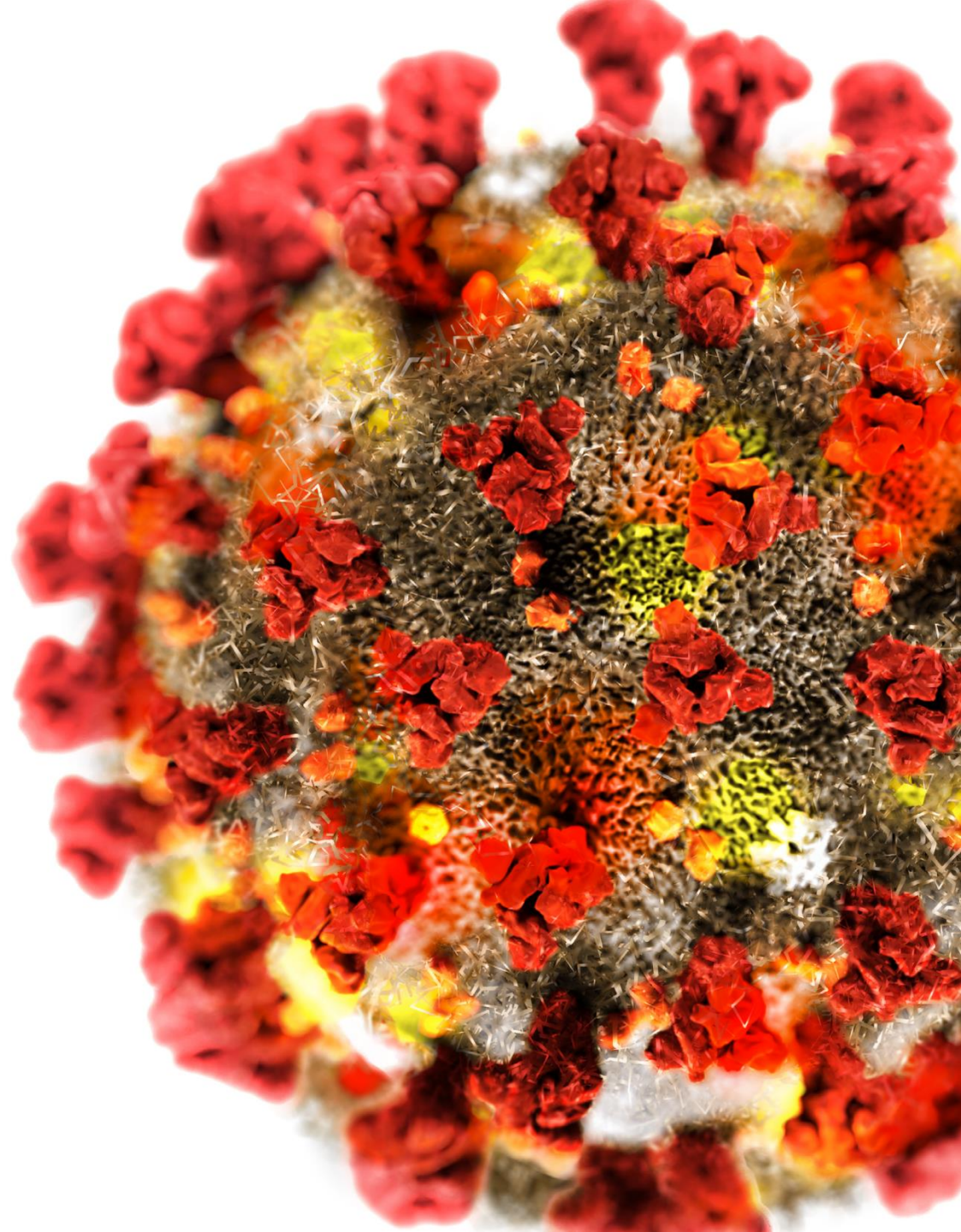


Reopening to the “New Normal”: Is Your Business Ready?

Practical and Legal Considerations for
Deciding Whether Employers Are Ready to
Return to the Workplace

