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**LEGAL ISSUES RELATED TO RE-OPENING WORKPLACES  
DURING CORONAVIRUS PANDEMIC**

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*Note: We are periodically updating all of our public coronavirus materials as new information becomes available. For updated versions and memos on new topics, please visit <https://tristerross.com/update/>.*

As government officials begin lifting restrictions on business operations and public gatherings, nonprofit employers have to decide when to re-open their offices, how to resume operations, and what precautions to take. When engaging in this process, organizational managers should involve their board of directors and consider local conditions and government orders, the business necessity for gathering people together, individual employees' circumstances, and steps the organization can take to mitigate the legal risks outlined below.

**I. Medical Inquiries**

If your offices have been closed in recent months, when you reopen you may quickly be faced with the question of what you can ask employees about their COVID-19 symptoms and exposure.

The Americans with Disabilities Act ("ADA") restricts the circumstances in which an employer can ask applicants and employees for medical information. The ADA applies to employers with 15 or more employees. State and local laws may impose similar requirements on employers with fewer employees.

Under the ADA, a disability-related inquiry or medical examination of an employee must be "job-related and consistent with business necessity." The criteria are satisfied when an employer believes, based on objective evidence, that an employee either:

- is unable to perform essential job functions because of a disability; or
- poses a direct threat to self or others in the workplace because of a disability.

Because of the pandemic, specific inquiries to employees who will enter the workplace are allowable. For example:

- An employer may ask about COVID-19 symptoms, diagnoses or tests.
- An employer may take an employee's temperature. If an employer is going to take temperatures, we advise doing so in a systematic, non-discriminatory way – for example, testing all employees who work on site, or all employees who work in a particular area or have been exposed to a particular risk.

But despite the pandemic, employee medical information concerning COVID-19 still must be treated confidentially. Medical information should be kept in separate files, apart from personnel records. Supervisors should be informed of what an employee can and cannot do, for medical reasons, but should not be informed of diagnoses without the employee's consent. If someone becomes ill, the employer may, and should, inform everyone with whom that employee has had contact that “an employee” has been diagnosed, *without naming the individual*, and that the ill employee had contact with the individuals receiving the announcement. If an employee chooses to voluntarily disclose that they have been diagnosed, the employer may inform coworkers of their identity.

While many people associate medical privacy with HIPAA, that law applies to health care providers, not other employers.

## **II. Leave and Telework after Re-Opening**

When you reopen your office, you may have employees who cannot return because they are ill, quarantined, or caring for children who have no school or day care. You may have employees who are immune-compromised, or who have been through emotional trauma during the pandemic, and feel unsafe using public transportation, traveling to the office, or being at the office while the pandemic continues.

Continued telework may be the first option. If an employee can do the essential functions of their job, but has a disability that prevents or would make it significantly more difficult for them to work at the office, such as a compromised immune system or a mental health issue, the organization may be required to grant the employee telework as a reasonable accommodation.

In addition, the recent Families First Coronavirus Response Act (“FFCRA”) requires two weeks of emergency paid sick leave for employees who are ill with COVID-19, quarantined, or caring for children who have no school or day care because of COVID-19. It also requires 12 weeks of family leave, 10 of which must be paid, for an employee caring for children who have no school or day care. For more information, see our [memo](#) on the FFCRA.

If an employee is ill but has taken all of their FFCRA leave, they may be entitled to short-term disability leave benefits under state law in some states. You may have your own short-term disability employee benefits, regardless of what the state mandates. Employees may be entitled to earned paid sick leave, and you may advance sick leave when earned sick leave is gone. The employee may also be entitled to

additional leave under the pre-FFCRA federal or local family leave law or federal, state, or local disability law.

### **III. Legal Liability**

Employers are concerned about keeping their employees healthy and safe. They also worry about being held financially liable if employees contract coronavirus on the job or if community members become infected through interaction with the organization. Liability will depend on all of the facts and circumstances, but a nonprofit organization can reduce disease spread and limit its liability by taking steps including those outlined below. Congress is considering limits on employer liability, which may provide additional protections.

#### **A. Government Orders**

State and local government orders should be the primary driver of whether to open an office. This memorandum addresses considerations that apply after the state or local government has given permission to re-open particular types of workplaces. If state or local officials continue to require or recommend that your organization's type of workplace remain shuttered, re-opening will expose your organization to a variety of additional liability.

Organizational managers and boards of directors should consider the lifting of closure orders as the floor criterion on whether to re-open a workplace. When closure orders are lifted, organizational leaders should evaluate local conditions, business needs, health risks and potential legal liability to determine whether and how to re-open.

#### **B. Liability to Employees**

Liability for employee illnesses depends upon the laws of your state and the particular facts of the case. We provide the following information only as set of general guideposts. Promptly contact counsel and your insurance company in the event of a potential claim.

