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### Mitigate Discrimination and Sexual and Other Harassment

- ▶ Ensure that workers in isolated work environments understand complaint procedures.
- ▶ Create opportunities for employees to connect with each other to share concerns.

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### Cyber Security Risks

- ▶ Increased hacker activity, phishing scams
- ▶ Unsecure connections to organizational systems
- ▶ Transferring corporate data using personal e-mail accounts
- ▶ Unsecure WIFI networks
- ▶ Working on unsecure personal devices
- ▶ “Hard-Copy” document management & destruction
- ▶ Data security risk on termination of remote working employee w/org equipment

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### Mitigating Cyber Security Risks

- ▶ **Increased hacking activity, phishing with increased remote work:** Continue employee training/reminding employees of policies of not clicking on links or attachments, checking email domain of sender to ensure it's authentic; vigilance
- ▶ **Unsecure connections to organizational systems:** *Ensure you have a secure portal (VPN) for employees accessing your systems.*
- ▶ **Transferring corporate data using personal e-mail accounts:** *Advise employees against sending sensitive organization data to their personal email accounts, and to permanently delete any corporate data remaining on their email accounts after they return to their normal working arrangement.*

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Mitigate Cyber Security Risks

- ▶ **Unsecure WIFI networks:** *Secure home WIFI networks with a robust password and, when possible, avoid use of public networks.*
- ▶ **Working on unsecure personal devices:** *Employees should only conduct work on their employer-issued computers.*
- ▶ **“Hard-Copy” document management and destruction:** *Advise as to proper destruction and to avoid disposing of documents at home or in a public place without proper cross-cut shredding.*
- ▶ **Return Equipment:** *Police / agreement in place*

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Mitigate Cyber Security Risks

- ▶ **Synching with personal cloud storage accounts:** *Monitor, remind employees of policy.*
- ▶ **Key vendor relationships:** *Contact vendors as to their plans to continue to support your organization and keep your data safe. Also review your vendor contracts to be aware of your rights and remedies.*

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Employee Privacy

- ▶ **Social-distancing and contact-tracing apps**
  - what data collected
  - how is it collected
- ▶ **State laws**
- ▶ **Union collective bargaining**

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Potential Legal Risks/Liability:

- ▶ Violation of CBA /collective bargaining of new safety and other terms during re-opening
- ▶ Gross negligence
- ▶ Legal off-duty conduct laws



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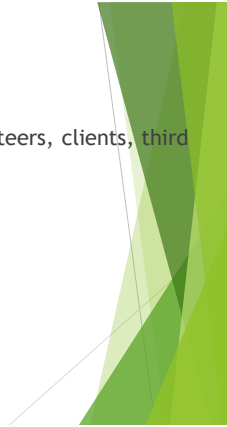
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Other Potential Risks

- ▶ Liability for injuries to volunteers, clients, third parties
- ▶ Reputational Risk



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What Should Employers Do Now?



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### Implement and Communicate Plans

- ▶ Conduct risk assessment for each work area
- ▶ Infectious/communicable disease control plan
- ▶ Safety/Health Plan
- ▶ Physical Distancing Plan (employees, volunteers, clients, visitors)
- ▶ Cleaning/Disinfecting

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### Implement and Communicate Plans

- ▶ Health Screening: employees, visitors, clients, vendors, volunteers/tracking (logging) of visitors, clients, volunteers
- ▶ Provide face coverings for all
- ▶ Workplace reconfiguration/reasonable accommodation and accessibility to the disabled
- ▶ Business Continuity Plan (and planning for successive pandemic waves)

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### Communications

#### Develop Communication Plans for:

- ▶ Communications with staff about safety/hygiene protocols, how return-to-work will happen, new office protocols, who will continue working remotely, interacting with clients, etc.
- ▶ Communicate with clients about schedule for return-to-work and servicing/meeting clients (determine what can still be done remotely vs. face-to-face)/health screening/physical distancing protocols

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### Implement Plans and Policies

- ▶ Infectious Disease Control policy (including handling employee who contract COVID-19)
- ▶ Physical Distancing/Health Screening/Cleaning/Disinfecting
- ▶ Interactions Clients/Visitors/Vendors
- ▶ Restricted Business travel

