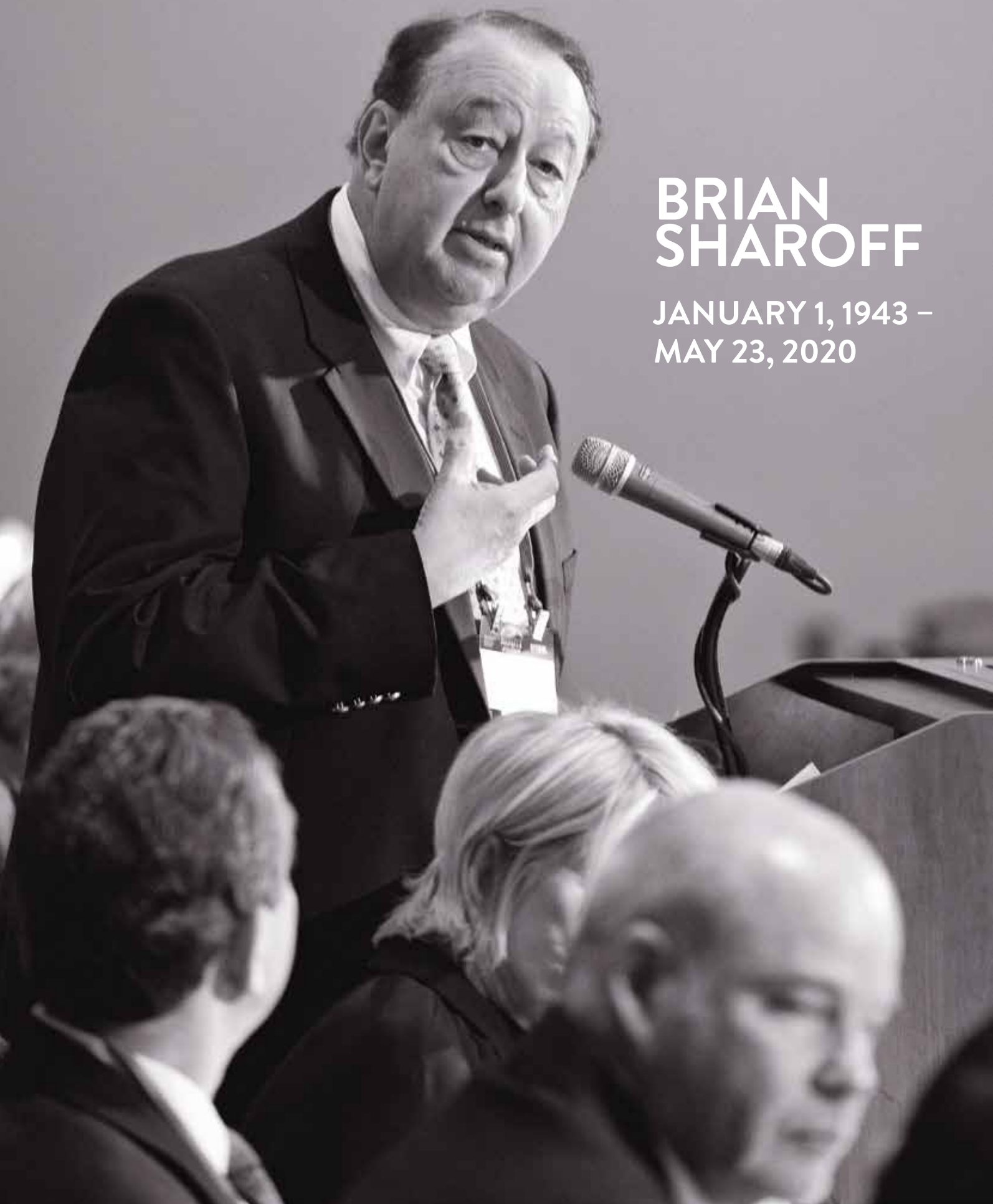


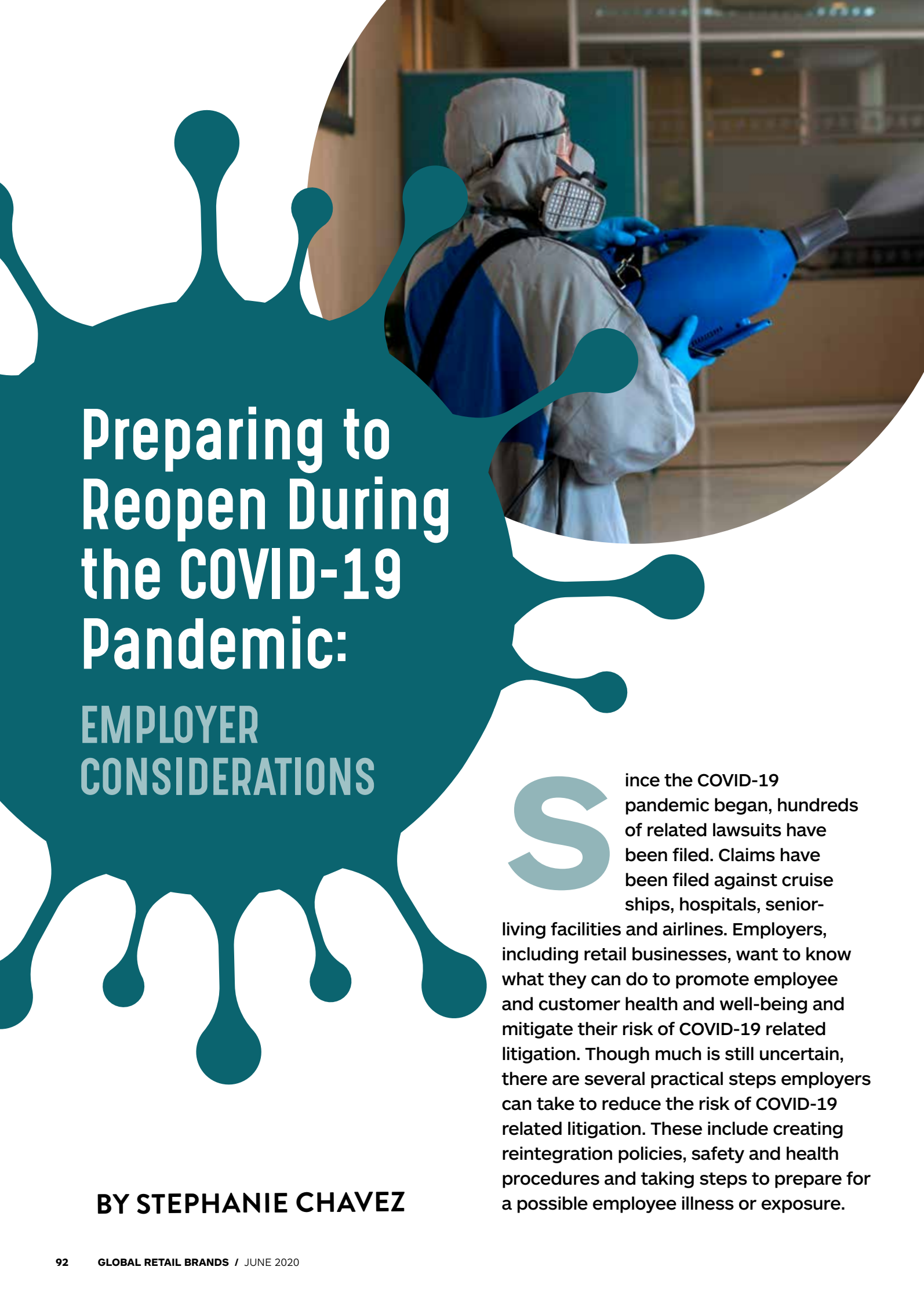
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Preparing to Reopen During the COVID-19 Pandemic:

EMPLOYER CONSIDERATIONS

BY STEPHANIE CHAVEZ

Since the COVID-19 pandemic began, hundreds of related lawsuits have been filed. Claims have been filed against cruise ships, hospitals, senior-living facilities and airlines. Employers, including retail businesses, want to know what they can do to promote employee and customer health and well-being and mitigate their risk of COVID-19 related litigation. Though much is still uncertain, there are several practical steps employers can take to reduce the risk of COVID-19 related litigation. These include creating reintegration policies, safety and health procedures and taking steps to prepare for a possible employee illness or exposure.



A.

