

GIBSON DUNN

**Returning to Work:
Health, Employment, and Privacy
Considerations and Constraints as
Businesses Resume Post-Quarantine
Operations in the U.S.**

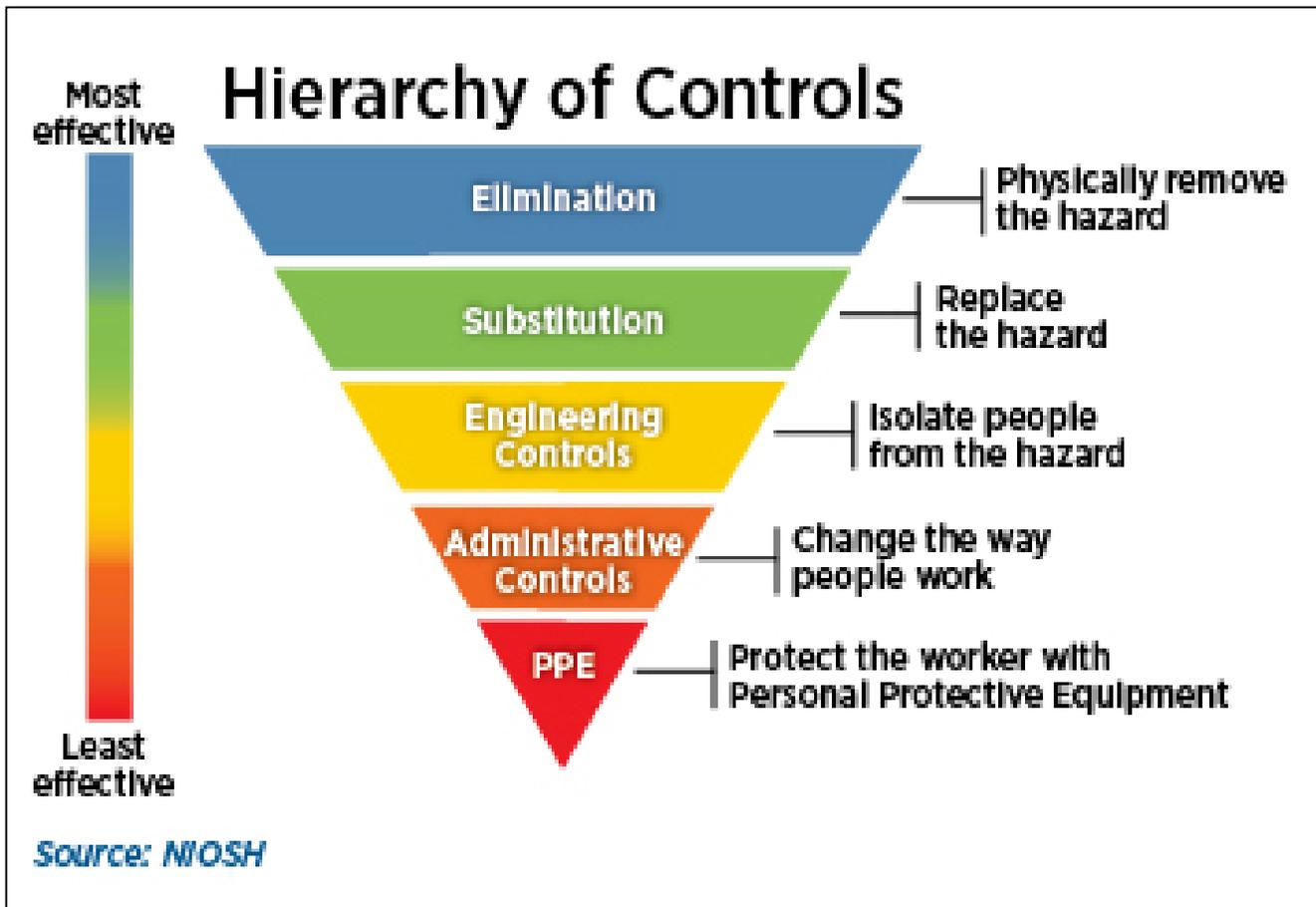
**Presented By:
Gibson, Dunn & Crutcher LLP
and CTEH, LLC**

