

Return to Work: How to Successfully Navigate the Transition

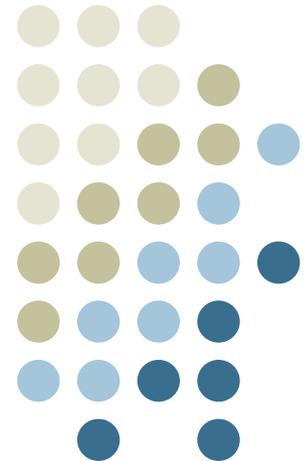
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Presenter:

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COVID-19 RESOURCE CENTER: www.saLAWus.com

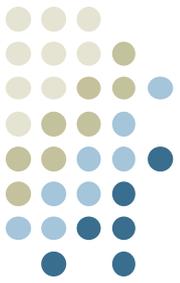
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Initial Thoughts...



- The multitude of patchwork re-opening plans across the country has created confusion for employers on how to effectively and safely open their businesses in light of the ongoing pandemic.
- This presentation will provide some guidance for businesses looking to re-open and/or reintegrate in person operations.
- There is no “one size fits all” way to reopen your business and bring back workers.
- The 2 most important things to keep in mind from a business perspective: 1) the health, welfare and safety of everyone (employees, contractors, customers, suppliers, the public, etc.); and 2) the ability to operate your business as effectively as possible.



We Will Discuss And Cover:

- The latest guidance from local, state, and federal government on Restore Illinois and how to phase in workers.
- Training and screening employees, including temperature checks at the door, and related privacy concerns.
- Mandating, requiring and/or encouraging vaccines.
- Public transportation and commuting issues.
- Managing childcare issues.
- Avoiding discrimination claims and related pitfalls.
- Latest from OSHA.
- Diminishing the threat of workers compensation claims.

Restore Illinois Plan



- Illinois has a 5 Phase Recovery Plan (with a 4.5 Bridge to 5).
- Phases are fluid and can move forward/backward with the number of cases.
- Illinois is broken down into Regions.
- **Phase 4**
 - There is a continued decline in the rate of infection in new COVID-19 cases. Hospitals have capacity and can quickly adapt for a surge of new cases in their communities. Additional measures can be carefully lifted allowing for schools and child care programs to reopen with social distancing policies in place. Restaurants can open with limited capacity and following strict public health procedures, including personal protective equipment for employees. Gatherings with 50 people or fewer will be permitted. Testing is widely available, and tracing is commonplace.

Illinois Phase 4 Reopening



Business Sectors

- **Manufacturing:** All manufacturing open with IDPH approved safety guidance.
- **“Non-essential” businesses:** All employees return to work with IDPH approved safety guidance -- employers are encouraged to provide accommodations for COVID-19-vulnerable employees.
- **Bars and restaurants:** Open with capacity limits and IDPH approved safety guidance:
 - All businesses must maintain social distancing measures and provide a minimum of 6-feet between tables or other designated patron service areas. The maximum occupancy for indoor standing areas is 25% capacity. Restaurants can seat no more than 10 people together in one group and booths may be seated within 6-feet if an impermeable barrier is in place. Additionally, buffets and self-service food stations are allowed, with queue points of 6-feet apart.

Illinois Phase 4 Reopening



- **Personal Care Services and Health Clubs:** All barbershops, salons, spas and health and fitness clubs open with capacity limits and IDPH approved safety guidance.
- **Entertainment:** Cinema and theaters open with capacity limits and IDPH approved safety guidance:
 - Admission is limited to the lesser of up to 50 guests or 50% of overall theater or performance space capacity for each screening room/stage.
- **Retail:** Open with capacity limits and IDPH approved safety guidance:
 - Customers and employees should wear face coverings (unless they have a medical exception) and retailers must limit the number of customers in a store to 50 percent capacity, or five customers per 1,000 square feet of retail space.

