

THE BIG QUESTION: Back to the Office?



98.6°F



100.4°F

How to weigh your firm's—and your clients'—
options and mitigate legal risk

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As businesses and their leaders navigate these unprecedented times, we face novel decisions that will likely impact our businesses and our employees both in the short term and for years to come. The first of these decisions was whether to bring your entire business remote (if possible) in order to protect employees and family members from what, at the time, was a relatively unknown pandemic. Messerli Kramer, like many businesses, innovated and brought the entire Minneapolis Division—including all attorneys, paralegals, administrative support, and all non-legal functions, including finance and IT—remote over a week before ordered to do so by Gov. Tim Walz’s stay-at-home order.

Next, like many businesses, we navigated that order to identify which businesses, and which functions of a particular business, were deemed critical and exempt from the general prohibition against office work. Then came the CARES Act and the PPP Loan Program, a well-intended program that provides a significant tailwind to some businesses, while leaving others (hospitality for example) out in the cold. Now as the stay-at-home orders in many states have concluded, and as Minnesota “turns the dial” to reopen parts of the state’s economy, the next issue is perhaps the most difficult one from a human, business, and even legal perspective: How and when do we return to a semblance of normal, which in most cases means a return of employees to the workplace?

When working through a crisis, we must continue to focus long-term, difficult as that may be, and ensure that core values drive decision-making. For that reason, successful leadership teams will identify a guiding principle as a primary step. For Messerli, the safety and health of our employees and our families is the first priority. That spirit guided each decision while we strategized to position the business to weather the storm. This guiding principle led us to the decision to require all functions of the Minneapolis Division to begin teleworking over a week before ordered to do so by the state.

While federal and state guidance has been extremely helpful in navigating these uncharted waters, as leaders we cannot and should not wait to be told what to do. The decision to return to the workplace is similarly fraught with practical, legal, and health concerns. This article attempts to address best practices guided by these concerns. One size does not fit all, and you need to make the best decisions for your firm or business based on the specific dynamics of your work environment. As a starting point, it is helpful to understand whether you can legally open your business and under what conditions.

On March 25, 2020, Gov. Walz signed Executive Order 20-20 directing Minnesotans to stay home beginning Friday, March 27, 2020 through Friday, April 10, 2020. The Stay-at-Home Order required Minnesotans to stay at their home or place of residence with limited exceptions.

On June 4, 2020, Gov. Walz announced that Executive Order 20-74 would replace Executive Order 20-63 in its entirety beginning at 11:59 p.m. on June 9, 2020. EO 20-63 focuses on increasing occupant capacity at many businesses previously permitted to operate during Phase II, and further permits the reopening of gyms, fitness centers, and entertainment venues.

Specifically, the order contains the following provisions:

Group gatherings: The maximum gathering of people in any organized setting, whether residential or business, is 250 persons. Private outdoor gatherings size increased from 10 to 25 people. Private indoor gatherings must not exceed 10 people. Social distancing is required and masks are strongly encouraged.

Restaurants and bars: Restaurants and bars are permitted to open for indoor dining; they may serve a maximum of 50 people inside and 250 people outside, and operating capacity has increased from 25 percent to 50 percent. Reservations and all social distancing requirements previously outlined in Phase II are still required. Employees are still required to wear a mask and customers will be strongly encouraged to do the same (as much as practically possible while eating and drinking).

Personal care services (barbershops, hair salons, tattoo parlors, and nail salons): Operating capacity has increased from 25 percent to 50 percent. Clients are still required to make appointments and walk-ins will not be allowed under any circumstances. Employees and clients are still required to wear masks.

Places of worship, religious services, weddings and funerals: Places of worship are permitted to operate at 50 percent capacity. May host gatherings of a maximum of 250 people inside or outside.

Gyms, fitness centers, and yoga studios: Gyms are permitted to reopen with a capacity of 25 percent (not to exceed 250 people). Social distancing is required and masks are encouraged as much as possible. Group exercises will be allowed if social distancing requirements can be maintained. Outdoor group exercise is encouraged.

Entertainment venues (movie theaters, bowling alleys, arcades and museums): Permitted to reopen with a capacity of 25 percent (not to exceed 250 people). There will be special safety precautions depending on the type of venue. For example, seated entertainment and recreational entertainment will have different social distancing requirements. Outdoor entertainment venues are permitted to host events for 250 people or less.

