

HOW TO DEVELOP A RETURN TO WORK PLAN FOR YOUR WORKPLACE

APRIL 22, 2020



GOALS

- Provide a status update on reopening the economy
- Equip your business to develop a plan to return to “normal” (or to improve your current plan)
- Answer your questions

APRIL 16 -TRUMP ADMINISTRATION PLAN TO REOPEN

- Phased reopening based on benchmarks
 - Decline in cases over 14 day period
 - Capacity to test all with symptoms
 - System of Contact Tracing
 - Adequate capacity of medical system to handle a resurgence of cases

- Decision left to the States

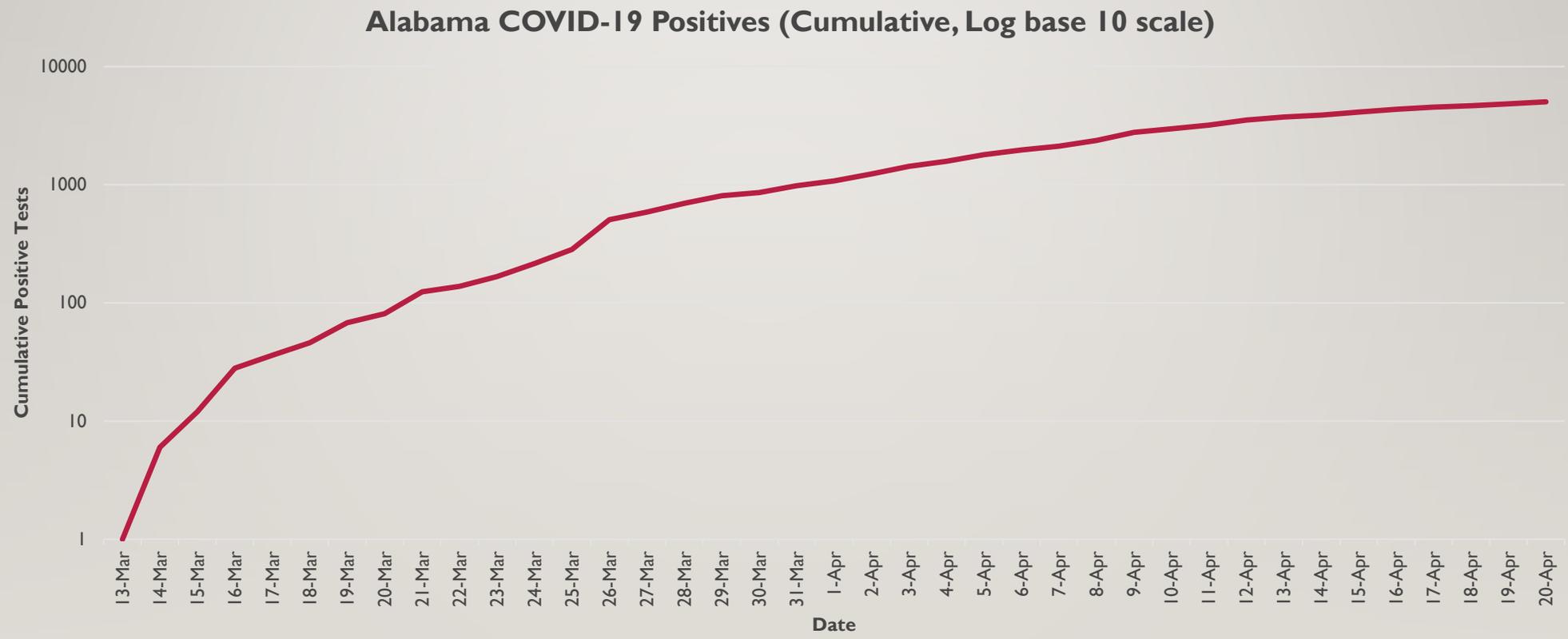
TRUMP'S PLAN FOR EMPLOYERS

- Accommodate “Vulnerable” Employees
- Encourage Teleworking
- Return in Phases
- Minimize Nonessential Travel

APRIL 17 - ALABAMA SMALL BUSINESS TASK FORCE

- Recommends immediate opening of most business sectors, including retail, restaurants, manufacturing, and childcare
- Statewide Stay at Home Order still in place until April 30
- Based on CDC guidance

WHERE DOES ALABAMA STAND WITH RESPECT TO THE BENCHMARKS?