Workers' compensation insurance can apply when employees are injured or become ill because of their jobs. Workers compensation laws trade off lower standards of proof of causation for limited damages: an employee does not have to prove that their employer acted negligently, but the employee cannot receive pain and suffering damages. Wage replacement and medical care for the particular illness and injury are the only remedy. This principle is known as workers' compensation exclusion.

In some states, wrongful death cases are an exception to workers' compensation exclusion. The family of a deceased employee can file a wrongful death case and seek damages far beyond lost wages based on allegations that the death was caused by intentional harm or gross negligence.

In either type of case, the employee would have to prove that they were infected due to workplace exposure, rather than community exposure. An employee's ability to prove they were infected in the

course of their work would depend on their specific circumstances. Even if employees can prove workplace infection, some states bar workers from receiving compensation for ordinary diseases to which all members of the public are exposed equally, unless the exposure is due to the nature of their occupation (e.g., being a nurse).

### **C. Liability to Non-Employees**

In trying to prove a nonprofit organization is legally liable for the harm caused by the coronavirus illness, the infected individual first must prove the organization caused their infection. This could be difficult, given the disease's prevalence, but could happen if an outbreak is clustered around a certain event, like a conference. Second, the infected person must demonstrate the organization failed to exercise reasonable care in keeping its premises, events or operations safe. If the organization re-opened in contravention of a government quarantine order, there might be a presumption that the organization was not exercising reasonable care. Re-opening only after the government has said re-opening is safe, and taking other reasonable precautions tailored for the circumstances, reduce the risk that an infected individual would be able to attribute their illness to negligence by the organization.

## **IV. Day-to-Day Precautions to Mitigate Risk**

To protect their employees and the public from infection, organizations should take reasonable precautions to reduce the spread of coronavirus. The reasonableness of various precautions will be judged in light of the circumstances at the time they were implemented. Given the evolving response to the pandemic, what is "reasonable" today is different from what was considered a reasonable precaution eight weeks ago – and what is reasonable in the future likely will be different. Some factors for nonprofit employers to consider include:

- *Cleaning* – As workplaces re-open, the cleaning services considered "reasonable" to ensure people's safety will differ from pre-pandemic levels. Organizations should contract for cleaning services on an increased frequency (including, possibly, during the workday for kitchens, cafeterias and other frequently used common areas), and with more areas to be cleaned more thoroughly. Further, organizations may choose to provide hand sanitizer at facility entrances, kitchens and cafeterias, conference rooms and other common areas.
- *Physical changes* – Depending on the circumstances, some employers will choose to make physical changes to their space, to reduce disease spread. This could include installing temporary or permanent barriers to reduce disease spread, such as a clear plastic shield to screen their receptionist from visitors. Other changes could include moving workspaces to create more separation between desks, removing cafeteria salad bars, installing automatic doors, etc.
- *Staggered workdays* – To increase physical distancing and reduce exposures, some employers will re-open their offices with a staggered schedule. Under this plan, workers in a particular job function (e.g., communications, accounting) might work in the office on three days of the week and

telecommute the other two days, while those in a different function work the opposite schedule, or an employer might allow non-uniform schedules during a work day.

- *Masks* – Whether and when to require employees and the public to wear masks will depend on government recommendations and the particular circumstances of an employee’s job requirements. Consider, also, what accommodations employees may need. For example, if masks are required, a hearing-impaired employee may need their coworkers to wear masks with a transparent panel during meetings, to facilitate lip-reading.
- *Organizers vs. office workers* – Precautions that may be reasonable for one group of employees may not be appropriate for another. Returning to an office facility may be reasonably lower-risk, because the workers are exposed to a small number of other people, while it would be high-risk for community organizers to be interacting with a broad swath of the public. Similarly, reasonableness will depend on whether community organizers are interacting with populations that have a high rate of coronavirus infection.

In all cases, employers will need to recognize that some employees will be differently situated than others. This may be due to their individual health vulnerabilities, their childcare needs, or mental-health trauma caused by the pandemic itself. Flexibility in dealing with individuals’ circumstances will help smooth the transition back to full productivity, reduce infection rates, and mitigate legal risk.

## V. Additional Resources

The Centers for Disease Control and Prevention (“CDC”) identifies safe practices for opening offices and other workplaces:

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

The Occupational Safety and Health Administration (“OSHA”) describes an employer’s duty to provide a safe workplace, both in general and in specific environments:

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

The Equal Employment Opportunity Commission (“EEOC”) interprets the ADA and its own regulations to guide employers that may need to ask about their employees’ health, but must keep responses confidential:

<https://www.eeoc.gov/coronavirus/>

**NOTE: This document does not constitute legal advice. For application of the matters discussed in this document to a particular situation, please consult legal counsel.**