Sports and recreational activities: Permitted so long as any gathering does not exceed 25 people. Per the June 5, 2020 conference, Gov. Walz indicated that guidelines for low-risk and high-risk sports would be forthcoming. Public swimming pools are permitted to reopen with a capacity of 50 percent.



In every circumstance, these changes are only permitted if capacity and social distancing requirements and other safety precautions can be followed. Gatherings greater than 250 people are not permitted in any circumstances.

As required under EO 20-63 during Phase I and Phase II, individuals who can work from home must continue to do so, meaning that law firms and other businesses that work from an office environment will not change to the extent workers are able to work from home. Beginning on June 29, 2020, all critical sector businesses are required to have a Covid-19 Preparedness Plan in place. Workers continue to raise concerns regarding the safety of their work environments during this time and reports of unsafe work environments, discipline, and retaliation have been common.

ASSESSING WHETHER TO REOPEN

If your business can reopen per the applicable state order, the first question is whether you should. The answer can only be determined by weighing multiple factors. First, given the capacity limitations, does it make financial sense to open? Many restaurants and gyms will struggle with this question and likely choose to stay closed until capacity increases again. Second, if allowed to open, and opening makes financial sense, will your employees return to work? How can we, as employers, make them comfortable with the idea and provide a safe work environment?

Even though they are legally allowed to do so, many business and law firms are debating whether they should require employees to return to the workplace. The decision should be guided first and foremost by employee safety, and the extent to which a plan to return workers to the office can be implemented. With employees settling in to a routine of working remotely, and to the extent they can be efficient and productive in doing so, many firms and other businesses are opting to allow employees to continue. In these cases, office work is limited to a small crew providing critical administrative functions that cannot be effectively serviced by telework, like mail processing.

Companies returning employees to the office must focus on the health and safety of employees. From a legal compliance and risk mitigation perspective, this means following appropriate guidance. A limited number of people should be charged with staying informed about and updating employees on current guidelines from leading health authorities, including the CDC and local authorities. While many statements by

authorities are advisory, and provide guidance only, they still serve as a good measure for best practices and determining whether reasonable care has been taken to protect employees and customers.

The first and most important step (and one required by Minnesota law) is to develop and communicate policies and procedures for reopening your office. Employees should receive policies in writing, written in plain language easily understood by all employees. Employees should sign and return an acknowledgment stating they received the policy and procedures to make a safe workplace, they understand their requirement to participate, and importantly, they acknowledge their mandatory reporting requirement to report any unsafe working conditions. The goal is to comply with the OSHA general duty standard, and the mandatory reporting eliminates any later claim that the employer failed to meet this standard. Comprehensive plans to return workers to the workplace safely should follow the current CDC and OSHA Guidance, both of which recommend inclusion of the following elements:

■ **Evaluate which employees may have the right to remain off work.** Before requiring employees to return to work, employers should evaluate which employees may have the right to remain off work under the Family and Medical Leave Act (FMLA) and/or the Families First Coronavirus Response Act (FFCRA). When leave is requested, document the name of the employee requesting leave, the dates for which leave is requested, the reason for leave, and a statement from the employee that he or she is unable to work because of the reason. If the leave is requested to care for a child whose school is closed, or child care provider is unavailable, also document the name of the child, the name of the school/provider which is unavailable, and a statement from the employee that no other suitable person is available to care for the child. Employers who provide paid sick leave and expanded family and medical leave under the FFCRA are eligible for reimbursement of certain costs through refundable tax credits. Thoroughly documenting leave will make claiming these tax credits easier when the time comes.

■ **Actively encourage sick employees to stay home.** Employees who have covid symptoms should notify their supervisor, stay home, and follow CDC-recommended steps. People with covid-19 who have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions: (1) at least 3 days (72 hours) have passed *since recovery*, defined as resolution of fever without the use of fever-reducing medications, (2) improvement in respiratory symptoms (e.g., cough, shortness of breath), and (3) at least 10 days have passed *since symptoms first appeared*. Previous recommendations for a test-based strategy remain applicable; however, a test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing.