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### Update & Communicate COVID-19 Policies

- ▶ Update FMLA/Emergency Paid Sick and Paid Family Leave Policies
- ▶ Review/update reasonable accommodation policies and form for requesting accommodation
- ▶ Remote work policies/employee agreements
- ▶ Implement attendance/timekeeping policies for remote workers
- ▶ Review WC policies/protocols for reporting COVID-19 illness

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### Updated Training

- ▶ Enhanced managers' training to include employee rights for federal, state and local paid sick, COVID-19-related and family leave
- ▶ Managers' training on wage/hour compliance with respect to remote work/impact of reduced pay or hours
- ▶ Anti-discrimination/retaliation training and documenting reasons for adverse action

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### Updated Training

- ▶ Sex Harassment prevention in remote workplace
- ▶ Safety/health/hygiene/distancing protocols (while maintaining social distancing during training)
- ▶ Proper use of face coverings and PPE and need to enforce

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### Updated Training

- ▶ Cross-training of employees (to address reduced workforce and employees out sick, on FFCRA or other paid leave)
- ▶ Data Security/Privacy policies/protocols
- ▶ Expectations for employees

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Review Documents that may impact decision to lay off, furlough, recall, severance, salary reduction

- ▶ Employment agreements (and severance provisions)
- ▶ Collective bargaining agreements (recall, furloughs, etc., and for safety changes, what needs to be bargained over?)

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### Self-Audits

- ▶ W/legal counsel to preserve privilege
- ▶ Assess potential negative impact of layoff/furlough/salary cuts on legally protected groups (age, gender, disability, race, etc.)
- ▶ Pay Equity issues impacting salary reductions and new hires
- ▶ Reasonable accommodation processes

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### Other Considerations

- ▶ Follow CDC, State, regional and local guidance to minimize legal risk
- ▶ Update job descriptions, where employee performing additional or different functions (and ensure worker classification remains accurate)
- ▶ Review OSHA and workers' compensation illness reporting requirements

77

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### Effective Reporting Mechanism for Concerns/Complaints

- ▶ Ensure clear complaint mechanism for safety/health/other concerns and no retaliation
- ▶ Train managers on proper handling of complaints
- ▶ Train managers to ensure no retaliation against those who complain about safety/health/wages, etc.

78

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### Document, Document, Document

- ▶ Document efforts to address safety/health concerns
- ▶ Document reasons for selecting employees for remote work (work can be performed, positive performance evaluations, underlying conditions, etc.)
- ▶ Document reasons for selecting employees for furlough/layoff/recall
- ▶ Be aware of potential legal risks of not recalling older, disabled or pregnant employees

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79

### Document and Be Consistent

- ▶ Document reasonable accommodation process efforts
- ▶ Analyze disparate impact of adverse employment actions on legally protected groups (age, gender, race, etc.)
- ▶ Be consistent in your application of policies to employees to reflect fairness and lack of bias
- ▶ Be mindful of potential discrimination claim where older employee unwilling to work in office due to safety concerns but needed for direct, live service is replaced by younger worker

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80

### Postings

- ▶ US DOL FFCRA
- ▶ OSHA
- ▶ State and local antidiscrimination postings
- ▶ CDC and other public health agency postings relating to COVID-19 on hygiene and distancing - ex. "Cover Your Cough"
- ▶ Physical distancing
- ▶ Get mandatory labor postings to remote workers

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81

### What Should Employers Do Now?

- ▶ Flexible work arrangements
- ▶ Understand which laws apply and interplay between federal, state and local laws
- ▶ Confer with your employment counsel because of fluidity of legal developments
- ▶ Confer with employee benefits counsel on how COVID-19 laws affect your benefit plans (health insurance, 401(k), FSA, etc.)
- ▶ Confer with immigration counsel regarding how employment actions may impact employee visas

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82

### KNOW THE LAWS IN YOUR JURISDICTION

- ▶ Be aware of any state and local laws (mini-WARN, mini-FMLA, State OSHA, other paid sick/family leave laws)
- ▶ States vary in terms of how they will apply the federal UI benefits; know the laws where employees work