WHAT WILL ALABAMA DO?

APRIL 28 ANNOUNCEMENT FROM GOVERNOR IVEY

PRESENTERS

- Amber Whillock - CDC
- Weathers Bolt - OSHA
- Jordan Gerheim – Workers Compensation
- Breanna Young – Vulnerable and Fearful Employees, etc.



AMBER WHILLOCK



WORKPLACE RISK CATEGORIES

- Risk Exposure Levels:
 - Very High Exposure Risk
 - High Exposure Risk
 - Medium Exposure Risk
 - Lower Exposure Risk (Caution)
- Levels may vary among employees at the same facility
- Protective measures based on the applicable risk exposure level

MEASURES TO PREVENT TRANSMISSION

- Education and Communication
- Social Distancing
- Personal Protective Measures
- Cleaning and Disinfecting
- Health Screenings

WHAT SHOULD I DO IF AN EMPLOYEE BECOMES SICK?

- Isolate the sick employee
- Clean and disinfect the facility
- Identify employees in close contact with sick employee
- Require employees in close contact to self-quarantine

WHEN CAN AN EMPLOYEE RETURN TO WORK?

- Employees with Confirmed Infection
 - For employees that have tested positive, follow CDC guidance for discontinuing self-isolation.

- Employees Exposed to Virus
 - For employees who have been exposed to COVID-19, but have not been tested, CDC recommends 14 days of quarantine after exposure.

WHAT DOCUMENTATION SHOULD EMPLOYERS REQUIRE?

- Consider requiring employees who were unable to work due to confirmed infection or exposure to the virus to provide documentation prior to returning to work.
- If testing becomes readily available, employers may consider requiring a documented negative COVID-19 test result prior to returning to work.

WEATHERS BOLT



OSHA OVERVIEW

OSHA has determined that COVID-19 presents a recognized workplace hazard

Potential Concerns:

- Regulations & Standards
- Hazard Analysis
- Safety Plan
- Communication with Employees
- Recordkeeping & Reporting
- Handling Inspections & Employee Complaints

OSHA REGULATIONS & STANDARDS

Approximately 10 regulations identified by OSHA

Primary Regulations

- General duty clause (Section 5(a)(1) of the OSH Act, 29 USC 654(a)(1))
- Reporting/Recordkeeping (29 CFR 1904)
- Personal Protective Equipment, particularly Respiratory Protection (29 CFR 1910.134)

OSHA REGULATIONS & STANDARDS

Other Common Regulations

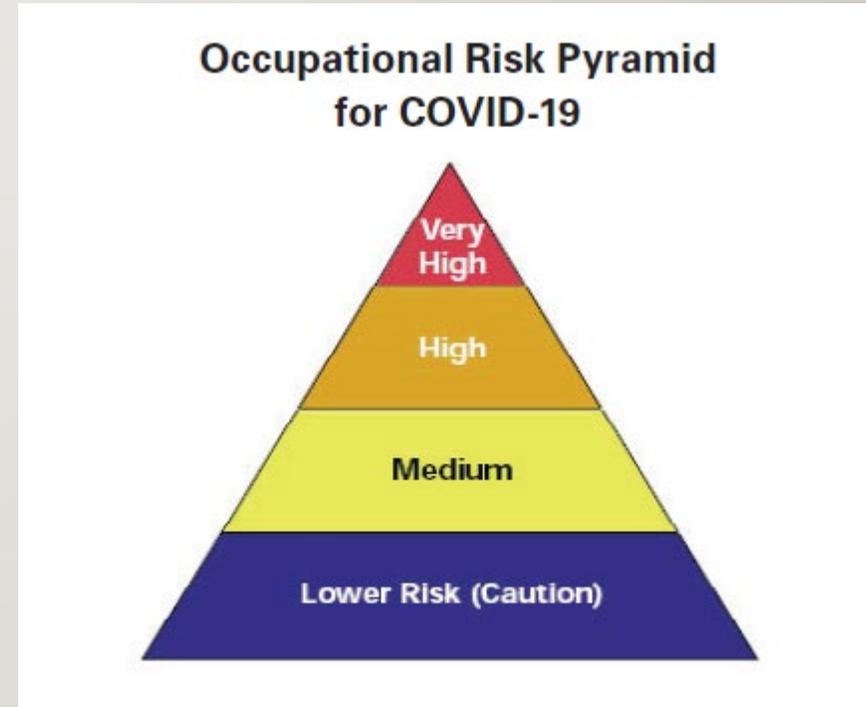
- Bloodborne pathogen (29 CFR 1910.1030)
- Hazard Communication (29 CFR 1910.1200)
- Sanitation (29 CFR 1910.141)

