

COVID-19

A Retail Industry Focus



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COVID-19 is the top priority across businesses and industries as the virus affects millions of people, directly and indirectly, both nationally and globally. Employers are acting at lightning speed to ensure the health and safety of their workforce and the public at large. Retail is on the frontline with citizens in all communities, large and small, and in that unique position, faces its own specific challenges in managing the impact to its business including: managing communications and interactions with its employees and customers, handling work schedules, configuring time off options and planning for the prospect of site closures. Retail employers should, of course, follow the guidance provided to all by the Centers for Disease Control and Prevention (CDC) and consult the CDC website to remain current with their recommendations. With this update, we highlight some of the issues of particular concern to the retail community.

1. Communications with the Retail Workforce

The question on everyone's mind is how to ensure that those who have contracted the virus do not contribute to further spread. Addressing this issue in retail environments, where strangers converge and the public and the retail workforce necessarily intersect, necessitates strong communication protocols. First and foremost, retail employers can and should play a pivotal role in educating their workforce with postings that encourage employees to stay home when they are sick, advising employees on coughing and sneezing etiquette, and encouraging hand hygiene at entrances to retail locations and in other common workplace areas. Retail employers may also ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. Federal or state law may require the employer to handle the employee's responses as a confidential medical record. To help address that obligation, employers should maintain the information in a separate, confidential medical file and limit access to those with a business need-to-know.

Employers may actively encourage sick employees to stay home until they have recovered. Should an employee appear to have acute respiratory illness symptoms (e.g., cough, shortness of breath) upon arrival to work or develop such symptoms during the day, those employees may be asked to go home. If the employee is unable to work from home, the employee may be permitted to use their available sick time or paid time off in accordance with the employer's sick time and leave policies as well as applicable state and local laws. Employers should ensure their sick leave and attendance policies are flexible and consistent with public health guidance, modify them if appropriate, and communicate these policies and modifications to employees.

Employers may still mandate compliance with time and attendance policies requiring healthcare provider notes for absences if an employee is calling in sick, subject to applicable law. Employers may also require a fitness-for-duty release in certain circumstances, when an employee has been absent due to illness or because of any incubation leave. Whether an employer may require a fitness-for-duty release depends on the particular facts of the situation and should be assessed on a case-by-case basis. As the CDC points out, healthcare provider offices and medical facilities are becoming overwhelmingly busy and likely unable to provide documentation in a timely way.

Retailers can expect employees to request permission to wear protective gear such as face masks and gloves, and to ask that the company provide such protective gear. The CDC does not recommend that people who are well wear a face mask to protect themselves from respiratory disease, including COVID-19. The CDC advises that face masks

should be used by people who show symptoms of COVID-19. However, if an employee shows symptoms or has been diagnosed with COVID, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask.

If an employee asks to wear a face mask as an accommodation of another condition (such as an autoimmune condition that, the employee reports, may cause a “direct threat” of harm to the employee if they contract the virus), the employer should, at the very least, engage the employee in the interactive accommodation process before denying the request. Pending the conclusion of the interactive process, such an employee should not be required to remain in the workplace. If, through the interactive process, the employer determines that the employee does, indeed, have a disability that would pose a direct threat and that wearing a face mask will sufficiently reduce or eliminate the threat, the employer should allow the employee to wear a face mask unless it would interfere with the employee’s ability to perform their essential job functions or it would pose an “undue hardship.”

If an employee is well, but has a family member at home with COVID-19, the [CDC’s Interim Guidance for Businesses and Employers](#) provides that employees should notify their supervisor and refer to CDC guidance for [how to conduct a risk assessment](#) of their potential exposure.

If employers have reason to believe (or actual knowledge) that an employee has COVID-19, employers should pay close attention to sanitizing the workspace where that employee worked or frequented. The CDC issued Environmental Cleaning and Disinfection Recommendations that can be found [here](#). When implementing sanitizing measures, it is important to note the following:

- These guidelines are focused on community, non-healthcare facilities (e.g., schools, institutions of higher education, offices, daycare centers, businesses, community centers) that do not house people overnight and are not meant for cleaning staff in healthcare facilities, repatriation sites or households.
- The personal protective equipment (PPE) required does NOT include respirators (which makes it easier for employers) but includes disposable gloves and gowns for all tasks, including handling trash, with the added guidance that:
 - 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.
 - Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Hands should be cleaned after removing gloves.
 - Gloves should be removed after cleaning a room or area occupied by ill persons and, again, hands must be cleaned immediately after gloves are removed.
 - Cleaning staff should immediately report breaches in PPE (e.g., tearing gloves) or any potential exposures to their supervisor.
- The guidelines state that employers should: (1) develop policies for worker protection; (2) provide training to all cleaning staff on site prior to providing cleaning tasks; and (3) include in the training 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.