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83



### What Should Employers Do Now? Looking to the Future

- ▶ Consider whether to get liability waivers/assumption of risk
- ▶ Look for new opportunities in ways to service clients (ex. Telemedicine)
- ▶ Consider whether additional staffing reductions/furloughs/pay reduction needed
- ▶ Business Continuity Plan for successive waves of pandemic

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84

### Mitigate Employment Law Risks

- ▶ Communicate regularly with staff (check-in), how you can support them, workplace safety, return-to-work expectations
- ▶ Provide mental health resources for employees and their families; remind them of EAP programs and the services through those programs as well as public health mental health counseling resources and how to access
- ▶ Consider other ways your organization can support its staff and family emotionally, financially or otherwise at this time

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### QUESTIONS?



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### THANK YOU!

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Contact:

Lisa M. Brauner, Esq.  
lisa@perلمانandperلمان.com  
(212) 889-0575

If you would like to receive our legal alerts, please send an email to: [lisa@perلمانandperلمان.com](mailto:lisa@perلمانandperلمان.com)

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88

APPENDIX

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89

Pre-Plan for Re-Opening

2. Are recommended health and safety actions in place?

- ▶ Promote healthy hygiene practices:
  - hand washing
  - employees wearing a cloth face covering, as feasible
- ▶ Intensify cleaning, disinfection, and ventilation

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90



Pre-Plan for Re-Opening

2. Are recommended health and safety actions in place?

- ▶ Encourage social distancing/enhance spacing between employees:
  - physical barriers
  - changing layout of workspaces
  - encouraging telework
  - closing or limiting access to communal spaces
  - staggering shifts and breaks
  - limiting large events, when and where feasible

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Pre-Plan for Re-Opening

2. Are recommended health and safety actions in place?

- ▶ 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

If any answers are "no," don't reopen.

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Pre-Plan for Re-Opening

3. 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

If any answers are "no," don't reopen.

93

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### Pre-Plan for Re-Opening

#### 3. Is ongoing monitoring in place?

- ▶ 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 local area

If any answers are "no," implement safeguards.

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94

### CDC Guidance for Safe Re-Opening

CDC recommends:

- ▶ Conducting daily health checks
- ▶ Conducting a workplace hazard assessment
- ▶ Encouraging employees to wear cloth face coverings in the workplace, if appropriate
- ▶ Implementing policies and practices for social distancing in the workplace
- ▶ Improving the building ventilation system

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95

### CDC Guidance for Safe Re-Opening

- ▶ Hygienic and Cleaning Practices
- ▶ Promoting Social Distancing
- ▶ Monitoring and Preparing
- ▶ Maintaining Healthy Operations

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96





### CDC Recommends:

- ▶ Enforcing hand washing, covering coughs and sneezes, using cloth face covering when around others, when feasible
- ▶ Cleaning and disinfecting frequently touched surfaces at least daily & avoid use of shared items that aren't easily cleaned, sanitized or disinfected
- ▶ Ensuring ventilation systems operate properly & increase circulation of outdoor air/open windows & doors

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97



### CDC Recommends:

- ▶ Plan for when an employee will become ill
- ▶ Provide telework options to employees who would commute from areas with high rates of infection
- ▶ Implement flexible sick leave and other flexible policies and practices, if feasible
- ▶ Cross-train employees
- ▶ Postings (safe hygiene)

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98



### CDC Guidance for Re-Opening

- ▶ Protect employees at higher risk for severe illness by supporting and encouraging options to telework.
- ▶ Consider offering workers at higher risk duties that minimize their contact with clients and other employees, if agreed to by the worker.
- ▶ Encourage any other entities sharing the same work space also follow this guidance.
- ▶ Provide employees from higher transmission areas telework and other options as feasible to eliminate travel to workplaces in lower transmission areas

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99



## State Guidance

- ▶ Adhere to State mandates and guidance

As part of a safety plan, consider:

- ▶ Daily health screening assessment upon arrival at the workplace
- ▶ Increased cleaning efforts and procedures
- ▶ Face coverings, hand sanitizer, and PPE at no cost to employees, clients, volunteers and visitors
- ▶ Display required signage and floor markers/decals
- ▶ Implement physical distancing in each area of workplace
- ▶ Enforce wearing of face coverings and physical distancing
- ▶ Plan for when an employee becomes ill

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## Safety Plan: Promoting Physical distancing

### Entering/Exiting Protocols

- ▶ Low-touch way to enter building/elevator/office
- ▶ Open doors
- ▶ Shoes removed or anti-bacterial mat/shoe covers/anti-bacterial wipes

101

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## Safety Plan: Promoting Physical distancing

### Entering/Exiting Protocols

- ▶ Low-touch means for punching timeclock or secure entry
- ▶ Welcome package for employees w/PPE
- ▶ Sanitizer foot pumps
- ▶ Motion-activated lights (hands-free)

102

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### Safety Plan

#### Create plan for Physical Distancing and Low-Touch

- ▶ Workplace reconfigurations that allow for physical distancing and low-touch
- ▶ Plexiglass separators/other 24 in. barriers
- ▶ Directional markers for 6 ft. distance/one-way hallways
- ▶ Use signs, tape marks, or other visual cues like decals or colored tape on the floor, placed 6 feet apart, to indicate where to stand when physical barriers are not possible.

103

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### Safety Plan

#### Create plan for Physical Distancing and Low-Touch

- ▶ No hand-shaking or physical contact
- ▶ No sharing of utensils/mugs/carry from home
- ▶ Plan for common area/high-traffic areas

104

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### Create A Safety Plan

#### Meetings/Gatherings in Enclosed Spaces

- ▶ To be held by videoconferencing;
- ▶ Where not possible, meet in open, well-ventilated spaces
- ▶ Maintain 6 feet of physical distance (e.g. if there are chairs, leave space between chairs, employees sit in alternating chairs).
- ▶ Remove chairs from conference rooms and guest chairs from offices

105

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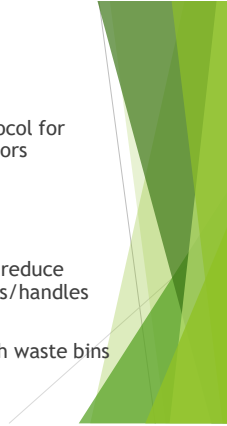
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**Safety Plan**

**Clients/Visitors/Vendors**

- ▶ Create physical distancing protocol for interacting client/visitors/vendors
- ▶ Plexiglass
- ▶ Open doors, where feasible, to reduce incidence of touching doorknobs/handles
- ▶ Tissues, hand sanitizer, no touch waste bins




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106



**Safety Plan**

**Clients/Visitors/Vendors**

- ▶ Hand sanitizer/face coverings
- ▶ Communicate protocols to clients/visitors/vendors and staff
- ▶ Postings directed to clients/visitors/vendors on physical distancing, safety/hygiene/cleaning
- ▶ No hand-shaking or physical contact




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107



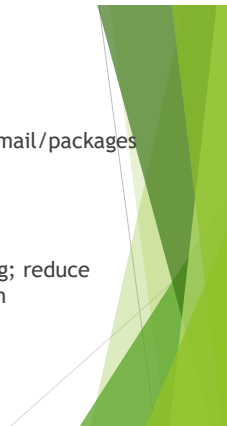
**Safety Plan**

**Mail/Package delivery**

- ▶ Create plan for dealing with mail/packages to avoid virus transmission

**Common Areas/Restrooms**

- ▶ Implement physical distancing; reduce number of persons in common areas/restrooms




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108



## Pre-Planning for Re-Opening

### Monitoring and Preparing

Checking for signs and symptoms

- Consider conducting daily health checks (e.g., temperature screening and/or symptom checking) of all employees.
- If implementing health checks, conduct them safely and respectfully, and in accordance with privacy laws and regulations.
- ▶ Confidentiality should be respected. Employers may use examples of screening methods in CDC's General Business FAQs as a guide.
- Encourage staff who are sick to stay at home