Prepare the Physical Workplace

Before employees return to the workplace, steps should be taken to prepare the space to ensure employee wellness. Employers should try to implement what is feasible and practical for each specific workplace, and consult and comply with state and local ordinances that might apply to reopening. Employers should also review U.S. Centers for Disease Control and Prevention (CDC) guidance on cleaning and disinfecting their facilities, which are available online here. These procedures should remain in place after employees have returned and should include:

FOR WORKPLACES:

- Disinfect all surfaces that might be touched before employees return to the workspace and regularly afterwards. Also follow guidelines regarding increased sanitizing stations, inventory and restocking requirements, and disposal of Personal Protective Equipment in accordance with World Health Organization (WHO), CDC and Occupational Safety and Health Administration (OSHA) guidelines.
- Close or restrict community spaces where large groups of employees may congregate. The area can be closed entirely or chairs can be removed to limit the number of employees in the space.
- Discontinue the use of high-touch services, such as vending machines or coffee makers.
- If possible, install high-efficiency air filters and increase ventilation in the workplace.
- Even if employees are spaced out, install physical barriers between them.
- Stagger work schedules to reduce employee interaction, or promote remote work, if feasible.
- Stagger meal and rest breaks to avoid employee interaction.
- Prohibit equipment sharing, such as office supplies, tools and personal items.
- Post reminder signs for safe distancing, proper respiratory etiquette and hand washing.

For Public Interaction:

- If employees directly interact with customers, install physical barriers between them, such as clear plastic sneeze guards, or establish a drive-through or curbside pick-up systems. Also, customer access to the workplace should be limited, by enforcing entry capacities and marking six feet measurements between customers waiting in line.
- Restrict access to work environments by outside delivery personnel by establishing a drop-off location with designated employees provided with Personal Protective Equipment and training to process the deliveries.
- Post reminder signs for customers regarding safe distancing and proper respiratory etiquette.

The risk of exposure to employees delegated to clean is relatively low. However, if the employer assigns its own employees to perform cleaning and disinfecting, the employer must:

- Provide training on how to properly clean/disinfect and how to properly use and remove Personal Protective Equipment to avoid potential exposure, according to CDC guidelines;
- Provide disposable gloves and gowns for all cleaning tasks and enforce their use;
- Provide additional Personal Protective Equipment if required due to type of cleaning/disinfecting products being used and whether there is a risk of splash.

These measures should continue in the workplace on an ongoing basis until otherwise directed by the CDC. Employers should continue to communicate with employees regarding good hygiene and provide refresher training and reminders regarding proper Personal Protective Equipment, cleaning/disinfection methods and hygiene and etiquette.

All Personal Protective Equipment and cleaning/disinfecting supplies should be purchased by the employer at its cost.





B.

Communicate with Employees

Regular communication with employees will reduce employee uncertainty and anxiety during the pandemic. There are several avenues of communication that can be utilized, including conference calls, town hall meetings via video or teleconference, emails and digital signage on employee intranets. When communicating with employees, be sure to establish clear guidelines and expectations regarding returning to work. This should include the policies and procedures put in place regarding employee health screens, cleaning and disinfecting, altered work schedules and workplaces, and infected and exposed employee procedures.

Employers should practice the following to establish and maintain effective communication with employees:

- Monitor public health communications about COVID-19 recommendations and ensure employees have access to that information.
- Create a system where employees can criticize, report or file concerns or violations of health and safety procedures. Take all reports and complaints seriously by investigating the report. Do not retaliate against any employee who issues a report or complaint. Employees should not be disciplined or terminated because they raised or escalated complaints about a potential violation of health and safety laws or

procedures, including concerns regarding the employer's response to COVID-19.

- Create regular town hall meetings (remotely or via telephone conferences) to discuss health initiatives and promote safe work policies and procedures.
- Post necessary legislative information of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises, available online [here](#).
- Revise and circulate employee policies and handbooks to communicate new procedures related to COVID-19. Revisions may be necessary to the following policies in your handbook:
 - Attendance policies
 - Vacation/ Paid Time Off
 - Remote Work
 - Schedules and Reporting Time
 - Leave Policies, including Sick Leave
 - FMLA
 - Americans with Disabilities Act
 - Travel Policies.

C.

Maintain Social Distancing and Good Hygiene Practices



No one knows for certain when the need for social distancing will subside. It is important that employers follow CDC guidelines regarding social distancing and hygiene. If litigation arises, the question will be whether the employer upheld its responsibility to provide a safe workplace free from serious recognized hazards.

Retailers should establish the following to ensure a safe workplace:

- Space out work stations no closer than 6 feet.
- Routinely clean and disinfect all frequently touched surfaces in the workplace, such as workstations, keyboards, payment devices, telephones, handrails and doorknobs.
 - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
 - For disinfection, most common EPA-registered household disinfectants should be effective. Follow the manufacturer's instructions for all cleaning and disinfection products (e.g., concentration, application method and contact time, etc.).
 - The CDC provides that employers should provide training to all cleaning staff on site prior to providing cleaning tasks.
- Continue to encourage remote work where possible.
- Permit but do not require more vulnerable population of employees to work remotely, if possible.