With respect to the timing and scope of cleaning, the following steps are recommended:

- Close off areas used by the ill person(s) and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets.
- Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.

- Cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill person(s) focusing especially on frequently touched surfaces.

If an employee is *confirmed* to have COVID-19 infection:

- The confirmed employee should remain out of work for at least 14 days.
- Employers should inform fellow employees of their possible exposure to COVID-19 in the workplace **but ensure to maintain confidentiality** as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for [how to conduct a risk assessment](#) of their potential exposure.
- Employers should consult CDC and local health departments regarding appropriate cleaning procedures (see list above).
- Employers should consider hiring a third-party professional cleaning company with appropriate PPE and hazmat capabilities.
- Conduct a risk assessment to determine whether the facility where the diagnosed person worked should be closed for 14 days.

2. Implementing Social Distancing for Employees & Customers

Implementing social distancing measures is said to be the key to halting the spread of COVID-19 and a recommended safety measure for all. For retail workers and customers, attention must be paid to maintaining a safe distance during the entirety of the retail transaction. In addition to practicing good hygiene and maintaining a recommended safe distance (6 feet or 2 meters) from co-workers and customers, retail employers can implement the additional measures:

- Discourage workers from using other worker's phones or other work tools and equipment whenever possible;
- Ensure break areas accommodate distancing with regular disinfection of all eating surfaces;
- Space workers at the worksite;
- Stagger work schedules;
- Decrease social contacts in the workplace (limit in-person meetings);
- Eliminate large work-related gatherings (e.g., staff meetings, after-work functions); and
- Cancel work-sponsored conferences, tradeshow, etc.

As for customers, while many people are avoiding gathering in public spaces, some are flooding certain retail stores for necessities as they cope with employer and school closings. As a preliminary precaution, retailers can consider posting signs asking people who are sick not to enter the store and advise customers that the retailer is excluding sick employees from the workplace so they feel confident to enter. Providing customers alcohol-based disinfecting cloths and sanitizing stations or other places to wash their hands, and ensuring these areas are routinely stocked and refilled, provides a layer of protection most customers have come to expect. Provision of tissues and trash receptacles to customers and the public is an additional method of protection support. Some retailers are limiting the number of patrons entering their store locations and asking patrons to use credit card payment only to limit the exchange of medium that may serve as transfer surface. Consider strategizes to minimize customer face-to-face contact with workers where possible (e.g., drive-through windows, phone base communication, etc.).

Of course, when educating and implementing measures that separate, attention must also be paid to the concern for discrimination of customers (and employees) who appear to be from areas that are severely impacted (*i.e.*, Asian, Chinese). Title VII and state law prohibit discrimination based on race, color, national origin, and other protected

classifications. The [CDC has advised](#) in this context: “To prevent stigma and discrimination in the workplace, use only the guidance described below [provided by the CDC] to determine risk of COVID-19. Do not make determinations of risk based on race or country of origin, and be sure to maintain confidentiality of people with confirmed COVID-19.” Employers should be careful not to exclude any person from work or work-related activities, as well as from any type of customer or client interaction, based purely on race or national origin, without evidence of illness or recent travel to a high-risk area. Finally, employers should ensure that any communicable disease or travel policies do not implicate antidiscrimination laws, not only based on race, color, age, pregnancy, or national origin, but also on disability or other prohibited bases. Any communicable illness policy should address all communicable illnesses and not just one that disproportionately affects (or is perceived to affect) a particular protected class of individuals. Similarly, employers should be sure that any travel restrictions and other employer-mandated policies are imposed impartially.

Employers must also take steps to prevent discrimination and harassment against individuals who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted coronavirus. To accomplish this, employers should ensure the confidentiality of all employees’ medical information and leave details to prevent harassment. Employers should consider reminding employees of antiharassment and discrimination company policies. Employers should also work to tamp down rumors about employees related to employee health or travel. Employers must be vigilant about promptly responding to and investigating any complaints of harassment or bullying in the workplace.

3. Temperature checks

Because retail employees, due to the nature of the business, are in close contact with a wide range of individuals in the general public, it is in the interest of everyone to halt the spread of the disease where possible. As a result, some have questioned whether retail employers can conduct temperature checks of employees (like those performed in some other countries grappling with this virus) and under which circumstances. As of March 17, 2020, federal authorities have condoned employee temperature checks. Employers should bear in mind that state or local antidiscrimination laws may continue to restrict the use of temperature checks, so additional guidance may be needed.

Generally, the ADA prohibits an employer from requiring medical examinations of employees, like temperature checks, except in limited circumstances. However, [EEOC guidance](#) initially issued in 2009 in connection with the H1N1 influenza virus pandemic, and updated on March 17, 2020 specifically related to COVID-19, provides: “Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature.”