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109



## Pre-Planning for Re-Opening

### Monitoring/Testing

- ▶ EEOC: COVID-19 pandemic= direct threat and employers may undertake medical examinations, like temperature testing, to confirm whether a particular employee may pose a direct threat due to infection.
- ▶ Testing must be undertaken consistent with current medical knowledge and the best available objective evidence, including by selecting tests with reasonably confirmed rates of accuracy and by strictly following test manufacturers' guidelines and instructions for use

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110



## Safety Plan

### Communication with Staff about Safety Protocol

- ▶ Establish a communication plan for employees, visitors, and customers with a consistent means to provide updated information.
- ▶ Ensure employees know before return-to-work the measures taken to keep them safe

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111



### Safety Plan

#### Communication with Staff about Safety Protocol

- ▶ Maintain a continuous log of every person, including workers and visitors, who may have close contact with other individuals at the work site or area; excluding deliveries that are performed with appropriate PPE or through contactless means; excluding customers, who may be encouraged to provide contact information to be logged but are not mandated to do so.

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112



### Safety Plan

#### Communication with Staff about Safety Protocol

- ▶ If a worker tests positive for COVID-19, employer must immediately notify state and local health departments
- ▶ Cooperate with contact tracing efforts, including notification of potential contacts, such as workers or visitors who had close contact with the individual, while maintaining confidentiality required by state and federal law and regulations.

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113



### Pre-Planning for Re-Opening Building safety

Has building made arrangements for safe return of tenants?

- Sanitize building/common areas
- Hands-free sign in and elevator operation
- Protocols on how many in elevators/stairwell
- Physical distancing
- HVAC
- Rules on visitors/vendors on-site
- Mitigation for Legionnaires Disease/Mold

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114

WARN ACT

- ▶ “Plant Closing”: Covered employer closes a facility or discontinues an operating unit permanently or temporarily, affecting at least 50 full-time employees, at a single site of employment; or an employer closes an operating unit that has fewer than 50 workers but closing also involves the layoff of enough other workers to make the total number of layoffs 50 or more.
- ▶ Mass Layoffs:
  - (1) Layoff of 500 or > full-time employees at a single site of employment during a 30-day period; or
  - (2) layoffs of 50-499 F/T employees, when that is at least 33% of employer’s total active workforce (not counting P/T) at the single site of employment.

115

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Families First Coronavirus Response Act: < 500 Ees

- ▶ Emergency Paid Sick leave Act (EPSLA): Up to 10 days (80 hours)
- ▶ Expanded FMLA Extension Act/ChildCare (12 wks’ total) (EFMLEA)
  - 1<sup>st</sup> 10 days unpaid
  - Remaining 10 weeks PAID
- ▶ Employer payroll tax credit/reimbursement

116

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Families First Coronavirus Response Act

- ▶ Paid Sick leave qualifying reasons: If employee unable to work (or unable to telework) due to a need for leave because the employee:
  - 1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  - 2) has been advised by a health care provider to self-quarantine related to COVID-19;
  - 3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
  - 4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);

117

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Families First Coronavirus Response Act

- ▶ Paid Sick leave qualifying reasons: If employee unable to work (or unable to telework) due to a need for leave because the employee:
  - 5) is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
  - 6) is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

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118



Families First Coronavirus Response Act

Paid Sick leave amounts:

- ▶ Sick leave for reasons #1-3: Higher of: regular rate of pay or fed./state minimum wage, up to \$511/day cap or aggregate cap of \$5110 (for up to 2-week period)

Paid Sick leave amounts:

- ▶ Sick leave for reasons #4-6: Higher of: 2/3s of regular rate of pay, or fed./state minimum wage, Up to cap of \$200/day or total cap of \$2000 (for up to 2-weeks' paid sick leave)

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119



Families First Coronavirus Response Act

Expanded Family Medical Leave Extension Act (EFMLEA) amounts:

- ▶ 12 weeks of paid extended family leave
- ▶ Must be employed at least 30 calendar days
- ▶ Covers need to care for employee's child (under 18 years of age) when school or place of care (or childcare) has been closed