CDC guidance recommends that employees not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers. Employees who are well but who have a sick family member at home with covid-19 should notify their supervisor and follow CDC recommended precautions.

■ **Consider conducting daily in-person or virtual health checks.** Perform health checks (e.g., symptom and/or temperature screening) of employees before they enter the facility, in accordance with state and local public health authorities and,

if available, your occupational health services. If implementing in-person health checks, conduct them safely and respectfully. Employers may use social distancing, barrier or partition controls, or personal protective equipment (PPE) to protect the screener. However, reliance on PPE alone is a less effective control and is more difficult to implement given PPE shortages and training requirements.

Employers choosing to conduct health checks should limit the number of individuals charged with administering checks. They should be medical staff if possible, or senior employees or members of the human resources team. All medical information obtained, including temperatures, should be kept in a separate employee medical file (not in the employee's general personnel file) to be treated as a confidential medical record under the Americans with Disabilities Act and the Minnesota Human Rights Act. The information should also be destroyed once it is no longer needed. To prevent stigma and discrimination in the workplace, make employee health screenings as private as possible, and do not make determinations of risk based on race, country of origin, or any other protected class.

Instead of performing checks, some employers have opted for self-reporting policies ranging from a general requirement of self-reporting and prohibition of coming to the workplace if the employee or a family member has symptoms, to daily or weekly surveys proactively administered to each employee with results monitored by the employer's human resources department.

Employees refusing legitimate and standard screening procedures may be denied entry into the workplace. If an employee is refusing to be screened, be aware of the reason the employee is refusing; are they requesting an accommodation based on religion, disability, or age? Can a reasonable accommodation be found to the screening procedure? If the request for accommodation is illegitimate, or an accommodation cannot reasonably be made because doing so would jeopardize the health of other employees or customers, the employee's refusal may be treated as insubordination.

■ **Identify where and how workers might be exposed to covid-19 at work.** Employers are responsible for providing a safe and healthy workplace. Conduct a thorough review of the workplace to identify potential workplace hazards related to covid-19. Use appropriate combinations of control to limit the spread of covid-19, including engineering controls, workplace administrative policies, and PPE to protect workers from the identified hazards:

- Conduct a thorough hazard assessment to determine if workplace hazards are present, or are likely to be present, and determine what type of controls or PPE are needed for specific job duties.
- When engineering and administrative controls cannot be implemented or are not fully protective, employers are required by OSHA standards to:
 - determine what PPE is needed for their workers' specific job duties,
 - select and provide appropriate PPE to the workers at no cost, and
 - train their workers on its correct use, including when to use PPE; what PPE is necessary; how to properly put on, take off, dispose of, or disinfect PPE; how to inspect PPE for damage and maintain PPE; and the limitations of PPE.
- Encourage workers to wear a cloth face covering at work if the hazard assessment has determined that they do not require PPE, such as a respirator or medical facemask, for protection.



■ **Separate sick employees.** Employees who appear to have symptoms upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors, and sent home. Have a procedure in place for the safe transport of an employee who becomes sick while at work. The employee may need to be transported home or to a healthcare provider.

■ **Take action if an employee is suspected or confirmed to have covid-19 infection.** In most cases, you do not need to shut down your facility. If it has been less than 7 days since the sick employee has been in the facility, close off any areas used for prolonged periods of time by the sick person. Wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible. During this waiting period, open outside doors and windows to increase air circulation in these areas. If it has been seven days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility.

Follow the CDC cleaning and disinfection recommendations:

- Clean dirty surfaces with soap and water before disinfecting them.
- To disinfect surfaces, use products that meet EPA criteria for use against SARS-Cov-2, the virus that causes covid-19, and are appropriate for the surface.
- Always wear gloves and gowns appropriate for the chemicals being used when you are cleaning and disinfecting.
- You may need to wear additional PPE depending on the setting and disinfectant product you are using. For each product you use, consult and follow the manufacturer's instructions for use.

Next, determine which employees may have been exposed to the virus and take additional precautions, including informing employees of their possible exposure. Employers must maintain confidentiality of the sick employee as required by the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act. Most workplaces should follow the Public Health Recommendations for Community-Related Exposure and instruct potentially exposed employees to stay home for 14 days, telework if possible, and self-monitor for symptoms.

