

# Going Back to Work: Tips on What Your Boss Can—and Can't—Make You Do

As some states begin reopening for business, we answer your questions about worker safety and protections

By

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Employers and legislators are turning their attention to the eventual reopening of workplaces, and in some places it is [already happening](#): Georgia Gov. Brian Kemp is letting salons, tattoo parlors, gyms and other businesses open as early as Friday, while some South Carolina retailers opened this week with restrictions.

But many employees remain nervous about their health, and about how they will make ends meet if they can't return to work. Meanwhile, many employers are confused by an onslaught of guidelines, rules, executive orders and recommendations from the White House, governors and an array of federal and state agencies.

To help make sense of fast-changing rules and norms, The Wall Street Journal consulted a panel of employment lawyers and other experts. While not all of the policies and guidelines referred to here are hard-and-fast requirements, the following answers to some common questions do reflect best practices, the experts say.

## Workplace Safety

My boss is calling me back to the office soon. I'm healthy, but I don't feel safe and have been working from home just fine. Do I have to go back?

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Fear isn't a legal reason for refusing to work, but there is one exception, says Angela Walker, an Ann Arbor, Mich., attorney who specializes in representing employees in Americans With Disabilities Act cases. If you have a diagnosed mental-health disability, such as severe anxiety, and the pandemic is exacerbating that disability, you can ask to work from home as a reasonable accommodation under the ADA.

Otherwise, you can make the case for continuing to work at home, but your boss isn't obligated to allow it.

I have an underlying health condition. Can my employer force me to return to work?

The White House [guidelines](#) call for a three-phase return to work, with special accommodations for vulnerable individuals until the third phase, at which time the policy envisions a return to "unrestricted staffing of worksites." Under the guidelines, vulnerable people are the elderly and those "with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy."

Keep in mind these aren't orders. "There's no enforcement power," says Jennifer Merrigan Fay, an employment-law partner at Goodwin Procter LLP. So if you have asthma, your employer can still call you back. "If you have a disability under the ADA, you're better protected," she says.

What if I'm pregnant?

Pregnant women aren't identified as vulnerable workers in the White House guidelines. But some states, including Massachusetts, New York and California, have laws that obligate employers to consider reasonable accommodations for pregnant employees, Ms. Fay says.

What should I do if my employer isn't following Centers for Disease Control and Prevention guidelines for a coronavirus-safe workplace?

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First, bring up your concerns with your manager. If nothing changes, [file a complaint](#) with the Occupational Safety and Health Administration, says Debbie Berkowitz, director of the Worker Health and Safety Program at the National Employment Law Project and a former OSHA chief of staff. You can opt to remain anonymous.

The CDC's guidelines are recommendations, so employers can't be sanctioned just for violating those. But OSHA can determine whether those employers are violating its [general-duty clause](#). And the agency is required to follow up on complaints, so the employer will at least be put on notice that workers are upset and willing to take action, Ms. Berkowitz says.

What can I do if my employer doesn't provide handwashing breaks or enforce social distancing?

Again, raise your concern with your employer. If nothing changes, file an OSHA complaint. Workers also have some protections to refuse to work if there is a reasonable expectation that workplace conditions could cause serious physical harm or death.

Collective employee action may also help, Ms. Berkowitz says. The National Labor Relations Act protects "concerted activity," so if employees walk out together after exhausting other options, they can't be retaliated against, she says.

My employer follows safety guidelines, but I worry about exposure on my commute. What are my options?

If you are able to work from home, ask to do so. If you are considered a vulnerable individual or have an ADA-qualifying disability, you have a better chance of getting permission. Otherwise, you could be required to come to work.

If working from home isn't an option, you may be able to take unpaid leave, but there is no guarantee your job will be available when you feel it is safe to commute. Meanwhile, some employers are considering enhancing transportation benefits for employees, like reimbursing for car services, or offering parking

benefits, says Lindsay Burke, co-chair of the employment practice at Covington & Burling LLP.

