

Employment law checklist for return to work following mandated closure

As state and local governments roll out plans to reopen businesses, employers have quite a few issues to consider for a safe and productive return to work. Those include: assuring compliance with government mandates for safe operating procedures; calling people back to work in a way that avoids discrimination or other legal risks; and dealing with reluctance on the part of some workers to return amid a continuing risk of COVID-19 exposure. Here is a checklist of things to consider.

Guidelines for a safe return to work

What does the government say?

- Review all orders and guidelines issued by federal, state or local authorities
- Safety measures to consider:
 - Social distancing
 - Rearrangement of work areas and workspaces
 - Face masks (employees, visitors, customers)
 - Staffing or shift restrictions
 - Staggered breaks
 - Limiting access to common areas, like break and lunch rooms, copy centers, elevators, etc.
 - Restrictions on specific job tasks which generate close contact
 - Possible temperature monitoring

What guidance have government agencies provided?

- OSHA guidance for controlling COVID 19 risk is a good source for ideas (<https://www.osha.gov/SLTC/covid-19/controlprevention.html>)
- CDC has announced it will issue guidelines specifically geared to “return to work” protocols

When to quarantine and when to allow return after quarantine.

- Develop a plan and protocol for assuring that employees remain away from work when symptomatic and a plan for responding when an employee gives notice of a positive COVID-19 test or high risk of exposure.
- Be prepared to enforce quarantines, to do deep clean sanitization and to notify employees, local health departments and customers as appropriate when made aware of possible exposure. When doing so, protect employee confidentiality.



- Assess whether local orders permit (or prohibit) requests for medical clearance to return to work.

Getting people back to work

Recall from furlough or rehiring from layoff or termination

- Choosing who to return to work
 - Evaluate selection decisions for discrimination risks
 - Comply with all collective bargaining agreement recall requirements
 - Review what was communicated with employees when placed on furlough or terminated to ensure consistency or address any inconsistencies in approach
 - Timing considerations:
 - Are you complying with any applicable state orders based on industry?
 - Is there work for employees to come back to?
 - Will this impact on any funding/loans received by the employer? (e.g., PPP must return employees to work by 6/30/20)
- Evaluating changes in pay, benefits or policies
 - Will reduction in pay or benefits be necessary due to the economic downturn?
 - Will you implement economic incentives, including pay restoration?
 - Are you covered by the requirements of the new Families First Coronavirus Recovery Act (FFCRA)? If so, have you developed compliance policies and forms for extended Family Medical Leave Act (FMLA) leave for child care and for emergency paid time off requirements?
- Orientating returning workers to the “new” workplace
 - Plan in advance to orient returning workers to all that will have changed in your “new” work environment.
- Dealing with reluctant employees
 - When reluctance is based on general fears and concerns:
 - Communicate assurances of precautions in place
 - When concerns are based on medical condition
 - Evaluate disability discrimination, FMLA and other risks before taking adverse action
 - Dealing with the employee who asks: “Why can’t I continue to work from home?”
 - Consider local stay-at-home orders which may encourage or require providing remote work “when possible.”



- Employees who cannot return to work because of childcare issues
 - Review FFCRA coverage
 - Evaluate gender discrimination claim risk before taking adverse action
 - Consider ability to replace or backfill

Risk spotting

Retaliation or interference

- FMLA
- FFCRA

Americans with Disabilities Act (ADA) accommodation

Disability discrimination

Alleged workplace exposure to COVID-19

Collective Bargaining Agreement (CBA) issues and union organizing

Determine recall rights under the CBA

Seeking relief from CBA requirements

Incentive or “hazard” pay

Potential union organizing

Economic downturn

Reductions in force

Worker Adjustment and Retraining Notification Act (WARN) and State law equivalents

Staffing decisions may have an impact on stimulus loans and related financial benefits.

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