OSHA: HOW TO PROTECT YOUR BUSINESS

Hazard Evaluation/Analysis

1st: Classify Your Business

2nd: Consider Areas of Facility and Specific Activities



OSHA: HOW TO PROTECT YOUR BUSINESS

Written Plan

- Not required
- But, it is a best practice
 - OSHA will request it during an inspection
 - Provides evidence that you were paying attention

OSHA: HOW TO PROTECT YOUR BUSINESS

Communication

- OSHA calls it “Training”
- Bad information in public sphere
- Best Practices:
 - Training, both on return to work and periodically
 - Invite comments, questions & concerns
 - Document (keep notes)

OSHA: HOW TO PROTECT YOUR BUSINESS

Feasibility & Good Faith

- Supply Shortages
- Annual Requirements



OSHA: RECORDING & REPORTING

Record on 300 Log

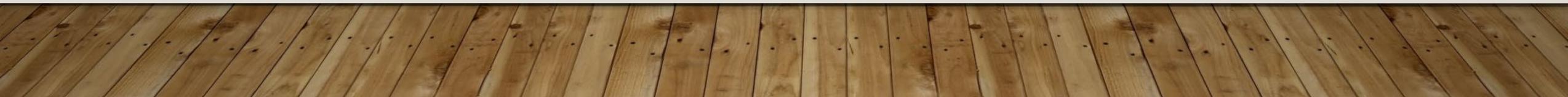
- Positive test for COVID-19
- Work related
- Causes days away from work, medical treatment, change in work requirements, etc.

Report to OSHA

- Positive test for COVID-19
- Work related
- Causes hospitalization, amputation, loss of an eye, or fatality

** within 24 hours for hospitalization;
within 8 hours for death

What is work related?



OSHA: RECORDING & REPORTING

- Guidance on Work-Relatedness for Non-Healthcare Employees

*“... OSHA **will not enforce** 29 CFR § 1904 to require other employers to make the same work-relatedness determinations, except where:*

- ***There is objective evidence that a COVID-19 case may be work-related.** This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and*
 - ***The evidence was reasonably available to the employer.** For purposes of this memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees’ health and safety in the ordinary course of managing its business and employees.*
- Big change is the need for an investigation

OSHA: INSPECTION & EMPLOYEE COMPLAINTS

- Interim Enforcement Guidance
 - Informal letters or communication are **more likely**
 - Rapid Response Inspection are **more likely**
 - In-person inspections are **less likely**, particularly in non-healthcare industries
- Respond knowing that the employee will have opportunity to respond or OSHA may conduct inspection
- Be mindful of whistleblower protections



JORDAN GERHEIM



WORKERS' COMPENSATION

- If An Employee Contracts Covid-19, is the Employer Liable ?
- What about a Customer/Visitor ?
- What Should Employers Be Doing ?

Workers' Compensation

- 'Injury and personal injury' shall mean only injury by accident **arising out of** and **in the course** of the employment, and shall **not** include a disease in any form, except for an occupational disease or where it results naturally and unavoidably from the accident..."
§ 25-5-1(9), Ala. Code 1975.
- In Alabama, the employment must be the **source and cause** of the accident.
- Must be able to trace the resultant injury to a proximate cause set in motion by the employment and not otherwise.

