



LABOR & EMPLOYMENT

RE-OPENING CHECKLIST

FOR EMPLOYERS AMID CORONAVIRUS PANDEMIC

It's time to "re-open" and get back to "normal." The only problem is that normal looks a whole lot different than what it was, and this new normal is fraught with uncertainty, legal risks, financial problems, and ethical complexities. With the possibility of heavy liability costs due to the pandemic and related revenue disruptions, businesses could go bankrupt or struggle to return to commerce if they do not tread carefully through these unprecedented times. Indeed, various logistical challenges await employers as they bring back their workforce.

However, re-opening in a safe, responsible and bottom-line friendly manner is an attainable goal. Though there is no simple solution to a successful workplace re-opening, the following checklist of strategies and return-to-work best practices will help prepare your business as it re-opens amid a pandemic world.

STRATEGIZE AND PLAN

- Create a task force or designate a workplace coordinator that will create, plan and maintain your business' return-to-work plan and will be responsible for COVID-19 issues
- Review state and local ordinances, shelter-in place orders (e.g., CA), and guidance for employers generally and industry-specific guidance pertaining to the company's industry area. Also, review federal guidance, including:
 - EEOC updates: <https://www.eeoc.gov/coronavirus/>
 - OSHA guidance: <https://www.osha.gov/SLTC/covid-19/>
 - CDC guidance: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
 - Stay up to date with Holland & Hart Coronavirus Resource Site: <https://www.coronavirus.hollandhart.com/>
- Communicate with your building management or landlord, become aware of their strategy and plan, and coordinate where possible
- Establish an emergency communication plan and ensure employee contact information is up to date
- Consider what personal protection equipment (PPE) and other supplies will be needed and create a stockpile

ASSESS WORKFORCE NEEDS AND UPDATE LEAVE POLICIES

- Create a recall plan that is objective, fairly applied, and fully documented in order to prevent any appearance of discrimination or impropriety
 - Plan a phased or staggered return to work, allowing employees who do not need to be physically present to temporarily continue working remotely where possible
- If employees will need to be terminated due to changing business conditions:
 - Consider whether a business reorganization or reduction in force is necessary, carefully map out such actions, create a defensible selection criteria, and conduct a disparate impact analysis
 - Consider whether a furlough or reduction in hours/wages would be necessary
 - Consult counsel to determine if any additional obligations may be triggered (i.e. WARN Act, mini-WARN Act state laws, severance or termination payments, etc.)
 - Consider providing a separation package, including a release of claims
- Determine which employees (including furloughed and laid off employees) are ready to immediately return to work and which will need accommodations under the Americans with Disabilities Act ("ADA"), the Families First Coronavirus Response Act ("FFCRA"), or the Family and Medical Leave Act ("FMLA")
- Create a return to work letter that includes at minimum:
 - Employment Offer that allows an employee reasonable time to accept or reject employment, if appropriate
 - Return to work date
 - Terms of Employment (position, supervisor, responsibilities, pay, hours), especially critical if pay or hours will be reduced
 - Benefits status (seniority, benefits, accrued PTO)
 - Any changes to employee's terms of employment
 - New safety procedures and policies



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RE-OPENING CHECKLIST

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ASSESS WORKFORCE NEEDS AND UPDATE LEAVE POLICIES (Continued)

- Update leave and accommodation policies, and accounting procedures
 - Understand and determine eligibility for leave under the ADA, FFCRA¹ (including pay differential), and FMLA
 - Particularly, if the FFCRA applies, adopt new procedures for the application of emergency FMLA and Paid Sick Leave
 - Track employees' use of leave and reason for leave
 - Avoid retaliation and even the perception of retaliation against employees requesting leave, particularly if you have a loan under the PPP, you will need to implement tracking procedures and documentation in order to get loan forgiveness

WORKPLACE SAFETY

- Create safety training for returning employees and communicate with employees clearly and often regarding safety precautions and procedures
- Consider increased cleaning of facilities, such as more stringent cleaning each evening after regular hours and/or having specific employees cleaning high traffic door knobs/handles and countertops throughout the day
- Employee screening
 - Implement testing policies and procedure for employees to ensure that no one is coming into work with a fever or when feeling ill (the EEOC has, as of late April 2020, stated that employers can take the temperature of employees or require a COVID-19 test before allowing workers to return to the workplace)
 - Consider having a daily routine where employees are asked if they have any COVID-19 symptoms
 - Immediately send home any employees that have COVID-19 symptoms
 - Ensure all screening and communications are confidential
 - Limit the number of employees designated as screeners and ensure their safety
 - Avoid questions that might reveal other non-COVID-19 related health issues; know exactly what questions you can ask

WORKPLACE SAFETY (Continued)

