

Insights

U.S. EMPLOYER GUIDANCE FOR REOPENING THE WORKPLACE

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Over the past week, increased discussion of reopening the U.S. economy has raised numerous questions as employers prepare to return their employees to the workplace. While the exact steps to reopen the economy remain uncertain, employers should begin to consider what measures will help ensure a safe, orderly return to business, particularly since yesterday President Trump's White House issued its Opening Up America Again¹ three phased approach for re-opening the economy, and earlier today the Equal Employment Opportunity Commission issued guidance about returning to work.

Just as the shutdown and stay-at-home orders varied based on state and locality, employers should expect reopening orders to similarly provide a range of legal requirements. One thing most state and federal leaders agree on, though, is that employers will not immediately resume "business as usual."

The following is a list of potential measures and related issues we suggest clients consider in preparing to return to work, whether next week, next month, or this summer.

Physical Workplace Measures

- Be prepared to comply with the CDC's Guidelines in effect at the time of a return to work. For example, employers should ensure they have sufficient handwashing stations and supplies, tissue disposal options and appropriate postings regarding sanitation and hygiene.
- Be prepared to comply with any guidance from OSHA regarding limiting workplace exposure to COVID-19.
- Review/amend agreements with third party employers to ensure that, as applicable, they agree to implement the CDC's Guidelines and guidance from OSHA with respect to contract employees.
- Consider additional sanitization materials for workers and visitors and improved infection control/sanitization practices for high-touch areas such as equipment, machinery, restrooms and breakrooms.

- Consider implementing rules regarding spaces where employees congregate in large numbers such as limiting the number of employees that can be in such spaces at the same time (e.g., in breakrooms, check-in area/time clocks, and elevators).
- Consider whether you want to discontinue or limit any services (e.g., the service of vending machines; on-site workout instruction; food trucks; meal delivery; dry cleaning pick up; shoe shine services) so as to limit the number of visitors you have in the workplace. To the extent vendor services are not discontinued, consider implementing protocols for visitors to arrive on-site (including, as appropriate, temperature screenings). With respect to visitors, ensure your reception area allows for adequate social distancing and aim to decrease the amount of time any individual spends in waiting areas.
- To the extent you share work space with third party employers or other organizations, identify who will be responsible for infection control/sanitization of joint work spaces and allocate costs associated with the same.
- It is likely that in every state some form of social distancing-related restrictions will remain. Whether those will be recommended (rather than required) and how specific they will be is still unknown. Social distancing, under the CDC's current guidelines, means avoiding large gatherings and maintaining distance (approximately 6 feet or 2 meters) from others when possible. However, more current research is showing that COVID-19 can travel further in the air if an infected person (even asymptomatic) coughs or sneezes, so be sure to regularly monitor updates from the CDC and local public health organizations. In addition to conference rooms and work areas, companies should evaluate non-working areas as well, such as breakrooms and lunchrooms. Social distancing strategies may include:
 - Implementing flexible worksites as employees return (e.g., telework)
 - Implementing flexible work hours to decrease the number of employees present at one time (e.g., staggered shifts)
 - Increasing physical space between employees in work and non-work spaces
 - Increasing physical space between employees and customers (e.g., drive through, partitions)
 - Implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events, continue using teleconferencing)
 - Downsizing operations as appropriate
 - Delivering services remotely (e.g., phone, video, or web)
 - Delivering products through curbside pick-up or delivery

- If increased teleworking, videoconferencing and other technology-driven solutions are implemented as part of social distancing solutions, review system capabilities and ensure data security and data privacy requirements are met.

Employee and Workforce Guidance

- Consider the potential logistical challenges associated with trying to return everyone to the workplace at the same time. For larger employers, returning employees in phases may be more manageable, while also allowing for increased social distancing with a smaller workforce present at one time. To the extent employees are returned in phases, consider which positions are most essential for your business and identify ways to train employees in these areas, if available employees are not experienced in these fields. Where possible, attempt to provide enough time between phases to monitor for potential outbreaks. Current guidance indicates a 14 day spacing between phases is sufficient.
- If returning employees to work in phases, ensure selection for return is done on a non-discriminatory, non-retaliatory basis.
- Be mindful of new requirements not to discriminate or retaliate against individuals who have availed themselves of leave or provided information regarding circumstances indicating that they are eligible for paid leave under new COVID-19 related leave laws such as the Families First Coronavirus Response Act (Paid Sick Leave and Emergency FMLA). In addition, remember that selections within a job category will be subject to discriminatory treatment and discriminatory impact analysis.
- If work from home/teleworking has been utilized during the pandemic, be prepared to address a potential increase in the number of requests to work from home as employees are faced with returning to the office. Ensure when addressing such requests your policy/practice is applied in a non-discriminatory manner for employees who do not have a disability. Also recognize that where the request to work from home is made as part of an accommodation for a disability, the temporary telework experience during the pandemic “could serve as a trial period that show[s] whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information,” according to the EEOC. Therefore, if denying such requests, consider whether you can identify (if challenged in a legal dispute) essential job functions that were temporarily dispensed with during a national emergency but cannot be dispensed with on a regular, long-term basis (e.g., in-person collaboration, ability to be effectively supervised, etc.).
- Continue to address ADA accommodation requests through the typical interactive process. Recent EEOC guidance on the subject of ADA accommodations and the interactive process includes the following:

- Begin accommodations discussions now, if possible, even before employees return to the workplace, so that decisions and arrangements may be made in advance. Employers may ask employees with known disabilities to request accommodations that they believe they may need when the workplace re-opens.
- Employers may still ask questions or require medical documentation to demonstrate the existence of a disability and the need for an accommodation. If it is difficult to obtain such documentation, employers may provide accommodations on an interim or trial basis.
- Employers may adapt the interactive process to meet the changing circumstances of the pandemic. For example, the pandemic may create urgency to providing an accommodation, leading to a shortened interactive process. Or it may be appropriate to provide short-term or temporary accommodations which may be revised, extended, or even end as public health directives and government restrictions change, such as restrictions on the number of people who may congregate.
- It is permissible to evaluate undue hardship (significant difficulty or expense) with respect to requested accommodations in light of the challenges posed by the pandemic. For example, current circumstances may create significant difficulty in acquiring or providing certain accommodations. The sudden loss of some or all of an employer's income stream, or the amount of discretionary funds available at this time, may also be relevant to the analysis.
- Review paid sick and other leave policies to address potential absence issues related to COVID-19.
 - Make sure policies are updated to include any changes in federal, state or local pandemic-related sick leave requirements, where applicable.
 - Ensure all required notices are posted, where applicable.
- If returning employees are known to have been exposed to COVID-19 or have tested positive, consult the CDC's most recent guidance and determine whether you will follow that guidance or whether you will implement even more restrictive requirements (e.g., requiring a doctor's note if anyone returning has lingering symptoms such as a cough).
- Ensure all decision-making regarding which employees to return to work, when to return them to work, on what schedules, and the like is based on legitimate, non-discriminatory considerations.
- Develop a procedure to address situations in the workplace when one employee raises concerns that another employee either: 1) has symptoms of COVID-19, or 2) has been in close contact with someone known to have COVID-19 or symptoms of it.

- Develop and implement policies and procedures for workforce contact tracing if an employee tests positive for COVID-19 after returning to the workplace. Designate an individual or team to compile a list of employees who may have come in contact with the COVID-19 positive employee and implement a system to monitor and prevent a hotspot in the workplace. Ensure the policies maintain the privacy and confidentiality of employee health information.
- When the return to work occurs, if COVID-19 remains classified as a pandemic, employers will need to comply with any CDC guidance or state order (e.g., regarding hygiene, temperature checking, face mask/face covering). Employers may also want to consider implementing a protocol in order to limit individuals' entry into the workplace and reduce spread of the virus to protect the safety, health, and well-being of employees (e.g., questionnaire, temperature taking, facemask/face covering and/or glove requirements) even if not required by the CDC or a state order.
- Per recent EEOC guidance, although employers may require employees to wear protective gear (such as masks or gloves) or observe infection control practices (such as regular hand-washing and social distancing protocols), employers may need to discuss modifications or alternatives if feasible and not an undue hardship, if needed by employees with a disability or employees who need a religious accommodation. Examples of potential accommodations include non-latex gloves, modified face masks for those who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs.
- Prepare for the likelihood that employees may begin returning to the workplace while "vulnerable individuals" are still advised to shelter-in-place. Consider allowing employees to voluntarily designate themselves as either vulnerable or not vulnerable. Any designation should not require specific information relating to the category of vulnerability, but should instead require a yes/no answer based on the CDC's criteria.

Additional Policy Concerns

- In those workplaces with union representation, comply with the duty to bargain and ensure collective bargaining-related obligations are met (e.g., recall in compliance with CBA provisions; appropriate exercise of management rights or other CBA provisions); comply with shutdown and return to work agreements; and negotiate return to work provisions where required.
- When hiring, be aware of the EEOC's current guidance on subjects related to COVID-19. For example, in light of the current pandemic, the EEOC has indicated that it is permissible to screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as the employer does so for all entering employees in the same type of job. Similarly, the EEOC has indicated that employers may delay the start dates, or even withdraw a job offer if

an immediate start date is needed, for an applicant who has COVID-19 or symptoms of it. This guidance may change as the pandemic situation improves.

- Be prepared to swiftly address any complaints of COVID-19 related harassment in the workplace, such as race, national origin, or disability-related jokes or negative comments, as well as any retaliation for an employee's pursuit of worker's compensation benefits. Remind managers of their roles in watching for, stopping and reporting any such misconduct.
- Employees returning to the workplace may have increased anxiety or stress associated with the return. Be prepared to offer support, such as through an EAP, and be ready to engage in accommodation discussions with individuals who may have a mental health disability.
- Workplace discussions among employees concerning personal and family health-related issues may occur more frequently and openly given the current context. While employees are free to voluntarily share their experiences and situations with co-workers, managers should be reminded not to pry into employees' and their family members' health issues and medical situations. Specific COVID-19 related concerns (such as whether a particular employee who appears to have COVID-19 symptoms should be in the workplace) should be handled by HR.
- Consult with your workers' compensation insurance carrier regarding any instructions on documenting and reporting any workplace related reports of COVID-19 exposure / injury, and any other instructions on how the carrier would like the alleged exposure investigated.
- Consider the extent to which salary reductions will be reversed and whether employees will have an ability to recoup lost wages through bonuses or other means.

It may be several months or longer before workplaces begin to feel "normal" again, but spending time considering and implementing the above should help ensure your organization is well equipped to handle the transition as efficiently and well as possible. BCLP has developed a number of additional resources to help guide clients through many of the recommended measures.

1. <https://www.whitehouse.gov/openingamerica/>

RELATED PRACTICE AREAS

- Employment & Labor

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