Employers in critical infrastructure have an obligation to manage potentially exposed workers' return to work in ways that best protect the health of those workers, their co-workers, and the general public. Critical infrastructure workers may be permitted to continue working following potential exposure provided they remain asymptomatic, and additional precautions are implemented. These include pre-screening employees with temperature checks, regular monitoring of symptoms, wearing masks, social distancing where possible, and disinfecting and cleaning work spaces.

Employers may not retaliate against any employee who has been in isolation or quarantine, or who is not in isolation or quarantine but has responsibility for care of a minor or adult family member who is disabled or vulnerable and who is in isolation or self-quarantine, if such employee is responsible for all or a portion of such person's care.¹ An employee cannot be discharged, disciplined, threatened, penalized, or otherwise discriminated against in the work terms, conditions, locations, or privileges because of such isolation or quarantine.²

Finally, recordkeeping requirements under the Occupational Safety and Health Act (OSHA) also require that covered employers record certain work-related injuries and illnesses on their OSHA 300 log. Per OSHA's May 19, 2020 guidance, employers are responsible for recording confirmed covid-19 illnesses which are work-related, and which involve one or more of the general recording criteria (deaths, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness). Cases involving significant injury or illness diagnosed by a physician or other licensed health care professional also meet the general recording criteria even though such illness does not result in any of the foregoing.

■ **Educate employees about steps they can take to protect themselves at work and at home.** Encourage employees to follow new policies or procedures related to illness, cleaning and disinfecting, and work meetings and travel. Advise employees to:

- Stay home if they are sick, except to get medical care, and to learn what to do if they are sick.
- Inform their supervisor if they have a sick family member at home with covid-19 symptoms, and to learn what to do if someone in their home is sick.
- Wash their hands often with soap and water for at least 20 seconds or to use hand sanitizer with at least 60 percent alcohol if soap and water are not available. Inform employees that if their hands are visibly dirty, they should use soap and water over hand sanitizer.
- Avoid touching their eyes, nose, and mouth with unwashed hands.
- Practice routine cleaning and disinfection of frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to

disinfection. To disinfect, use products that meet EPA's criteria for use against SARS-CoV-2, the cause of covid-19, and are appropriate for the surface.

- Avoid using other employees' phones, desks, offices, or other work tools and equipment, when possible. Clean and disinfect them before and after use.
- Practice social distancing by avoiding large gatherings and maintaining distance (at least 6 feet) from others when possible.

■ **For employees who commute to work using public transportation or ride sharing, consider offering support.**

If feasible, offer employees incentives to use forms of transportation that minimize close contact with others (e.g., biking, walking, driving, or riding by car either alone or with household members). Ask employees to follow the CDC guidance on protection during transportation. Allow employees to shift their hours so they can commute during less busy times and remind employees to clean their hands as soon as possible after their trip.

■ **Do not retaliate.** In Executive Order 20-54, Gov. Walz reiterated that workers have the right to refuse to work under conditions that they, in good faith, reasonably believe present an imminent danger of death or serious physical harm.³ This includes the reasonable belief that a working environment is not reasonably protected from exposure to covid-19. Workers cannot be fired for refusing to work in unsafe conditions, including conditions without sufficient protection from covid-19.⁴ Employers may not retaliate against workers for reporting unsafe or unhealthy workplaces to health officials.⁵

Finally, as a pre-condition to allowing employees to return to the workplace, employers should deliver a copy of their covid-related policies and require that each employee acknowledge and agree (either by signature or survey) to follow these requirements. This acknowledgment will provide some level of protection against a claim that the employer has forced the employee into an unsafe work environment and will provide an assurance from the employees that they will report sickness in their household as required, abide by the applicable quarantine policies, and practice social distancing when in the workplace.

Any business, law firms included, should start with investigating the financial and practical aspects of returning employees to the workplace, guided by how we can provide safe work environments. Development of a written policy should be the next step, which will assist in accomplishing this objective and minimize liability for employers to do so. ▲

Notes

¹ Minn. Stat. 144.4196

² *Id.*

³ Minn. Stat. 182.654 Subd. 11

⁴ Minn. Stat. 182.654 Subd. 9

⁵ *Id.*



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