Illinois COVID-19 Guidance: IDPH and DCEO



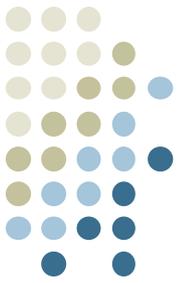
- Pursuant to the December 9, 2020 Guidance, all Illinois Employers are required to:
 - Evaluate which employees are able to work from home and are encouraged to facilitate remote work when possible;
 - Ensure that employees practice social distancing and wear face coverings when social distancing is not always possible.
 - Employers should provide face coverings at no charge to employees who are not able to maintain a minimum 6-foot social distance at all times;
 - Ensure that all spaces where employees may gather, including locker rooms and lunchrooms, allow for social distancing;
 - Ensure that all visitors (customers, vendors, etc.) to the workplace can practice social distancing. When maintaining a 6-foot social distance may not always be possible, visitors should be encouraged to wear face coverings;
 - Train employees on safety protocol; and
 - Prominently post the guidance from IDPH and the Office of the Illinois Attorney General regarding workplace safety during the COVID-19 emergency.

OSHA COVID-19 Guidance



- In January 2021, OSHA issued updated COVID-19 guidance recommending that all employers adopt a formal COVID-19 prevention plan, incorporating the following activities and elements:
 - Conduct a hazard assessment relating to COVID-19 exposure;
 - Identify control measures to limit the spread of COVID-19 (such as distancing, masks, barriers, work-from-home, staggered shifts, etc.);
 - Adopt policies that encourage sick workers to stay home and not come into work;
 - Communicate and train employees on the policies and procedures implemented (in their native languages); and
 - Implement protections from retaliation for workers who raise COVID-19 related concerns and issues.

OSHA COVID-19 Guidance (Cont'd)



- The guidance advises employers to continue to require all employees -- even those who have been vaccinated -- to comply with all control measures, including the wearing of masks and social distancing.
- OSHA can issue citations under OSHA's General Duty Clause.

Does an Employer Have a Right to Require the Employee to Report to Work?



- Yes. As businesses are given the authorization to re-open and go back to “business as usual” with the necessary safety measures, they will need to require employees to return to work in order to provide their services, generate income, and operate on a regular basis.
- Employees who chose not to return risk forfeiting their unemployment benefits.

EEOC Guidance re: COVID-19 Vaccines – Mandating Vaccines



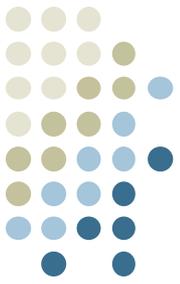
- In Illinois, all residents over the age of 16 are eligible -- vaccines are currently authorized for emergency use.
- Under the latest EEOC guidance, employers can ask if an employee is vaccinated and to show proof of vaccination, but likely cannot mandate vaccinations and cannot ask why an employee is not vaccinated.

EEOC Guidance re: COVID-19 Vaccines – Mandating Vaccines



- In order for an employer to require the COVID-19 vaccine, it must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

EEOC Guidance re: COVID-19 Vaccines – Mandating Vaccines

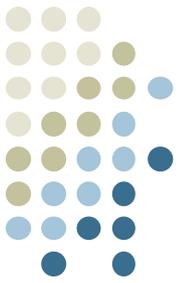


- Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists:
 - The nature and severity of the potential harm;
 - The likelihood that the potential harm will occur;
 - The imminence of the potential harm; and
 - The duration of the risk.

Even if You Can Mandate Vaccinations...



- Must assess and reasonably accommodate good faith religious and medical ADA requests.
- Interactive ADA Process.
- Assessing the pros and cons..
 - Employee surveys
 - Resignations
 - Requirements of vendors/clients



Encourage vs. Mandate

- Many reasons people are reticent to get vaccinated (i.e. cultural, political, medical, etc.)
- Employers can encourage vaccinations:
 - Education campaigns.
 - Tell your story campaigns – C-Suite.
 - Small incentives.
 - Make it easy – time off to get vaccinated.

