U.S. Chamber of Commerce

To: Members of the U.S. Chamber of Commerce
From: Suzanne Clark, President of the U.S. Chamber of Commerce
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Implementing a National Return to Work Plan

What will a return to work look like? That is the question weighing heavily on the minds of government leaders and public health officials, employers and their employees, and American families striving for the delicate balance of staying safe and making ends meet.

It is a question that begs more questions. But this much is increasingly certain: returning to work will be gradual, phased-in, and will vary by factors such as location, sector, business type or size, and the health status of workers. It also will require continued social distancing, expanded use of personal protective equipment, and other counter-measures.

Whenever the return to work begins, the planning for it must begin now. The American business community must begin preparing now for new processes, requirements, or restrictions for which there is no playbook or precedent. And we must not allow a lack of resources, regulations that are not fit-for-purpose, and the fear of litigation to sideline efforts to return to work and life—safely, successfully, and sustainably.

To help business and government anticipate the challenges we may face, the U.S. Chamber of Commerce has begun to explore and catalogue some of the major implications of returning to work in this environment—ranging from workplace safety and employee rights to liability concerns and continued revenue disruptions. Some of our initial thoughts are detailed below across three different sections:

This document is intended to spur discussion. We hope you will not only read it, but also react to it and add to it. We don't have all the answers today – or even all the questions.

Please provide feedback on the document and specifically to the questions included at the end, via this email address: returntowork@uschamber.com.

It is worth pausing to thank all of those who never stopped working, who risk their personal health to keep everyone else safer. As we proceed, we should think about how we honor them and recognize their efforts.

Working together, we know we can be better prepared for the successful reopening of our economy and an eventual return to normal ways of working and living.

Issues to Resolve for a Successful Return to Work

Essential Services and Resources

Bringing employees back to work and reopening commerce will require that certain essential services and resources are in place. These include:

General Health Screening

The CDC has recommended that critical infrastructure employers screen certain exposed employees for temperature, ideally before entering the facility. If this recommendation is expanded to cover all employees and potentially customers, employers will have to acquire temperature checking equipment and develop a process to screen individuals. Early and federally consistent guidance as to what will be expected is critical because it will take time to acquire equipment and establish protocols.

COVID-19 Testing

To the extent that return to work is based on the testing of employees either for the COVID-19 virus or antibodies to COVID-19, there will have to be sufficient testing capacity,

as well as clear resolution on who is responsible for administering the tests, paying for the tests, and checking test results. Most employers are not well-positioned to administer these medical tests, so there must be widely accessible third-party providers. There also will need to be standardization as to when employees need to be tested, the frequency of tests (especially important if testing for infection, rather than antibodies), and the documentation employees will provide to employers. Frequent testing could be especially costly, and it should be determined who will bear those costs.

Personal Protective Equipment (PPE)
If public health professionals recommend widespread use of PPE, such as masks, it will require clarity as to what is needed and who is responsible for providing such equipment, especially if shortages persist. For example, with respect to certain employees in critical infrastructure, the CDC has said: “Employers can issue facemasks or can approve employees’ supplied cloth face coverings in the event of shortages.” However, the purpose of these masks should be made clear as many are not rated for protecting the wearer and employers asking employees to wear them should not be held liable if an employee contracts COVID-19 while wearing such a mask.

Transportation
Approximately eight million Americans rely on public transportation to get to and from work each day. Public transportation is most efficient when it maximizes density, which needs to be avoided to preserve social distancing. While staggered worktimes can help spread out the rush hour, transit systems likely will need to operate at what would normally be excess capacity in order to support public health. Transit systems will likely require some form of financial assistance to support a safe return to work.

Childcare
Throughout the United States, many childcare providers that are still operating are primarily only caring for the children of essential workers. They also have implemented

various public health recommendations to increase social distancing, such as lowering teacher-child ratios. In order to allow other parents to return to work, childcare providers will need to presumably operate under sub-optimal financial conditions: below previous capacity levels (as not all employees will return to work at once) and with increased costs (to maintain social distancing and accommodate staggered work times). Childcare providers will likely require some form of temporary financial assistance in recognition that they will need to operate at a loss in order to allow parents to return to work.