June 11, 2020

pillsbury

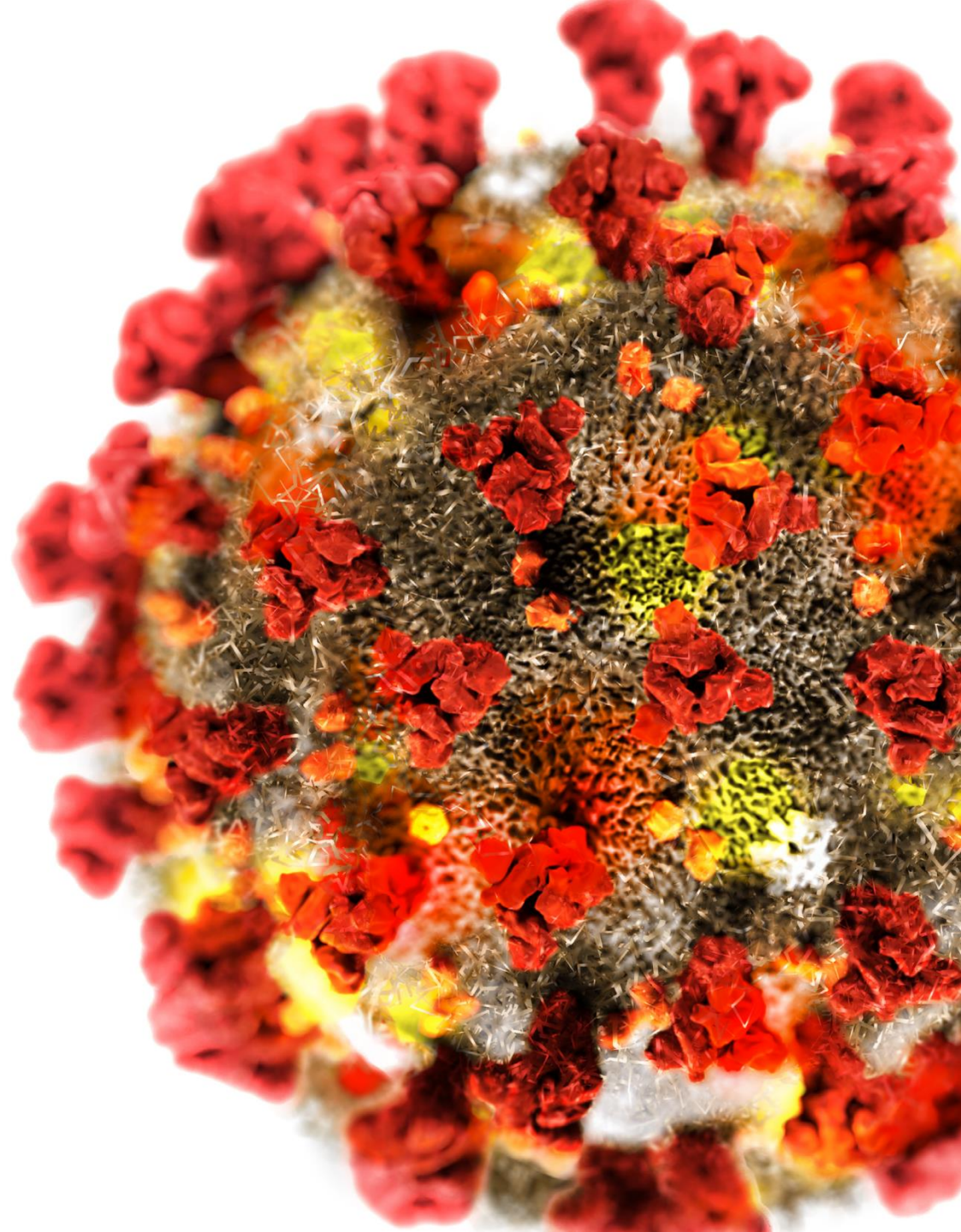


Reopening to the “New Normal”: Is Your Business Ready?

WELCOME

June 11, 2020

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Today's Panel



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Introduction



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General Considerations

- **Constantly changing orders and guidance**
 - Evaluate whether and when to reopen based on public health guidance
- **Timing**
 - Process vs. light switch
 - Continued telecommuting
- **Morale Issues**
- **Returning Workers on Furlough/Layoff**
 - Risk of discrimination/retaliation claims based on selection
 - CBA's/ local ordinances requiring bringing back by seniority (e.g. LA, SF)
 - WARN issues if longer than 6 months or turning furloughs into layoffs

Preventative Measures



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Planning

- Follow OSHA, CDC guidance and state/local resources
- Perform risk assessment of any potential or actual threat of exposure
- Make a Plan
 - Return to work (timing, physical distancing, scheduling)
 - Develop self-reporting protocols
 - Handling of symptomatic employees in the workplace
 - Notification practices for communicating with employees and visitor's
 - Prepare for a second wave or shut down
- Coordinate with cleaning services, building managers and other tenants

Preventative Measures (cont'd)



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Testing and Pre-Screening

- No perfect tests or screening available yet
- Temperature screens (but many infected individuals asymptomatic or presymptomatic)
- Symptom checks (same)
- Medical certification (for employees who have recovered)
- No reliable testing yet available (current tests used by White House reported to have a 15% false negative rate)

Preventative Measures (cont'd)



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Personal Protective Equipment

- Provide and maintain supplies of PPE; train as needed
- Consider whether to allow employees to use their own PPE

Social Distancing

- Review and modify access, layouts, equipment, supplies, signage and schedules
- Discourage previous common behaviors