Public Transportation and Commuting for your Employees Returning to Work



- Generally, employers are not required to provide transportation to work or assist with an employee's commute.
- Employees' fears about using various forms of public transit—subways, buses, or shared rides—could interfere with their willingness to return to work.
- As part of an overall plan to maintain operations and a safe work environment, employers may want to consider whether it is feasible to find ways to temporarily reduce reliance on public transit, which could take the form of parking benefits or commuting stipends that would allow employees to take private transportation to work.
- Employers could also consider schedule flexibility to allow workers to use public transit at off-peak hours.

Checking Employee/Visitor Temperatures



- The EEOC permits temperature and symptom checks of employees --- for this particular pandemic.
 - Consider using a questionnaire/checklist for each employee entering the site.
 - SA has a Sample Questionnaire Available
- Temperature checks follow ADA requirements that mandatory employee medical testing must be “job related and consistent with business necessity,” and recognizes that any employee infected with COVID-19 who enters the workplace poses a direct threat to others’ health.
- Employers should notify their employees of temperature and symptom screening measures in advance and inform the employees that the purpose of temperature screening is solely to protect the employees by keeping individuals with symptoms consistent with COVID-19 offsite and not to determine if an employee has any other illness, impairment or disability.
- Messaging should make clear that screening is not intended to be, nor is it a substitute for, a clinical diagnosis.

Additional Considerations for Temperature Taking...



- **Compensation for Screening**

- In some states, likely yes if the time is not de minimis.

- **Maintaining Proper Social Distancing**

- 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 a large number of 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) if employees must be in lengthy spaced-out lines prior to entering the facility.
- Employee privacy, especially where screening takes place and results are announced, should be accounted for during this time.

What Do You Do if an Employee is Symptomatic & Tests Positive?



- If an employee reports having any COVID-19 related symptoms, encourage the employee to contact their health care provider.
- If two or more employees report having COVID-19 related symptoms or test positive for COVID-19, the employer must notify their local health department within 24 hours.
- Conduct contact tracing.
- Notify all employees who were in close contact keeping the name of the sick employee confidential.

How Long is Quarantine Now?



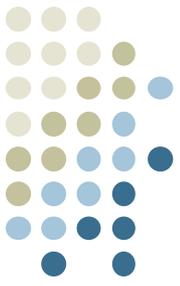
- The CDC currently recommends a quarantine period of 14 days. Local public health authorities can establish lesser quarantine options for certain lower risk close contacts. The following options to shorten quarantine are acceptable alternatives:
 - Quarantine can end **after** Day 10 without testing and if no symptoms have been reported during any day of the daily monitoring period. With this strategy, residual post-quarantine transmission risk is estimated to be about 1% with an upper limit of about 10%.
 - Quarantine can end **after** Day 7 if a RT (Reverse Transcriptase)-PCR test is negative and if no symptoms were reported during any day of the daily monitoring period. The earliest a specimen may be collected and tested would be on Day 6 with quarantine being discontinued no earlier than Day 8.

Protecting Health/Privacy of Employees re: Screening



- To the extent screening results lead to a decision to send an employee home, you should maintain a record of the results and treat the record as an employment medical record.
 - Keep separate from employee's regular personnel file.
 - DO NOT share the employee's name with other employees who may have been exposed.
 - But do inform them of the exposure.
- All other information should only be retained as long as necessary to manage risk during the COVID-19 crisis and should be permanently deleted once it is no longer needed.

Other Considerations Regarding Employee Health Data



- Does HIPAA apply?
 - Not likely. It only applies to “covered entities” such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions.
 - Disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel. Further, you should be careful not to release information to someone until you have properly identified them. The health department (state and local) is authorized to obtain information regarding employees as part of its infectious disease control responsibilities.
- Do Privacy rights apply?
 - Not likely, but depends on technology used. Under Illinois law, for example, BIPA is very easy to violate and can cost employers a lot of money if they don’t have a written BIPA policy and written consent when obtaining “biometric” identifying information. Under BIPA, biometric information includes “retina or iris scans, fingerprints, voiceprints, or hand scans or face geometry.” It expressly excludes “human biological samples used for valid scientific testing or screening.” *****NOTE: Some technology is imaging faces for timekeeping purposes to avoid fingerprint scans.**

Childcare Issues for Returning Employees...