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120





Families First Coronavirus Response Act

Expanded Family Medical Leave Extension Act (EFMLEA) amounts:

- ▶ Higher of: 2/3s of regular rate of pay, or fed./state minimum wage, up to \$200/day cap or aggregate cap of \$10,000 (over 10-week period)

Employee qualifies for expanded family leave if employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

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121



Families First Coronavirus Response Act

- ▶ Provides paid sick leave for those who need to comply with self-quarantine order or to care for their own or someone else's COVID-19 related issue PLUS
- ▶ 10 weeks of emergency paid family leave for parents who can't work because school or childcare services closed due to COVID-19
- ▶ Covered employers will be reimbursed up to \$511/day, or \$200/day depending on type leave, up to caps

Quarantine or isolation order includes shelter-in-place or stay-at-home orders, issued by Federal, State, or local government authority.

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122



Expanded FMLA

Small Business exception documentation

An officer of the business must determine one of the following:

- ▶ The expense of providing paid sick or family leave would exceed available business revenue and cause the business to cease operating at a minimal capacity.
- ▶ The absence of employees requesting leave would create substantial risk to the financial health or operational capabilities of the business.
- ▶ The business doesn't have sufficient workers to perform the labor or services provided by the employees requesting leave, and such labor or services are needed for the business to operate at a minimal capacity.
- ▶ No exemption from providing the FFCRA's paid sick leave for other qualifying reasons is available.

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123



### Paycheck Protection Flexibility Act

- ▶ Extends the PPP and rehiring deadline from June 30 to December 31, 2020
- ▶ Expands covered period for loan use from 8 weeks to 24 weeks (i.e., if you got loan in April, you have until Oct. to use funds)
- ▶ Maturity for new loans grows from 2 years to 5 years—and borrower and lender may mutually agree to later maturity
- ▶ PPP participants now eligible for employer payroll tax deferral

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124



### Paycheck Protection Flexibility Act Loan Forgiveness Provisions

- ▶ Eases rehire requirement based on inability to rehire former or similarly qualified employees, or inability to return to operations levels
- ▶ Reduces payroll-related costs from 75% to 60%
- ▶ Allows deferral of principal, interest, and fees payments until either:
  - 1) the date the lender receives payment for forgiven amount of loan or
  - 2) 10 months after the end of the covered period

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125



### Unemployment Insurance and CARES Act

- ▶ An additional \$600/week until July 31, 2020
- ▶ CARES Act: 39 weeks of UI instead of 26
- ▶ Self-funded nonprofits reimbursed only 50%
- ▶ US DOL guidance: instructs states to charge self-insured nonprofits for 100% of costs of unemployment benefits paid to employees laid off as a result of COVID-19!

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126

## Resources

Lisa Brauner - Doctor's Orders! Get Your Organization Prepared for Handling COVID-19 in the Workplace  
(<https://www.perlmanandperlman.com/doctors-orders-get-organization-prepared-handling-covid-19-workplace/>)

Lisa Brauner - Mask Up! NY Essential Businesses/Nonprofits Must Provide Face Masks:  
<https://www.perlmanandperlman.com/mask-new-york-essential-businesses-nonprofit-organizations-must-provide-face-masks-public-facing-employees>

127

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## Resources

Lisa Brauner - COVID-19 and FFCRA  
<https://www.perlmanandperlman.com/covid-19-workplace-families-first-coronavirus-response-act-nys-emergency-covid-19-paid-leave-mean-organization/>  
See also  
<https://www.perlmanandperlman.com/author/lisabrauner/>

Jon Dartley - COVID-19 and Cyber-Readiness - Good Practice for Remote Work  
(<https://www.perlmanandperlman.com/covid-19-cyber-readiness-good-practices-remote-work/>)

128

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## Resources

**Re-Opening State-by State**  
<https://www.uschamber.com/article/state-by-state-business-reopening-guidance>

<https://openingworkplaces.ideascale.com/a/index>

**Updated SBA Guidance on PPP Loans (and refusal to return to work)**  
<https://www.sba.gov/sites/default/files/2020-05/Paycheck-Protection-Program-Frequently-Asked-Questions-5-5-20.pdf>