This includes:

- Employees who are over 60 years old.
- Employee with underlying health conditions (do not require doctor note).
- Consider that requests to continue remote work may be considered a request for reasonable accommodation under the ADA. Proceed with the interactive process with the employee to determine whether any obligations exist to provide such an accommodation.
- Continue to limit travel to business essential only.
- Prohibit gatherings of 10 or more people, such as conferences, in break rooms, and only if proper social distancing practicing can be observed.
- Promote frequent and thorough hand washing and provide alcohol-based hand rubs containing at least 60% alcohol.
- Appoint a staff person to enforce these policies and procedures.
- Create training for these policies and procedures to educate employees.

Each workspace will require an individual assessment regarding the spatial and engineering changes possible. Consult with counsel regarding your space for an assessment prior to reopening.





D.

Prepare for Employee Illness or Exposure

As the pandemic continues, employee exposure and illness are likely to occur. Employers should create and implement a plan to identify and manage employees who are exposed or ill in order to protect all employees and minimize the risk of exposure and spread.

Health Screening and Communication:

- Consider conducting daily health surveys before employees begin shifts and enter the workplace, including taking temperatures. On March 19, 2020, the Equal Employment Opportunity Commission issued updated guidance specifically concerning COVID-19, the ADA and the Rehabilitation Act and indicated: “If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.” As of April 24, 2020, employers can test for COVID-19, according to the EEOC.
- Ask about symptoms (cough, fever, shortness of breath).
- Ask about exposure to persons with confirmed or suspected COVID-19.
- Ask about family and household member symptoms.
- Ask about travel.
- Be sure to compensate employees for the time they spend waiting for and conducting health screens to avoid any FLSA issues.
- Consider creating a designated “workplace coordinator” and hotline to self-report symptoms and receive guidance.
- Share employee and manager contact information so that employees can provide notice of possible symptoms and exposure and receive feedback on procedures.
- All these procedures should be enforced consistently to avoid an appearance of discrimination among protected classes.
- All information derived from health screenings should be kept confidential, and physical records are not recommended due to additional confidentiality requirements by privacy statutes.



Confirmed COVID-19 Cases:

If an employee is confirmed to have COVID-19, all CDC guidelines should be enforced. These include the following procedures:

1. Isolate/Quarantine the Confirmed Employee.

Send the employee home immediately and do not permit them to enter the workplace. According to the CDC, persons with COVID-19 symptoms who were directed to care for themselves at home may discontinue isolation under the following conditions:

- At least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications; and,
- Improvement in respiratory symptoms (e.g., cough, shortness of breath); and,
- At least 7 days have passed since symptoms first appeared.

2. Isolate Possible Exposed Employees.

Employees who worked near the confirmed employee (for 48 hours prior to symptoms) should be identified and sent home for 14 days to be sure no symptoms develop. If you are an essential business, asymptomatic employees who have been directly exposed to a confirmed case of COVID-19 can continue to work if certain CDC guidelines are met, which are available online here.

3. Clean and Disinfect the Workplace.

Once an employee has been confirmed to have COVID-19, following all CDC guidelines for disinfecting the workplace, which are available online here.

4. Notify Surrounding Employees.

Notify all employees who work in the location or area where the employee works of the situation without identifying the employee or exposing any confidential information. In addition to notifying employees of potential exposure, notify them of the health and safety procedures you have taken and their duty to self-monitor and report any suspected symptoms.

If an employee is suspected to have COVID-19 but is not confirmed, all procedures above should be followed as if the employee were confirmed.

E.

Plan for Absenteeism

In order to continue operations safely while implementing these procedures, it will be necessary for you to plan for potential absenteeism as employees are required to self-isolate. Additionally, employers should plan for a second and perhaps even a third wave of the pandemic to prolong employee illness and create absenteeism. In order to prepare for such events, employers should:

- Cross-train employees to carry out essential functions so the workplace can operate when essential staff are out.
- Create succession plans in the event employees become sick and cannot work.
- Identify your fundamental business operations and plan to continue these functions with minimal essential personnel.
- Identify alternative vendors that are critical to your business continuity in the event that primary vendors are unable to provide services. Initiate and continue regular communications with vendors.

If an employer is not prepared or cannot provide the required social distancing, cleaning and other safe work procedures, they should not reopen their workspace until they are able to do so.

Having a plan that prioritizes employee and customer health and well-being prior to reopening and resuming operations during the pandemic is critical to a retail business' successful operations. It can reduce employee and customer anxiety and mitigate the business' risk of litigation.



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