In addition, the CDC suggests “regular health checks on arrival each day (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings” in locations identified as having widespread transmission of COVID-19. As of March 16, 2020, those locations are Seattle, Washington; Santa Clara, California; and New Rochelle, New York. In addition, the CDC’s “Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission” guidance recommends employers “consider” temperature screenings for workplaces where “minimal to moderate” spread has been identified.

Retailers should consider some otherwise unintended consequences of mandating temperature scans for all employees. First, if hourly employees must wait for temperature checks to take place prior to entering the retailer’s premises and clocking in, there may be exposure for an off-the-clock claim. One way to potentially help mitigate risk would be to implement a system of compensating employees for the time spent waiting to be screened, which might include going through the process multiple times per day (*i.e.*, upon arrival, upon return from meal and rest breaks, etc.). Second, if the employee objects to the temperature check, retailers must consider the consequence. Discipline or sending an employee home (especially if the employee has no accrued paid time off or will not otherwise be paid for the time away from work) could lead to retaliation or “regarded as” disabled claims. Finally, as the EEOC noted in [its guidance](#), “some people with

COVID-19 do not have a fever.” Temperature checks are not the most accurate means of determining whether someone has COVID-19. Several individuals do not register a fever or may not do so until up to two weeks after they were able to infect others. In other words, an employee could have COVID-19, display no symptoms, report to work and not register a fever for 2 weeks. That employee would be permitted to enter the worksite (since the temperature check did not disqualify them from entry) and could, unknowingly, spread the virus to others.

As retailers explore whether to conduct temperature checks, they should consider some specific practical issues and measures, such as:

- Consider whether *all* individuals entering the retailer’s location (or just employees) will be checked. For retailers, checking everyone (*i.e.*, employees, vendors, customers, etc.) could be extremely burdensome and may dissuade customers from entering the location. If only employees are checked, then a large portion of the risk associated with the spreading COVID-19 is not addressed. Customers and vendors can spread the virus in the same way employees can spread the virus.
- Retailers must determine an objective elevated temperature reading that forms the basis for exclusion. Anyone who registers above the target temperature reading must be excluded (regardless of employment level or exemption status).
- The temperature checks must be uniformly applied. All employees must be checked upon entry (regardless of employment level or exemption status). If not uniformly applied, there may be risk of exposure to claims of discrimination.
- Temperature checks should be conducted by someone with adequate training to perform the check consistently, properly and safely and, ideally, in a private location.
- Temperature checks should be documented appropriately. That documentation should be securely stored in a confidential file separate from the individual’s personnel file.

4. Predictive Scheduling Laws

Many retailers may want to know whether the COVID-19 pandemic qualifies as an exception under a state or local predictive scheduling ordinance. Employers with stores in “predictability pay” jurisdictions (where the employer must provide typically 7 or 14 days of notice of upcoming scheduled shifts and any changes to the schedule may require compensation obligations), may be concerned that sudden changes in the CDC’s or local government’s assessment of the current COVID-19 pandemic, including unplanned local “shelter in place” ordinances or federal government recommendations, will leave them subject to predictability pay as a result of their inability to comply with the law’s notice period.

The impact of COVID-19 on the retailer’s particular locality, however, may be severe enough to rise to the level of an exception that removes employers from the requirement to pay premiums for schedule changes.

Note that not all states or localities have predictive scheduling requirements.¹ For those that do, several jurisdictions carve out exceptions to the premium pay requirement for schedule changes where a state of emergency has been declared by the federal, state, or local government. On March 13, 2020, the President of the United States declared a state of national emergency regarding the current coronavirus pandemic. New York City retail employers are permitted to cancel shifts as needed with less than 72 hours notices where the city or state has declared a state of emergency, as has occurred in [New York City](#). However, the NYC state of emergency exception only applies for complete closures of storefronts. And, on March 16, 2020, the predictability pay portion of Philadelphia’s ordinance, which was set to be effective as of April 1, 2020, [has been postponed](#) “until further notice” due to the COVID-19 pandemic.²

¹ State and local jurisdictions with predictive scheduling laws that could be relevant here include California (Berkeley, Emeryville, and San Francisco only), Chicago, Illinois (currently effective July 1, 2020), New York City, Oregon, Philadelphia, Pennsylvania (predictability pay portion postponed), and Seattle, Washington.

² The effective date of the remaining portions of the Philadelphia ordinance has not been postponed.

Other jurisdictions, like Emeryville and San Francisco, California, provide an exception for a cause not within the employer's control. The San Francisco Bay Area "shelter in place" orders may provide a qualifying exception.