129

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**Resources**

Dan Jenewein - Business Interruption Insurance and COVID-19  
[\(https://www.perlmanandperlman.com/business-interruption-insurance-nonprofits-covid-19-covered/\)](https://www.perlmanandperlman.com/business-interruption-insurance-nonprofits-covid-19-covered/)

**EEOC**  
 EEOC Guidance on Pandemic Preparedness:  
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

<https://www.eeoc.gov/wysk/what-you-should-know-about-ada-rehabilitation-act-and-coronavirus?renderforprint=1>

130

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130

**Resources**

► CDC guidance for re-opening:  
<https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf>

Re-Opening Checklist:  
<https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/workplace-decision-tree.pdf>  
<https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>

Cleaning/Disinfecting Guidance:  
[https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening\\_America\\_Cleaning\\_Disinfection\\_Decision\\_Tool.pdf](https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening_America_Cleaning_Disinfection_Decision_Tool.pdf)

131

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131

**Resources**

OSHA Employer Guidance: See  
<https://www.osha.gov/Publications/OSHA3990.pdf>

OSHA guidance regarding worker risk exposure level:  
<https://www.osha.gov/Publications/OSHA3993.pdf>  
<https://www.osha.gov/SLTC/covid-19/controlprevention.html#interim>  
<https://www.osha.gov/SLTC/covid-19/hazardrecognition.html>  
<https://www.osha.gov/as/opa/worker/employer-responsibility.html>

132

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132

## Resources

### CDC guidance for employers:

See <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

### CDC guidance on re-opening building water systems:

<https://www.cdc.gov/coronavirus/2019-ncov/php/building-water-system.html>

133

133

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## Resources

### OSHA guidance for various industries

<https://www.osha.gov/Publications/SHA4017.pdf>

<https://www.osha.gov/SLTC/covid-19/>

<https://www.osha.gov/Publications/SHA4000.pdf>

134

134

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## Resources

### IRS Guidance on Employer Payroll Tax Credits under FFCRA:

▶ <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-paid-sick-and-paid-family-leave-overview>

▶ <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

135

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**Resources**

Posters  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)  
  
[file:///sql2005/USERDATA/lisa/Downloads/CoronaVirus\\_Handwashing\\_Final\\_3.3.pdf](file:///sql2005/USERDATA/lisa/Downloads/CoronaVirus_Handwashing_Final_3.3.pdf)

136

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136

**Resources**

NY State and NYC  
 NYS Reopening guides--  
<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf>  
<https://www.governor.ny.gov/new-york-forward/regional-guidelines-re-opening-new-york>  
<https://paidfamilyleave.ny.gov/covid-19-paid-leave-guidance-employers>  
<https://paidfamilyleave.ny.gov/system/files/documents/2020/03/covid-19-sick-leave-employers.pdf>

137

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137

**Resources**

NY State and NYC  
 Financial resources for nonprofits and small businesses during COVID-19:  
<https://esd.ny.gov/economic-recovery-covid-19-loans-small-businesses>

138

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138

## Resources

NY State and NYC

- ▶ NY Council on Nonprofits:  
<https://www.nycon.org/resources/covid-19-resources-for-nonprofits>

139

139

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## Resources

NYC

- ▶ NYC Commission on Human Rights Guidance:  
<https://www1.nyc.gov/site/cchr/media/covid19.page>
- NYC Dept. of Health: NYS Paid Sick Leave**
- ▶ <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-paid-sick-leave-order-faq.pdf>
- ▶ <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-paid-sick-leave-order.pdf>

140

140

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## Resources

NYC

- ▶ Free face coverings for small business/nonprofit:  
<https://www1.nyc.gov/nycbusiness/article/free-face-coverings>
- ▶ NYC Commission on Human Rights Guidance:  
<https://www1.nyc.gov/site/cchr/media/covid19.page>
- NYC Dept. of Health: NYS Paid Sick Leave**
- ▶ <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-paid-sick-leave-order-faq.pdf>

141

141

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