- Even as workplaces are permitted to reopen, employees may have children whose schools or childcare facilities have not yet reopened.
- Give as much notice as feasible on return dates.
- Consider the employee and position, were they productive at home?
- Employers need to respond to requests from such employees to either continue working from home or take a leave of absence in order to care for such children.
- Some employers are creating shifts or alternating schedules to accommodate remote issues and childcare while ensuring that their business needs are met.
- Many business owners have staggered return dates per job positions to minimize exposure and to allow employees the time to arrange for childcare.
- FFCRA Leave – optional and should be considered.



FFCRA Paid Leave Tax Credits

- Private Employers with under 500 employees were required to provide paid leave for COVID-related reasons (some exceptions).
 - Expired December 31, 2020.
 - Refundable tax credit available to offset cost.
- American Rescue Plan:
 - Extends tax credits through September 30, 2021.
 - For employers who voluntarily choose to provide FFCRA paid leave.
 - Previously extended through March 31, 2021 by the CAA.
 - Updates certain FFCRA leave provisions

FFCRA Paid Leave Tax Credits



- Employers can voluntarily choose to grant FFCRA paid leave to employees for qualifying reasons and take tax credits for the leave.
- Includes both paid sick leave and paid emergency FMLA leave.
- Must comply with the paid leave provisions of the FFCRA, as amended, as if it were in effect at the time.

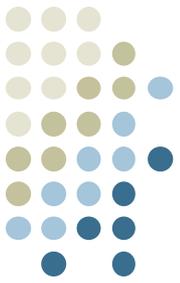
New Paid Sick Leave Qualifying Reasons



- Employee is unable to work (or telework) because the employee:
 1. Is subject to a federal, state or local quarantine or isolation related to COVID-19;
 2. Has been advised by a healthcare provider to self-quarantine;
 3. Is experiencing COVID-19 symptoms and seeking a diagnosis,
 4. Is caring for an individual who is subject to quarantine or is self-quarantining;
 5. Is caring for a child whose school or place of care is closed (or child care provider is unavailable) because of COVID-19;
 6. Is seeking or awaiting results of a COVID-19 test or diagnosis and: (i) the employee has been exposed to COVID-19, or (ii) the employee's employer requested the test or diagnosis;
 7. Is obtaining a COVID-19 vaccination or recovering from any injury, disability, illness, or condition related to such vaccination; or
 8. Is experiencing any other substantially similar condition specified by the US Secretary of Health and Human Services.

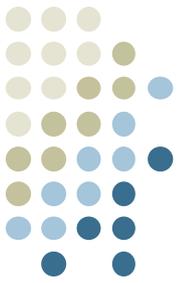


Amount of Paid Sick Leave/Tax Credits



- Up to 80 hours (10 days) for full-time employees.
 - Average hours over standard 2 week period for PT workers.
- **80 hour maximum resets as of April 1, 2021.**
 - Example: if employer took tax credit for providing an employee 80 hours paid sick leave during 2020, employer may take tax credit for another 80 hours paid sick leave beginning available April 1, 2021.

Amount of Paid Sick Leave/Tax Credits

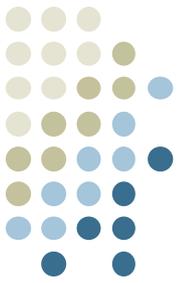


- Paid sick leave pay.
 - Employee's own condition – 100% of employee's regular rate of pay (or minimum wage if higher) up to \$511/day and \$5,110 total (reasons 1,2,3, 6 and 7).
 - Employee is caring for someone – 2/3rds employee's regular rate of pay (or minimum wage if higher) up to \$200/day and \$2,000 total (reasons 4 and 5).
- Tax credit available for full amount up to maximums above.