Introductions

- **Infection Control Program Considerations and Best Practices**
 - Christopher Kuhlman, PhD, CIH, DABT
CTEH, LLC
- **Privacy Considerations and Legal Constraints**
 - Alex Southwell
Partner, Gibson, Dunn & Crutcher LLP
 - Cassandra Gaedt-Sheckter
Associate, Gibson, Dunn & Crutcher LLP
- **Minimizing Employment Law Concerns and Exposure**
 - Karl Nelson
Partner, Gibson, Dunn & Crutcher LLP
 - Katherine Smith
Partner, Gibson, Dunn & Crutcher LLP

Return to Work Considerations for Work Sites

NIOSH gives us a framework to protect workers



Screening

- Take temperature (≥ 100.4 F)
- Evaluate symptoms:
 - Fever, cough, shortness of breath, headache, sore throat, runny nose, muscle aches, loss of taste or smell, nausea, diarrhea
- Close contact with COVID-19 cases?
- Recent travel?
- COVID-19 Testing?
 - Nasal Swab (PCR); Blood (Serology/Antibody – IgM/IgG)
- Consider a 'Self Assessment Program' that workers can use before arriving to site

Self Assessment App: Before Workers arrive on site

VISITOR REGISTRATIONS

Visitor / Contractor Questionnaire

_____ is working diligently to take appropriate action to protect the health and safety of our employees, contractors and visitors, and to ensure effective business operations. All visitors are required to complete this questionnaire prior to gaining access to a _____ location. Should you be permitted access, a confirmation and registration number will be emailed to you. You will need the registration number before arriving on location. Registrations are required daily.

Please answer the questions provided below as clearly as possible.

Contact Information

First Name

Last Name

Email

I understand that I need to provide my actual email address to be able to receive the registration number needed to gain access to any _____ site.

Phone

Company

Visit Information

Work Date

You may select today or tomorrow. Make sure the Registration Date matches the day you want to access the _____ site.
This registration is valid for 24 hours only.

Region

Location

Hess Host

Reason for Visit

Questions

1. Are you experiencing any cold or flu-like symptoms (cough, fever, or shortness of breath)?

2. Have you been in **close contact** (see definition below) with persons who you know or have reason to believe may have been exposed to the COVID-19 virus or are experiencing any cold or flu-like symptoms (cough, fever, or shortness of breath) in the past 14 days?

<https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>

3. Have you traveled within the past 14 days (i) internationally (with the exception of Canada) as defined by the CDC or (ii) domestically to New York, New Jersey, or Connecticut?

<https://www.cdc.gov/media/releases/2020/s038-travel-advisory.html>

<https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html>

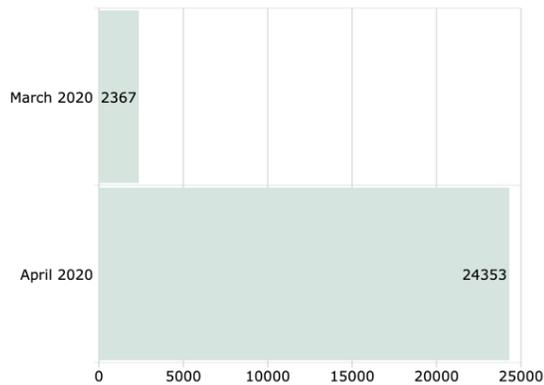
4. Have you been in **close contact** (see definition below) with persons who you know or have reason to believe have traveled from or through international (with the exception of Canada) locations in the past 14 days?

Self Assessment App: Generates data for EH&S to manage workers before they show to site.