## Legal Protections

I was fired after telling my boss that the safety measures at work were insufficient. What can I do?

What your employer did is called retaliation and it is illegal, employment lawyers say. Whistleblower laws protect workers who raise concerns about workplace health and safety. [Report the action](#) within 30 days to OSHA, and consider finding a lawyer to represent you.

If I get Covid-19 because of my job, am I eligible for workers' compensation? The rules on this are tricky and evolving, employment lawyers say. Generally speaking, having an infectious disease such as the flu hasn't entitled workers to compensation because it is nearly impossible to determine where someone contracted the illness.

But the workers' comp system is run by states, and several governors and state legislatures have already come out with orders or bills granting eligibility for health-care workers and first responders who fall ill with Covid-19. In some states, such as Illinois and Kentucky, the new rules apply to workers in grocery stores and some other essential businesses.

Can my employer ask me to waive my right to workers' comp?

No. The law recognizes that workers and employers have unequal bargaining power, so workers can't be required to sign away this right, Ms. Burke says.

I'm an independent contractor who contracted Covid-19. Am I eligible for workers' comp?

Generally, no. But if you think you contracted the infection while on the job, you can probably sue the company you were working for. Keep in mind, these are difficult cases to win in normal circumstances, and Covid-19 presents the additional challenge of proving you were infected while at work.

I'm pretty sure I got Covid-19 at work. Can I sue my employer?

The workers' compensation system protects employers from other legal claims pertaining to a work-related injury or illness. However, if employees believe their company was negligent—for example, by not providing personal protective equipment even if workers were regularly exposed to confirmed Covid-19 cases—there are situations and states where courts might be open to such claims, says Ms. Burke.

## **Job Security & Pay**

Am I entitled to hazard pay if my job puts me at risk of exposure to the virus?

Not under current law, Ms. Fay says. Employers may offer hazard pay for people in high-risk jobs, but they aren't obligated to do so.

If my employer asks for volunteers to return from furlough and I raise my hand, can my employer reject me? I'm over 50 and have an underlying health condition. If employers make decisions based on their perceptions of who is at higher risk, they are likely engaging in illegal discrimination.

“Employers might be motivated to pick the youngest and healthiest people to come back first, but if they do that, there would be legal ramifications,” says Ms. Walker. While the White House guidelines refer to elderly people as vulnerable, they don't specify at what age someone is “elderly.”

My employer has called me back to the office, and schools are still closed. I've already used up my paid leave and the expanded leave provisions in the Families First legislation. What do I do if I have no one to look after my kids?

Workers are in a difficult spot here, since schools and day care are a prerequisite for many people to go to work. You can ask for an unpaid leave of absence, but your employer isn't obligated to offer that or to hold your job for you if you do take leave, says Ms. Fay.

## **Privacy**

Can my employer take my temperature at work?

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Under normal circumstances, temperature screening would be considered a medical exam and would violate the ADA. But the U.S. Equal Employment Opportunity Commission has determined that, given the risks associated with Covid-19, temperature screening this is permissible, says Melissa Peters, special counsel at Littler, an employment and labor law firm representing management.

Do I have to report any coronavirus symptoms to my employer?

Yes. “If an employer asks you if you’re symptomatic, which it should, they can require that you report that,” as a workplace-safety matter, but only under pandemic conditions, says Ms. Fay. She recommends that employers require a simple daily health questionnaire, and that workers proactively report any symptoms. The information should be protected as confidential under the ADA.

Can my employer send me home if I’m showing symptoms?

Yes. Your employer has a duty to protect all of its employees. Ms. Peters recommends to employers that as soon as workers are symptomatic: “Get them out of there. Don’t mess with that.”

If a Covid-19 vaccine is developed, can my employer require I get it?

During a pandemic, employers can require vaccinations, the EEOC says. An employee may be entitled to an exemption if the vaccine would interfere with a medical condition or violate that person’s religious beliefs.

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