Resolution of Regulatory and Legal Liability Issues

A reopening plan that is medically based and relies on social distancing and other best practices for public health may raise significant regulatory and legal liability risks. These are in addition to numerous lawsuits already filed as a result of COVID-19 and litigation risk that will become exacerbated during a reopening. Issues include:

Health Privacy

Federal and some state laws are designed to maximize the health privacy of individuals. However, this objective could conflict with potential reopening requirements for employers to verify an employee's COVID-19 status and/or their vulnerability due to underlying health conditions. Employer efforts to protect other employees and conduct contact tracing in the workplace after an individual has tested positive could be slowed by obligations to protect the infected individual's health privacy. In addition, confidentiality requirements could prevent businesses from narrowly focusing their contact tracing so as to balance workforce safety while minimizing business interruption. During the COVID-19 national emergency and recovery period, employers will need a broad safe-harbor to make necessary inquiries regarding health status and to make certain limited disclosures to prevent the spread of the disease.

Discrimination Claims

Employers who conduct a medically-based or risk-based reopening (using factors such as age or underlying health conditions) may face liability under existing anti-discrimination rules, including the Age Discrimination in Employment Act and the anti-discrimination provisions of the Americans with Disabilities Act. In addition, employers could face claims for adverse employment actions by employees who are delayed in returning to work or who feel they are not provided other reasonable employment accommodations. At the same time, employers can likewise face liability if they return at-risk employees to work too soon. There is a need for clear guidance about what practices are acceptable in conducting a medically-based or risk-based reopening and provide a safe harbor for actions taken by employers consistent with those guidelines.

Safe Workplace Requirements

Generally, when maintaining a safe workplace requires the use of personal protective equipment (PPE) such as masks, respirators, and physical barriers, OSHA requires employers to be responsible for ensuring the availability of such equipment and training employees on the use of the equipment. This is simply not possible if PPE becomes recommended in all workplaces. The federal government should make clear that PPE recommended specifically to combat the spread of COVID-19 is not subject to the normal OSHA requirements around workplace PPE. Employers also may face lawsuits around the limited supply of or training for PPE. Worker's compensation issues dealing with shortages of PPE or its incorrect use are also likely to emerge. The federal government should clarify the scope of liability for the provision (or inability to provide due to scarcity) of PPE.

Support for Independent Contractors

More than 23 million Americans receive income as independent contractors in fields as varied as construction, news reporting, professional services, and online-platform-enabled work. Businesses want to be able to provide the same type of workplace protections to

independent contractors as they do for employees. However, doing so could be used to argue that the individual has ceased to be an independent contractor and is instead an “employee.” Congress should settle this tension by creating a safe harbor that would allow businesses to implement health practices and provide benefits, including PPE, without establishing a formal employment relationship for the duration of the COVID-19 return to work transition.

Employment Practices

Employers already are facing litigation regarding employment practices related to the pandemic. This includes class actions in the transportation industry regarding employees’ scope of work and travel destinations. Employers also could face liability around wage-and-hour issues (for example: Are employees compensated while getting tested or passing through screening?), leave policy, travel restrictions, telework protocols, and worker’s compensation. In addition, employers could risk legal actions if they do not accommodate employees who either insist on returning to work even though they have not completed health screenings or are high risk, or who refuse to return to work and provide adequate support for such refusal. There should be a safe harbor for temporary employer-implemented workplace policy changes designed to combat the spread of the coronavirus.

Another source of liability are charges against employers forced to lay off workers in response to social distancing policies and government-mandated closures. The federal WARN Act and many similar state laws require employers comply with procedural requirements, including notice to employees in the event of layoffs. California Governor Gavin Newsom issued an executive order on March 17, 2020 that suspended some requirements under California’s WARN Act and ordered the state’s labor agency to issue guidance on the suspension. Policymakers should implement similar statutory and/or regulatory changes designed to limit the application of the

WARN Act for COVID-19 related layoffs.