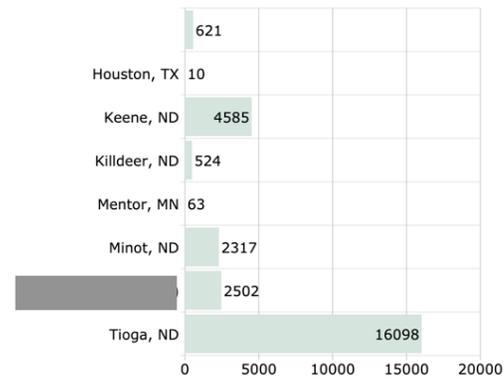
VISITOR REGISTRATIONS
INVITATIONS
QUESTIONNAIRE TYPES
ACTIONS
INVITATION NOTIFICATIONS
MORE (2)

CREATE NEW

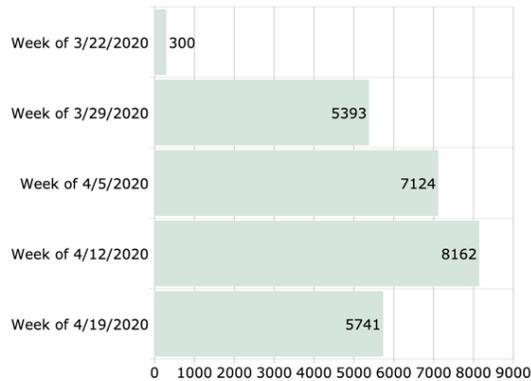
Visitors by Month



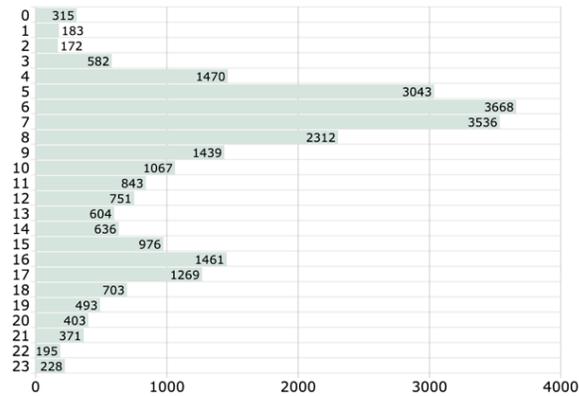
Visitors by Region



Visitors by Week



Visitors by Hour



Temperature Screening/Symptom Check



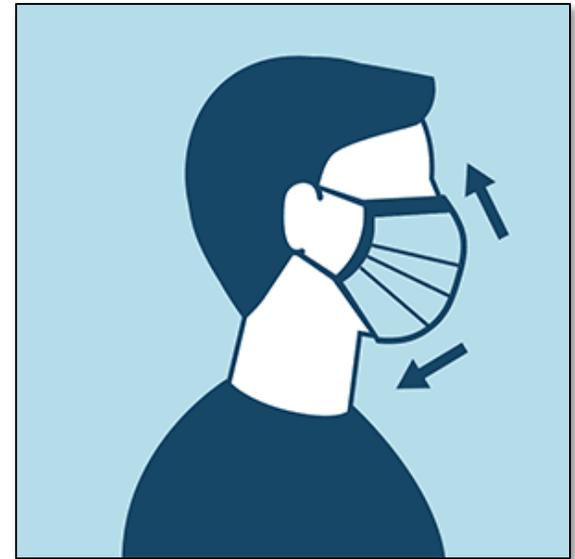
Social Distancing

- Keep at least 6 feet distance
- Avoid shaking hands
- Adjust traffic flow of people
- Limit elevator passengers
- Close common areas
- Look at re-configuring office spaces



Use Face Coverings if Social Distancing Cannot be Maintained

The Centers for Disease Control and Prevention (CDC) is advising the use of simple cloth face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others.