Workers' Compensation

- Case-by-Case Analysis
- Claimant's Burden of Proof
- Covid-19:
 - Contagious respiratory illness that can easily spread from person to person by numerous methods
 - Where exposure to the illness occurred will most likely be blurry, difficult, if not impossible, to prove

OCCUPATIONAL DISEASE

- Communicable Diseases: Non-Compensable in Alabama
- Exception: **Occupational Diseases:**
 - (1) due to hazards in excess of those ordinarily incident to employment in general and (2) is peculiar to the occupation in which the employee is engaged
 - Result of exposure, over a period of time, to the normal working conditions of the trade, process, occupation, or employment.
 - **Two Prong Test:**
 - Legal Causation: Employment exposed employee to a danger, materially in excess of that to which people commonly in that locality are exposed, when not situated as when performing work for employer.
 - Medical Causation: Excessive Exposure found to have been direct cause of injury

QUICK NOTE: CO-EMPLOYEE CLAIMS

- “Willful Conduct”
- The injured person must prove that the co-employee acted with substantial certainty that injury would occur or acted with a design or intent to injure.
- What Should Employers Be Doing ?



BREANNA YOUNG



DON'T FORGET ABOUT BASIC EMPLOYMENT LAWS

- Americans with Disabilities Act (“ADA”)
- Age Discrimination in Employment Act (“ADEA”)
- Title VII
- Family and Medical Leave Act (“FMLA”)
- National Labor Relations Act (“NLRA”)
- Occupational Safety and Health Administration (“OSHA”)
- Fair Labor Standards Act (“FLSA”)
- Families First Coronavirus Response Act (“FFCRA”)

THIS IS REAL LIFE.

To: _____

April 15, 2020

DUE to my health Issues at this time, I feel it is UN-SAFE and a THREAT to my health and well-being to be at _____ at this time. Not only my health is at stake at this time but also the health and well-being of my family/Grandchildren are also at stake to be working at _____ at this time.

Due to this Global Pandemic Coronavirus (Covid-19) at this time, and the advice of President Trump for everyone to stay at home, I Choose to do so at this time!

Please understand my situation at this time!

Thank You,



ACCOMMODATING THE “VULNERABLE POPULATION”

- ADA
 - Confidentiality
 - Interactive Process
 - Doctor’s Notes
 - “Reasonable” Accommodations
 - EEOC Guidance
- ADEA
- FMLA
 - Serious health condition that makes the employee unable to perform the essential functions of his/her job

MANAGING THE FEARFUL EMPLOYEE

- Communication
 - Complaint mechanisms
- NLRA
 - Applies to unionized and non-unionized employers
 - Protected concerted activity
 - Reasonable and good faith belief that working conditions are unsafe
- OSHA
 - Reasonable Belief of Imminent Danger
 - Specific fear based on fact
 - Employer cannot address specific fear
 - Retaliation

MANAGING THE FEARFUL EMPLOYEE

- FMLA
 - Serious health condition that makes the employee unable to perform the essential functions of his/her job
- ADA
 - Underlying conditions
 - Accommodations
- FFCRA
- Existing Leave Policies
 - Consistent application
 - Paid vs. Unpaid Leave
- “Hazard” Pay?

ADDITIONAL EMPLOYMENT LAW CONSIDERATIONS

- **ADA**

- Confidentiality of COVID-19 positive employees
- Confidentiality of medical records
- Confidentiality of “medical examinations”
 - This INCLUDES temperature taking.

- **FMLA**

- Does an employee get FMLA if COVID-19 positive?
- What if a family member is COVID-19 positive?

ADDITIONAL EMPLOYMENT LAW CONSIDERATIONS

- **NLRA**

- Striking employees
- Retaliation

- **FLSA**

- Ensure remote “working time” properly recorded
- Payment for “screening time”
- Salaried employees

- **FFCRA**

- Still in effect until 12/31/2020

ADDITIONAL EMPLOYMENT CONSIDERATIONS

- **Existing policies**
 - Don't forget about them!
 - Consistent application
- **Teleworking**
 - Policies
 - Security
 - Time recording
 - Productivity
 - Clarify expectations

STARNES

WE DO MORE

DAVIS
FLORIE^{LLP}

ELEMENTS OF A GOOD PLAN

- Designate a person or committee to be responsible
- Follow CDC/OSHA guidance applicable to your workplace(s) and stay on top of changes
- Allow teleworking to the extent possible
- Use a phased approach
- Source supplies/equipment needed
- Adopt policies necessary to ensure compliance
- Train and educate employees on the plan
- Provide a mechanism for employees to raise issues and concerns

QUESTIONS?