Exposure Liability

This is perhaps the largest area of concern for the overall business community. It encompasses multiple types of claims that could be brought against business that have been designated as “essential” as well as large swaths of the remaining business community once the economy is reopened. The core component of claims in this category is that a customer/employee/patient/member of the public/etc. was exposed to COVID-19 in a business facility or as the result of a business’ particular action, or failure to act, and then that claimant became sick. The legal theories underlying these claims may range from simple negligence to strict liability to public nuisance, which the plaintiffs’ bar could try to pursue through contingency fee arrangements with cash-strapped states and municipalities. Depending on the legal theory underlying the claim, proving causation may be a challenge for plaintiffs. If enough claims are brought, the scope and magnitude of the litigation still may exert enough pressure to threaten businesses or industries with bankruptcy. The threat of exposure-related lawsuits also will deter some businesses from reopening even after it is determined that they could safely operate by following the guidance of appropriate health authorities.

Reforms to address these types of claims are largely dependent on which legal theory underlies a particular claim. For example, in the negligence space, providing a safe harbor for companies following CDC or state/local health department guidance could be helpful so long as the companies’ actions do not amount to gross negligence, recklessness, or willful misconduct. Procedural reforms such as channeling certain claims into federal court rather than allowing them to remain in various state courts could be helpful. Prohibiting or tightly circumscribing public nuisance claims also could be useful. Finally, policymakers should look to the reforms contained in prior economy-wide federal legal reform laws, such as the Y2K Act for guidance.

Product Liability
Makers of certain products/devices/equipment to either protect against, treat, or test for COVID-19 may not have sufficient protection against speculative litigation. While the PREP Act currently provides protection against some types of liability for some categories of key "countermeasures," it does not cover others. For example, while respirators are now covered by the Act, hand sanitizers, soaps and other key cleaning supplies are not. Furthermore, the Act does not provide protection outside key healthcare-related spaces. For example, a non-healthcare provider business that provides PPE to its employees or uses recommended cleaning products does not receive any protections under the PREP Act. The list of product types covered by the PREP Act should be expanded to include widely recommended protective products such as hand sanitizers and cleaning supplies. In addition, the Act could be expanded to cover additional categories of users and providers of essential countermeasures.

Medical Liability
There is increasing concern about medical liability claims being brought against healthcare providers and facilities caring for COVID-19 patients. For example, the plaintiffs' bar could try to bring medical liability/malpractice claims arising from care decisions, lack of care due to equipment shortages, as well as mistakes due to long hours or staff shortages. Also of concern are lawsuits brought against nursing homes and assisted living facilities for allegedly failing to protect residents/patients from contracting COVID-19. Healthcare facilities could be forced to ration care and make difficult decisions about who does and does not receive specific types of treatments, and each of those decisions has the potential of becoming a lawsuit. In addition, there are liability concerns about claims brought by non-COVID-19 patients who allege that they did not receive the appropriate standard of care due to the influx of COVID-19 patients that a healthcare facility or provider was required to treat.

At the federal level, the CARES Act provides some liability protections for volunteer healthcare providers caring for COVID-19 patients. The CARES Act language should be expanded to include all healthcare providers and facilities (not just volunteers). In addition, significant state-level COVID-19 medical liability statutes, such as one New York recently enacted, could serve as a model for a preemptive federal fix in this area.