Hygiene and Cleaning

- Follow latest CDC Guidelines and distribute and display CDC posters
- Provide additional hand washing and/or sanitizer stations, supplies, etc.
- Modify food service
- Increase routine cleaning/sanitization; provide cleaning materials

Workplace Exposure Protocols



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For Known Exposures or Confirmed Cases, consider:

- Self-reporting to HR and immediate extraction from workplace
- Deep cleaning and sanitation of work area and common spaces in accordance with current CDC/OSHA guidance
- Daily self-monitoring and recording of symptoms
- Alternative work options during quarantine/isolation period (e.g. telework)
- To what extent to request/require self-quarantine
- Medical evaluation and testing; return to work certifications
- If employees must be onsite, enhance PPE and social distancing

Written Policies and Training



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- **Develop relevant written policies, procedures, guidelines**
 - Screening, Safety, Self-Reporting, Cleaning, Telework, etc.
 - Disseminate to employees
 - Review and update policies/practices regularly as things evolve
- **Provide training to employees and managers**
 - What the new enhance safety protocols are in the workplace
 - How to use equipment, personal protection, cleaning supplies
 - How to safely interact with other employees and public
 - What to do when employees, customers or clients don't comply with new practices?

Travel and Meeting Policies/Practices



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- **Employee Commutes**
 - Mass transit; Carpools
- **Office Visitor Guidelines**
 - Who's allowed in? Who can employees visit?
- **Heightened Travel Restrictions**
 - Refer to CDC and WHO guidance re high risk destinations
- **Necessary Business Travel**
 - What is necessary? Assess need for in-person client meetings (e.g. sales)
- **Personal Travel**
 - May require quarantine or other precautionary measures upon return

Wage Issues



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- **Wage and Hour Issues**

- Reimbursable expenses (PPE, remote work, etc.)
- Outside Sales? Commission Sales?
- Temporary changes in duties, hours, etc. can affect exemption status

- **Paid Sick Leave**

- Families First Coronavirus Response Act (FFCRA)
- State and Local Paid Sick Leave Ordinances
- Legal patchwork; as always, most protective wins

Workers' Compensation



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- **California**
 - Presumption that anyone who returns to work and gets sick contracted the illness at the workplace
 - Workers' compensation is generally considered a “no fault” system of liability, but
 - Employer's insurance premiums can still increase based on employee claims
- State-specific decisions
- Looking for further guidance from state legislatures
- Causation and proof issues

Liability Review: 60-day Lookback



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- **Self-Audit**

- Have outside counsel or legal team review all employment-related actions from the past 60 days
- Consider what, if any, remedial actions are necessary

- **Document Decision-making process**

- Where compliance with federal, state or local “best practices” is not practicable, make sure to document reasons why practices were or were not implemented
- Note any alternative measures that were implemented

Discrimination Claims



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- **Bases for discrimination:**

- Not just disability/perceived disability claims
- Age claims also likely to rise
- Title VII (race, national origin)
- Associational discrimination claims (i.e., being married to someone who is immunocompromised)

- **Best practices:**

- Continue to take all reasonable steps to prevent workplace discrimination, harassment, and/or retaliation on the basis of any protected characteristic
- Remind employees of anti-discrimination policies
- Consider how to deal with employees who want to return to work despite being high risk

Reasonable Accommodations



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- **10 Best Practice Reminders:**

1. Engage in the interactive process with all employees seeking a reasonable accommodation on the basis of COVID-19 or any other disabling condition
2. Don't be suspicious if employees raise conditions of which you were not previously aware
3. You can require employees to submit medical documentation (but can also choose to relax standards given influx/temporary nature of requests)
4. Maintain confidentiality of all medical information in a separate file
5. Ensure employees receive all statutory protected time off

Reasonable Accommodations (*cont.*)



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- **10 Best Practice Reminders (*cont.*):**

6. Don't have to provide employee's preferred accommodation
7. Potential increase in request for accommodations for anxiety and other mental health conditions
8. Not only a legal issue – employee morale and PR will also be impacted
9. Consider flexible work arrangements, PTO, vacation, other time off as accommodation if employee needs additional time off
10. Consider temporary changes to physical layout that will benefit everyone

Employee Privacy, Testing, and Contact Tracing



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- Do not identify employees by name to any other employees, without permission
- Identify individuals with whom the infected employee has had contact
- Involve CDC/local health department (as necessary or require)
- Record or report cases to OSHA (if required)
- Follow all EEOC, ADA, CDC, and other applicable guidelines as to:
 - What testing is allowed
 - What information can be requested of employees
 - How such information must be collected or stored
 - Contact tracing guidelines

Thank You

For questions about today's content,
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Or visit our COVID-19 Resource Center:

pillsburylaw.com/covid19

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