New Paid FMLA Expansion

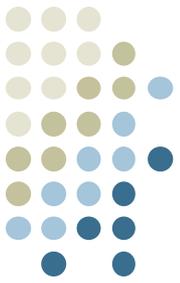
- Paid FMLA Qualifying Reasons.
 - Previously, available for employees caring for children whose schools or place of care was closed, or whose care provider was unavailable for reasons related to COVID-19.
 - Beginning April 1, 2021, available for all of the FFCRA paid sick leave qualifying reasons.
- Employees are eligible if they have worked for the employer for 30 days.



Amount of Paid FMLA

- Up to 12 weeks of Paid FMLA.
- 2/3rds employee's regular rate of pay up to \$200/day and **\$12,000 total** (increased from \$10,000).
- Removed 10 day waiting period before emergency FMLA is paid.

New Non-Discrimination Rules



- FFCRA tax credits are not available to employers who in providing FFCRA benefits discriminate:
 - in favor of highly compensated employees or full-time employees, or
 - on the basis of employment tenure of the employee.

Harassment Related to COVID-19

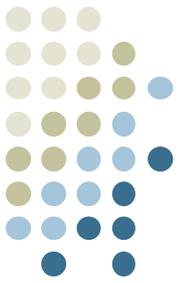


- There continue to be reports of xenophobia and backlash toward Asian and Asian American employees, and particularly Chinese workers.
- Employers should advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination, with a particular focus on discrimination and harassment related to race or national origin.
- An employer should also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

Workers' Compensation

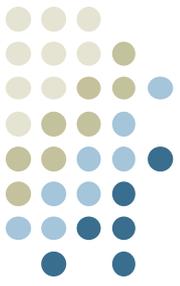


- Generally, under normal workers' compensation procedures, the burden is on the employee to establish that their injury or illness was directly caused by their duties.
- However, some states are creating new rebuttable presumptions that a first responder or front-line worker or ANY worker (i.e. IL) who contracts COVID-19 is covered by workers' compensation.
- Prepare a Questionnaire for any employee who is diagnosed with COVID-19 to determine the likelihood that they were infected at the workplace and have them certify their responses.



Waiver for Employees

- **Not a good idea.**
- Liability waivers for employees have traditionally been unenforceable due to the unequal bargaining power between parties.
- Employees can't waive work comp rights.
- Creates a perception that you are evading workers compensation and OSHA obligations.
- Will produce a negative reaction from employees and the public.



Waivers for Customers

- May be an effective deterrent.
- Generally, waivers for a party's liability for standard negligence can be valid and enforceable.
 - Cannot be contrary to public policy.
 - Cannot waive intentional, reckless, or grossly negligent conduct.
 - Parties should be of equal footing in the relationship.
 - Must be clear and unambiguous.
 - Some states are more flexible, while others are not --- actual enforceability is dictated by state law.

General **Sample** Reopening Guidance for Employees



In an effort to ensure that we re-open our office in a manner that protects our employees from exposure to COVID-19 while at the same time allowing us to resume operations, we are adopting the following policies and protocols that all employees must note and follow:

- Employee symptom monitoring:
 - Employees must monitor themselves for the development of any of the following symptoms: fever (temperature of 100.4 F or higher), cough, shortness of breath or difficulty breathing, chills, repeated shaking with chills, muscle pain, headache (not related to hunger, migraine, etc.), sore throat, nausea or new loss of taste or smell. If an employee develops any of these symptoms, they must notify their supervisor and stay home.
 - We will be screening employees for COVID-19 symptoms each day before they start work. Employees who have a fever of 100.4 F or higher or any of the symptoms described above upon arrival to work will be sent home immediately.
 - If an employee develops any COVID-19 symptoms while at work, they should notify their supervisor and leave work immediately.
 - Any employee who is off work or sent home from work due to having COVID-19 symptoms must stay off work until the employee is symptom free for 72 hours (without the use of fever reducing or other medication) AND at least 10 days have passed since the symptoms first appeared.