Securities Litigation

Securities class actions already have been filed against businesses impacted by the coronavirus—such as those in the cruise line and pharmaceutical sectors—based on stock-price drops resulting from the impact of the virus and claims that companies should have been warning investors about the potential consequences if the world was faced with an unprecedented pandemic. In addition, securities litigation also has been filed related to data privacy concerns for certain video conferencing platforms that have increased in popularity due to the increased use of teleworking because of COVID-19 stay-at-home orders. An automatic stay should be placed on securities litigation cases arising out of or related to the COVID-19 emergency until after the President's declaration of a public emergency has been rescinded. In addition, these types of securities cases could be consolidated into one or a few federal district courts for efficiency purposes. Also, defendants in these cases should be allowed to have interlocutory appeal rights for the denial of a motion to dismiss and plaintiffs should have to plead with particularity all the elements of their claim in these cases; and all discovery should be stayed until after the motion to dismiss stage of the litigation. Finally, it is worth considering a cap on damages in COVID-19 related securities lawsuits.

Customer Communications

Businesses have an enhanced need during the COVID-19 emergency to communicate to customers via telephone and text messages regarding operating status, restricted access, and other issues. However, the threat of litigation

under the Telephone Consumer Protection Act (TCPA) can cause a business to limit the use of the important informational phone calls and texts. Approval of a pending petition at the FCC to expand the type of communications subject to an emergency exemption due to the COVID-19 situation would be helpful.

False Claims Act

Cases brought under the federal False Claims Act (FCA) can impose significant liability on entities receiving federal funding or contracts and these types of liability concerns have the potential of slowing down relief under the CARES Act and any future relief measures. In the FCA space, the Small Business Administration's Interim Final Rule implementing the paycheck protection loan program under the CARES Act does contain very helpful hold harmless language for financial services providers; to more fully effectuate that language a memorandum of understanding between the SBA and the Department of Justice (DOJ) regarding how DOJ will approach FCA litigation under the CARES Act loan program would be extremely valuable and similar reforms also should be implemented for any future relief measures.

Support for Businesses and Individuals

The federal government took unprecedented steps to support employers and individuals during the current shutdown. These programs will need to be modified and to some extent extended and targeted to assist those businesses and individuals who will remain under distress during a phased or gradual reopening.

Businesses Dependent on High-Density Gatherings or Travel

Entertainment venues, restaurants, bars, companies that host meetings and events, and many other businesses are only profitable when they achieve the type of occupancy and density that is not possible during social distancing. In addition, many businesses rely on business, trade show, and personal travel that may be greatly reduced based on social distancing guidance. A gradual or phased reopening

that restricts the size of gatherings or limits travel may technically permit these businesses to reopen but this will mean operating at a significant loss. During the period where occupancy and gatherings are numerically restricted, these businesses should be provided with bridge assistance to enable them to remain viable.

Individuals Delayed in Returning to Work
Until there is a widely available vaccine, or at least a widely available effective treatment for those who fall ill, not everyone will be able to resume normal work activities. High risk populations will need to engage in social distancing or even remain at home entirely. Individuals, including independent contractors, who must stay home because of their risk profile will need ongoing financial support if they cannot work remotely. This may require an extension of regular unemployment insurance or the creation of a new “high risk” unemployment insurance system.

Questions

What additional essential services do you see as necessary to support a phased reopening?

What additional resources do you anticipate needing to operationalize a phased reopening?

What additional guidance, including specific regulatory guidance, from the federal government would be beneficial for a phased reopening?

What additional legal liability issues are you concerned about during a phased reopening?

Do you anticipate your businesses needing additional financial support to bridge a phased reopening? If so, what form should that take?

How have you changed how you operate your business as a result of COVID-19 and what changes do you

anticipate continuing after the pandemic?

Have you benefitted from any of the federal support, including the SBA's Paycheck Protection Program, implemented since the onset of the pandemic? If so, which support programs and do you have feedback on these programs and the federal response? Are there any changes you would recommend?

What new support do you envision needing going forward? For example, some types of standing support for business interruption in the case of a pandemic? How concerned are you about the potential costs of such support?

While restoring the economy will be a matter of private sector employers being able to resume activity, what other role should the private sector be playing, and what hindrances do you see in the way of any of these efforts? What did we forget to ask?
Please provide feedback via this email address: returntowork@uschamber.com.