



## AS TEXAS OPENS FOR BUSINESSES, ARE BUSINESSES FREE TO OPERATE AS THEY WISH?

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**Effective March 10, Governor Abbott reopened Texas for business by removing any government imposed COVID operating limits for businesses or other establishments. The only exceptions are areas with high hospitalizations (seven consecutive days in which the number of COVID hospitalized patients exceeds 15% of the total hospital capacity). Even then there are no state imposed limits, but a county judge can impose restrictions so long as businesses are not required to operate at less than 50% of total occupancy. Executive Order GA-34 (Order 34).**

***Are There Restrictions for Businesses on the Manner in Which They Re-Open?*** For the most part, Texas businesses are free to do as they wish with respect to operating capacity and requiring their employees and customers follow hygiene or other protective measures. However, the wording of Order 34 makes clear the state gives businesses the responsibility for decisions on mask wearing, social distancing and other hygiene procedures with respect to how businesses protect from COVID risks. Additionally, businesses need to consider the provisions of certain state and federal laws in making those decisions.

Bell Nunnally has received a number of questions from employers regarding what they can do in light of the Executive Order GA-34; and the most commonly asked questions and the answers to them are discussed below.

### **1. Can employers require their employees return to the workplace?**

Yes. However, if an employee has a medical condition that puts him or her at a higher risk for becoming very sick from COVID, the employee can request a reasonable accommodation under the ADA or its

state law equivalent. At that point, the employer and employee will need to engage in an interactive process to determine whether the employee has a disability and whether there is a reasonable accommodation that will allow the employee to perform his or her essential job functions without causing an undue hardship to the employer. An accommodation may be relatively simple if the employee has little contact with customers. On the other hand, if an employee's job requires a lot of customer facing, for example, like a retail sales representative and the employer does not want its sales employees wearing masks, then finding an accommodation could be problematic. Undoubtedly, an at-risk employee who has been allowed to wear a mask prior to Order 34 will argue that wearing a face covering subsequent to the order is a reasonable accommodation.

## **2. Can an employer require its employees to not wear masks or other face coverings?**

Yes, but if an employee has a medical condition that puts him at a high risk of becoming very sick from COVID, the employee can request a reasonable accommodation under the ADA or its state law equivalent, as set out in the paragraph above. Additionally, OSHA has a requirement for wearing face coverings when job hazards warrant it; and COVID can be a job hazard. While there is no private cause of action under OSHA, it does provide for fines and penalties for an employer's failure to comply with its requirements to provide a safe workplace. OSHA also protects employees from discrimination for speaking out about unsafe working conditions.

On January 29, OSHA posted guidelines for making the workplace safe from COVID. The guidelines are not a standard or a regulation and create no new legal obligations. Rather, they are informational in nature and intended to inform employers on how to safeguard against COVID in the workplace. They can be found at <https://www.osha.gov/coronavirus/safework>. Under the new administration, the guidelines, or part of them, might find their way into the OSHA regulations.

## **3. Can an employer drop requirements that its customers wear masks?**

Yes, but if an employee who has a medical condition that puts him or her at a higher risk of becoming very sick from COVID will have personal contact with customers, the employee can request an accommodation from the employer which will invoke the process in the answer to questions one and two above. And it can raise the OSHA issues discussed in the answer to question two above.

## **4. Can an employer require its employees to be vaccinated against COVID before they can return to the workplace?**

Yes. However, if an employee has a disability that prevents him or her from being vaccinated or if an employee has a religious belief against being vaccinated, then the employer may need to make accommodations for the disability or religious beliefs ([see Bell Nunnally's client alert of Feb. 11, 2021 for a full discussion of these issues](#)).

## **5. Can an employer fire an employee who refuses to (a) return to work, (b) to work without a Mask, (c) work with customers who are not wearing masks, or (d) be vaccinated?**

Yes, if the employee is an at will employee. However, these scenarios raise the ADA, religious belief and OSHA issues discussed in response to Questions one, two, three and four above. Additionally, a terminated employee may be able to collect unemployment compensation. The TWC has stated that due to COVID, a worker may be eligible for unemployment benefits if the employee refuses to return to work because of any of the following reasons:

- People 65 years or older, and/or people with medical issues, like heart disease, diabetes, cancer or a weakened immune system, or are at a higher risk for getting very sick from COVID-19. (Source: DSHS website)
- Household member at high risk – People 65 years or older or are at a higher risk of getting very sick from COVID-19 (source DSHS website).
- Diagnosed with COVID – the individual has tested positive for COVID-19 by a source authorized by the State of Texas and is not recovered.
- Family member with COVID – anybody in the household has tested positive for COVID-19 by a source authorized by the State of Texas and is not recovered and 14 days have not yet passed.
- Quarantined – individual is currently in 14-day quarantine due to close contact exposure to COVID-19.
- Childcare – Child's school or daycare closed and no reasonable alternatives are available.
- Any other situation will be subject to a case-by-case review by the Texas Workforce Commission based on individual circumstances.

It is important to note many of these scenarios posed require a careful and thoughtful considerations of all the facts of the particular situation. Rarely are any two situations identical. But these principles should provide some guidance to employers navigating the more consistent and permanent return to work.

***Pending Bill Addressing Legal Liability for Businesses.*** Finally, employers need to consider certain provisions of House Bill 3 pending in the Texas legislature ([see Bell Nunnally client alert of March 5, 2021](#)). If passed, it will significantly limit a plaintiff's ability to sue certain Texas businesses for damages from exposure to COVID-19. Central to the proposed bill is immunity for injury caused by exposing an individual to COVID. One requirement for immunity is that the business must make a reasonable effort to comply with applicable federal, state and local laws, rules, ordinances, declarations and proclamations related to the pandemic disaster. While the law stands a good chance of being passed by the legislature, nobody knows what its final wording and scope will be; but if this requirement remains in it, then employers need to keep this provision in mind when formulating their operating procedures with respect to protecting employees and customers from COVID.

***Final Thoughts On What This Means for Employers.*** The last year has been a difficult one for everyone, including employers, their employees and customers. Now that businesses have the green light to return to full operations, they should concentrate on that return and not incur unnecessary time and expenses over



employment issues and disputes regarding what to do to protect their employees and customers from exposure to COVID. Bell Nunnally can help you avoid those distractions. Give us a call.

For employers having additional questions about this Alert, please feel free to contact Jay Wallace or Brent Hockaday.

## Related Practices

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Labor and Employment

## Practice Area Contact

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