General **Sample** Reopening Guidance for Employees



- Employees who test positive for or are presumed to have COVID-19 and close contacts:
 - Any employee who tests positive for or is presumed to have COVID-19 is required to stay off work for either the length of time required by the local health department OR, if no requirement is imposed by the local health department, until the employee is symptom free for 72 hours (without the use of fever reducing or other medication) AND at least 10 days have passed since the symptoms first appeared OR a health care provider releases the employee to return to work, whichever is longer.
 - Any employees who were in close contact with the ill employee will be instructed to stay off work for 10 days from their last contact with the ill employee. Close contacts will either be contacted by the local health department or us. “Close contact” means being within six feet of the ill employee for at least 10 minutes during the time the ill employee was likely contagious or being coughed or sneezed on by the ill employee. Confidentiality of the ill employee will be maintained.
 - Employees who have a household member with COVID-19 or who have been informed that they are a close contact of someone who has COVID-19 should notify their supervisor and stay off work for 14 days or for as long as instructed by the local health department. If the employee develops symptom, the timeline set forth above applies.

General **Sample** Reopening Guidance for Employees



- In order to reduce the transmission of COVID-19 in the office, all employees must take the following steps:
 - Wear a face mask at all times while in the office unless they are in their own office with the door closed or otherwise appropriate isolated area. We are providing face masks.
 - Wash their hands frequently with warm, soapy water for at least 20 seconds. If soap and water are not readily available, use hand sanitizer. In addition to our normal access to soap and water, we are providing hand sanitizer.
 - Cover their mouth with tissues whenever they sneeze, and discard used tissues in the trash. We are providing tissues and no-touch disposal receptacles.
 - Clean frequently touched surfaces with sanitizing wipes. This includes all equipment that they touch during the course of the work day. We are providing sanitizing wipes.
 - Maintain social distancing while at work to the extent possible, which means keeping six feet between themselves and others. We have installed dividers between cubicles.
 - No more than ___ people at a time may be in the break room.

General **Sample** Reopening Guidance for Employees



- We have made the following changes to the office to reduce the spread of COVID-19:
 - Established enhanced cleaning protocol for the office, targeting frequently touched surfaces.
 - Eliminated the shared coffee maker, water cooler, refrigerator, microwave, reusable mugs/cups/flatware/etc. We will provide bottled water for employees. Employees should bring their own coffee with them.
 - Visitors to the office should be kept to a minimum and should wear face masks and follow social distancing guidelines.
 - Meetings should be held virtually to the extent possible. Any on-site meetings must be limited in size so that social distancing may be maintained. All attendees at live meetings must wear face masks.

General **Sample** Reopening Guidance for Employees

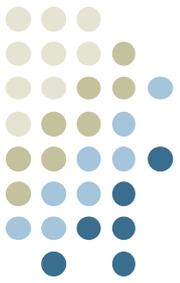


- Travel restrictions:
 - All non-essential business travel by any mode of public transportation or by airplane is prohibited.
 - Any essential business travel by any mode of public transportation or by airplane must be pre-approved by the company president. No international business travel will be allowed until further notice.
 - Any employee who travels by airplane domestically, whether for business or pleasure, must stay home for 72 hours after returning from such travel and self-monitor for symptoms of COVID-19. If symptoms develop, the timelines established above must be followed.
 - Any employee who travels internationally must stay home for 14 days after returning from such travel and self-monitor for symptoms of COVID-19. If symptoms develop, the timelines established above must be followed.

Your health and well-being are of utmost importance to us. As always, you should contact _____ with any questions or concerns.

The protocols established here are subject to change at any time due to new public guidelines, legal mandates and/or operational needs.

IN CONCLUSION: Food for Thought...



- The laws, regulations, and guidance for businesses re-opening are constantly changing.
 - Need to evaluate your individual circumstances
 - Look to others in your industry
 - Look to local/state guidance and orders
- SmithAmundsen's COVID-19 webpage & blog have insight and resources:
 - <https://www.salawus.com/practices-covid19-task-force.html>
 - www.laborandemploymentlawupdate.com

Questions????

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