Cleaning and Disinfection Plans

- 1) **Proactive** cleaning and disinfection protocol
- 2) **Reactive** cleaning and disinfection protocol

- Evaluate the training and capabilities of regular janitorial staff to implement these protocols
- **Things to consider:**
 - Appropriate PPE – facemask, gown, eyewear, gloves
 - Use disinfectant that meets EPA's criteria for use against SARS-CoV-2
 - <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>
 - Clean and disinfect high-touch surfaces
 - Adequate disinfection contact times
 - Consider a 3rd party review/gap assessment of C&D processes

Survival of SARS-CoV-2 on Environmental Surfaces

Environmental Surface	Survival Time¹	Reference(s)
Cardboard	24 hours	van Doremalen 2020
Cloth	24 hours	Chin 2020
Copper	4 hours	van Doremalen 2020
Glass	2 days	Chin 2020
Paper (printing/tissue)	30 minutes	Chin 2020
Plastic	3 - 4 days	van Doremalen 2020; Chin 2020
Stainless Steel	3 - 4 days	van Doremalen 2020; Chin 2020
Wood	24 hours	Chin 2020

¹ Study authors reported that infectious virus was detectable up to this point in time

Cleaning and Disinfection Plans/Documentation

Plan



Attachment A

Coronavirus Cleaning and Disinfectant Application Protocol

Documentation

ID: 300825 **GPS:** 32.93692, -96.98414
Date: 2020/04/17 13:42 **Location Description:** 4th floor, D wing, break
Primary Identifier: Disinfecting **Observation Type:** Event
Secondary Identifier: Wiping **Observation Subtype:** Observation
Comments: Areas wiped and left undisturbed for recommended time

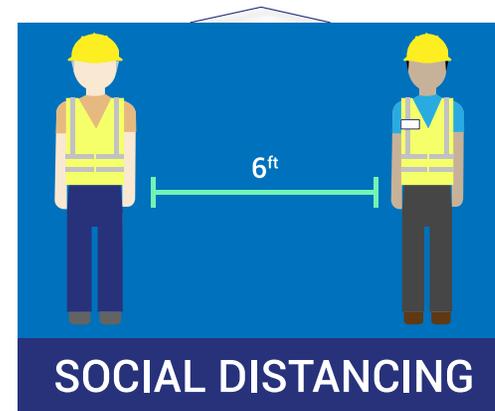


ID: 300826 **GPS:** 32.93715, -96.98394
Date: 2020/04/17 13:45 **Location Description:** 4th floor, D wing, entrance
Primary Identifier: Disinfecting **Observation Type:** Event
Secondary Identifier: Wiping **Observation Subtype:** Observation
Comments: Touch surfaces wiped and left undisturbed for recommended time



Other Return to Work Practices / Policies

- Develop FAQs for employees
 - Site Relevant
 - Topical
 - Updated (Weekly)
- Cleaning Plans Disclosed
- Signage: Hygiene/Social Distancing



Isolation of Symptomatic Individuals and Contact Tracing

- Symptomatic individuals should wear a surgical mask and be isolated ASAP and be medically evaluated/transported offsite for treatment/testing
- Identify close contacts of symptomatic individual in last 48 hrs; ask them to wear surgical masks, self-isolate, and monitor temperature/symptoms

Common Challenges/Concerns

- How long will this all take?
- Uptick or rebound in infections (re-escalation)
- Absenteeism
- Identification of vulnerable persons (ADA, HIPAA)
- Schooling, childcare
- Differing phases of de-escalation (State, local, companies, clients)

Privacy Considerations and Legal Constraints

Privacy & Cybersecurity Agenda

1

- Examples of COVID-19 Management Programs Implicating Privacy and Cybersecurity Issues

2

- Potentially Applicable Privacy Laws

3

- Health Testing Concerns in More Detail

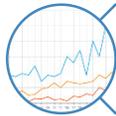
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- Contact Tracing in More Detail

5

- Brief Best Practices

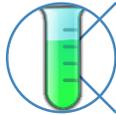
Examples of COVID-19 Management Programs Implicating Privacy and Cybersecurity Issues



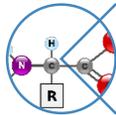
Internal modeling for reopening, prioritization of resources