- Determine how the company will handle employees who refuse to be screened (consult counsel before disciplining employees)
- Face coverings²
 - Provide instructions and/or training on how to properly wear, maintain, and clean face coverings
 - Consider providing or reimbursing employees for face coverings
 - Engage in the ADA interactive process (or similar state provision) when an employee refuses to wear a face covering for medical reasons
- Create action plan if employee becomes sick or tests positive for COVID-19³
 - Encourage employees to check themselves for symptoms and stay home when not feeling well
 - If employee is sick or displays COVID-19 symptoms during work, immediately separate that employee from others and send home
 - If employee tests positive for COVID-19, then follow a plan to inform impacted employees that they may have been exposed to COVID-19 and to be extra sensitive in washing, sanitizing, and monitoring themselves for illness
 - Refer to the CDC guidance on cleaning and disinfecting areas of potential COVID-19 exposure⁴
 - Follow CDC and local guidelines for when an employee can return to work⁵; the EEOC has authorized employers to require a return to work fitness for duty medical notation
 - Close off areas used by ill employee and disinfect areas per CDC cleaning recommendations⁴
 - Determine if you need to inform OSHA⁶ or other public health agency
- Create a travel policy limiting non-essential travel
 - Require testing or quarantine for those traveling outside the country or to domestic COVID-19 hotspots
 - Review state and local laws of the intended destination to determine if travel is allowed and whether quarantine upon arrival is required
 - Request and review policies of relevant third parties, such as vendors and customers, related to a potential employee visit



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BEST PRACTICES FOR SOCIAL DISTANCING & WORKPLACE HYGIENE

- Retain or offer work-from-home options whenever possible
- Consider alternating shifts and changed hours to reduce employee headcount and crossover in the workplace
- Limit number of in-person meetings and also the number of people allowed during these in-person meetings
- Limit non-employee visits and create a visitor and vendor questionnaire assessing health and travel
- Limit or restrict gatherings in public and common areas
- Request employees to routinely clean and sanitize their personal workstations
- Rearrange workspaces to maximize appropriate social distancing
- Restrict movement between departments, floors, and/or functions
- Increase ventilation and amount of outdoor air used by the HVAC system
- Limit the number of individuals in elevators and suggest appropriate spacing
- Provide intermittent breaks for hand washing
- Provide no-touch disposal receptacles and distribute tissues and hand sanitizers throughout multiple locations
- Discourage use of any contact methods of greetings
- Stagger breaks and lunches
- Where possible, keep doors open to reduce point of contact
- Limit the number of customers on premises and provide visual markers on floors for six-foot distancing

OTHER IMPORTANT EMPLOYMENT CONSIDERATIONS

- Discrimination claims
 - Do not make any hiring or firing decisions based on the applicant's or employee's: (1) vulnerability status for COVID-19 (state and local ordinances may possibly have specific definitions and special rules for "vulnerable" individuals); (2) reasonable accommodation requests; (3) leave requests pursuant to FMLA/FFCRA
 - If downsizing, consider consulting an attorney to help with a disparate impact analysis
 - Always utilize objective decision-making criteria for recalling or terminating employees
- FLSA wage claim
 - Consider compensability of time spent engaging in required pre and post work activities (temperature screenings, testing procedures, etc.) for non-exempt employees; federal and state wage & hour law may treat compensability of this time differently
 - Properly track non-exempt workers' time
- ADA⁷
 - Avoid disclosures of medical information, even if related to COVID-19
 - Maintain medical information, including screening or temperature logs, as confidential and separate from personnel files
 - Working from home might be considered a reasonable accommodation and employer should consider this option during the interactive process (If employees have been conducting work from home, denying a request for accommodation to work from home may be more difficult and employers should update and review job descriptions to demonstrate why working in the workplace is a business necessity)
- Harassment claims
 - Provide employees online reporting options, as employees might not have ability to report in person
 - Create protocol for phone and video investigation interviews and consistently enforce



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OTHER IMPORTANT EMPLOYMENT CONSIDERATIONS (Continued)

- Whistleblower action plan
 - Ensure that company has an action plan if a COVID-19 whistleblower scenario arises
- Trade Secrets and Confidential Information
 - Consider and update security procedures and protocol in order to reduce the risk of misappropriation
 - Remind employees of confidentiality policies and trade secret protocols
 - If possible, utilize a VPN and set up a two-step authentication feature for remote access to the company's business or at least access to confidential information
 - Limit access to certain files and folders to a need-to-know basis and guard against unauthorized access/use by requiring the use of secure file transfers and encryption technology when sending data outside the company's network
 - Remind workers to secure their WiFi system with a password
 - Educate works about malware, and other similar malicious communications

REFERENCES

¹<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (FFCRA: Questions & Answers)

²<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>

³<https://www.coronavirus.hollandhart.com/protecting-your-workforce> (Holland & Hart COVID-19 Resource site – Workplace Safety Tab)

⁴<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>

⁵<https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>

⁶<https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>
<https://www.osha.gov/Publications/OSHA3990.pdf>

⁷https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm



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