Seattle's ordinance includes an exception where operations cannot continue due to an act outside of the employer's control or due to the recommendation of a public official that work cannot begin or continue. As of March 16, 2020, [Washington State](#) continues to be subject to a state of emergency and gatherings are limited to 50 individuals or less. Also on March 16, [King County](#) (which covers Seattle, Washington) issued the following instruction specific to retailers, which permits them to stay open for now under the following guidelines:

- All restaurants and food service establishments cannot provide dining room service. They may remain open for drive-through, takeout and delivery.
- All other retail – including banks, grocery stores, hardware stores and pharmacies – should and may remain open, provided they observe COVID-19 prevention measures.

As a result, employers should evaluate the universe of factors relevant in the impacted jurisdiction such as any public declarations by government officials, instructions to close businesses or limit hours of operations, or the number of individuals permitted to congregate in one setting. In sum, where a "shelter in place" order or state of emergency has been issued, or there has been an instruction by the locality to close non-essential businesses like retail stores, it is arguable that an employer may qualify under the exception to the local predictability pay requirement. Before making any decisions, employers should review all of the unique circumstances relevant to their jurisdiction.

5. Furlough vs. Layoffs – Federal WARN & State-Specific WARN

Despite an employer's best efforts to avoid layoffs, the current climate caused by COVID-19 concerns including restrictions on recreational gatherings and the focus on social distancing, could hit the retail business pretty hard. Business needs may require several retailers to temporarily shut down operations and/or seek to furlough or layoff employees.

A furlough is an employer initiated, temporary unpaid leave due to circumstances impacting the company. Furloughed employees typically have an expectation of returning to work for the company at a company-specified time in the future and typically retain their benefits during the term of the furlough. A furlough is a good option for retaining employees that the company cannot currently afford, but who the company does not want to layoff. This option can be especially useful for retailers who typically have large numbers of non-exempt employees. Generally, employers can schedule non-exempt employees for fewer days or hours without major liability concerns since employers do not need to pay a non-exempt employee for time not actually worked.

On the other hand, if an exempt employee performs any work (even checking e-mail) during a workweek, that exempt employee should receive their *entire* salary that week. Failure to compensate an exempt employee for a week where any work is performed can jeopardize that employee's exempt status. In considering a furlough for exempt employees, the company should strive to time the furlough to ensure that no work was performed during the week that the furlough was implemented. When the furlough is over, the employee can simply return to work and resume their job duties.

A layoff, however, results in the termination of the employment relationship on a temporary or permanent basis. When an employer places employees on extended furlough or conducts a layoff, federal Worker Adjustment Retraining Notification (WARN) and state mini-WARN statutes may require employers to provide advance notification (60 to 90 days, depending upon the jurisdiction) to employees and government officials under certain circumstances:

- **Duration of Layoff:** Temporary layoffs of less than six months are not considered to be employment losses under federal WARN, and the same is true under many, but not all, state mini-WARNs.
- **Number of Impacted Employees:** Federal WARN is not triggered unless, at a minimum, there are 50 employment losses at a single site of employment in a 90-day period. State mini-WARNs can be triggered at lower levels.

Even if federal WARN or a mini-WARN are triggered, an exception could apply to the notice requirement based upon the current and developing circumstances surrounding COVID-19. Many jurisdictions permit shortened WARN notification periods when the layoff is the result of an unforeseeable business circumstance. The shortened notice period, however, still requires actual written WARN notice to impacted employees, with as much notice as possible. WARN issues can be quite complex, and employers should consult with knowledgeable counsel before proceeding.

Retailers in California, moreover, may meet some challenges if faced with unanticipated short-term layoffs. Unlike federal WARN, the California statute typically does not permit shortened WARN notice based on unanticipated business circumstances, and it can be triggered by temporary layoffs shorter than six months. However, the California governor recently suspended the 60-day notice requirement. Under the current circumstances, and considering the fluid nature of developments, California employers should do their due diligence prior to implementing any temporary layoff. Additional information about furloughs and layoffs in the COVID-19 context is available [here](#).

It should be noted that several states and local municipalities are now strongly encouraging, and in some instances *mandating*, non-essential businesses to close for at least 14 days. For example, in Pennsylvania, non-essential retail facilities, including shopping malls (except for pharmacy or other health care facilities located therein), are encouraged to temporarily close for 14 days. This trend is likely to expand.

We are living through an unprecedented time in global history. There is no instruction manual for how employers, in general, and retailers, specifically, should handle the myriad of issues associated with COVID-19 that are changing rapidly by the day. Retailers should stay informed regarding developments from a federal, state and local level to ensure they are compliant with any rules or regulations related to their specific geographic location and/or industry. We will continue monitoring the situation as well.