Temperature screening



COVID-19 testing



Antibody (IgM/IgG) testing



Surveys, questionnaires, and other information gathering



Wearables, apps, and other contact tracing

Potentially Applicable Privacy Laws

- California Consumer Privacy Act (CCPA)
- California's Confidentiality of Medical Information Act (CMIA)
- Health Insurance Portability and Accountability Act (HIPAA)
- Illinois Biometric Information Privacy Act (BIPA)
- Tracking statutes (e.g., Conn. Gen. Stat. Ann. § 31-48d, Cal. Penal Code § 637.7)
- State constitutional and common law rights to privacy
- Data breach laws (including CCPA's private right of action)

Health Testing Concerns in More Detail

Temperature, COVID-19, antibody, or other health testing

- Sanctioning by EEOC, CDC, and others, does not give a free pass on privacy

Select considerations for balancing testing purpose with privacy

- Mandatory or voluntary?
- Limited collection and use?
- Notice?
- Consent?
- Extent of invasiveness/technology used?
- *Required* by non-privacy law?
- Third parties/medical providers involved?
- Minimize retention and sharing?
- Security?

Contact Tracing in More Detail

Nature and concept

Mandatory vs. voluntary

Regulatory views

Options for collection

- Proximity (GPS, Bluetooth, Wi-Fi?)
- What information?
 - Limited to close contact vs. retention of precise location
 - Non-contact information
 - Outside of work

Access to and Use of information

Security

Brief Best Practices

- Consult with counsel, and encourage your business partners to consult with you.
 - Expanded definitions of PII, state-specific laws, and new collections and uses of data mean expanded risks
 - Pandemic context can lead to moving too quickly
- When in doubt, transparency and consent rule
 - Risk can almost always be mitigated by transparency and written consent
 - Certain laws require it; need to at least ensure compliance if business pushback
- Do not rely solely on public health, employment, or other guidance without balancing privacy considerations
 - Even steps sanctioned by government entities (*e.g.*, from an employment perspective by the EEOC) require privacy review
 - On the other hand, if *required* by regulation or county orders, different analysis

Return to Work Employment Law Considerations

Recalling Workers From Furlough

Selecting workers for recall

What about employees who can't return to work immediately?

Adjusting pay or hours upon reinstatement

Benefits considerations

What if some furloughs become separations?

Enhancing Workplace Safety: Potential Options

Strong, detailed, and well-publicized policies

Employee health screening

Temperature checks

Use of PPE and accommodations

Social distance monitoring

Operational changes: Staggered shifts, expanded entrance and exit opportunities, etc.

Enhancing Workplace Safety: Employment Law Considerations

OSHA Standards and Reporting

Employee screening and testing

ADA, Title VII, ADEA and related considerations

Wage and hour considerations

Responding to Employee Concerns

Employee resistance to screening or testing

Permitting employees to return to work from quarantine

Responding to employee reluctance to return to work

Employee protests and walkouts

Workers' compensation for claimed workplace infections

Presenters



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Karl Nelson represents employers across the country in connection with employment law compliance and litigation, including with respect to fair employment practices, benefits issues, worker health and safety, whistleblower claims, and collective bargaining rights and obligations.



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Alexander H. Southwell represents a wide-range of leading companies, counseling on privacy, information technology, data breach, theft of trade secrets and intellectual property, computer fraud, national security, and network and data security issues, including handling investigations, enforcement defense, and litigation.



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Cassandra Gaedt-Sheckter focuses on cutting-edge privacy law compliance concerns for clients in a broad range of industries, including relating to federal, state, and international privacy and cybersecurity laws, and representing companies in technology-related privacy class action and IP litigation matters.



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Dr. Christopher Kuhlman is a board certified toxicologist (DABT) and industrial hygienist (CIH) with CTEH. Dr. Kuhlman specializes in toxicology, risk assessment, toxicity evaluations, and emergency response toxicology. Recently, he has been working with employers around the globe to meet the ongoing challenges of the outbreak of COVID-19.