

## **Checklist for Return to Work (or Reinstatement) for Employees Impacted by COVID-19**

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Employers are now confronted with the next COVID-19 challenge: safely bringing employees back to work. The recent federal guidelines for “Opening Up America Again” specifically refer to recommended practices for employers. As the ultimate power to ease restrictions will be at the state and local level, employers will also need to navigate modifications to stay-at-home orders that will likely return employees to work in phases based on the nature of their industry, local data on COVID-19 measures, and other factors.

The checklist below addresses both how to manage increased crowding in the workplace as employees return to work and how to onboard new hires or formerly-furloughed employees. An employer should review and update our recommended procedures based on the then-current information about COVID-19. This will certainly be an ongoing effort as multiple studies are currently under way regarding strategies such as contact tracing, antibody testing and rapid, broad-scale COVID-19 testing. While the ultimate import of these efforts is currently unclear, it will be critical to monitor whether any of these are authorized for implementation or recommended as a workforce protection strategy.<sup>1</sup>

### **Issue One: Are there still state or local stay-at-home or other pandemic-control restrictions in place?**

If an employer is an essential business, or now permitted to operate given modifications to state or local stay-at-home orders despite guidance in the local area that the pandemic remains severe, such employers should consider the following action items:

- **For teleworking employees returning to the office, new hires or reinstatements (returning furloughed employees):**<sup>2</sup> The steps below involve collecting and managing sensitive health information. All information collected for the purposes below must be treated as separate, confidential information and maintained in a confidential medical record.

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<sup>1</sup> Employers should be particularly cautious when it comes to administering blood testing with its own employees given the numerous issues implicated by several laws, including ADA, GINA, and OSHA (as an employer would likely have to implement a blood borne pathogen program). Instead, employers could rely on employees self-reporting antibody test results obtained from a local health agency or have these tests be administered through a health care professional, clinic or similar service. Finally, employers should carefully monitor the reliability of any testing (i.e., margin of error) and assess whether employees should be afforded the right to be re-tested if they challenge the reliability of their test results, similar to an employee challenging a positive drug test.

<sup>2</sup> Please note that additional considerations will exist for an employee returning from expanded FMLA or Emergency Paid Sick Leave provided under the Families First Coronavirus Response Act (“FFCRA”). We have published separate [guidance](#) regarding leave taken under the FFCRA and an employer’s obligation to reinstate employees at the conclusion of such leaves, subject to certain narrow exceptions. Thus, while several of these steps are appropriate for such employees (such as subjecting them to a temperature check), others may be impacted by FFCRA.

- **Screen for symptoms.** An employer may ask specific questions about COVID-19 and screen job applicants for symptoms of COVID-19 after making a conditional job offer, so long as it follows the same practice for all offerees in the same type of job.
  - **Ask.** The company may implement screening questions as to whether an employee has experienced flu-like symptoms associated with COVID-19 in the past 14 days and ask whether an employee has traveled in the previous 14 days.
    - Consider using a written questionnaire, which should be maintained as any other confidential medical record.
    - According to the EEOC, employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease.
- **Follow Post-Illness Guidance.** For employees who report having COVID-19 (whether confirmed by a test or diagnosed without a test), follow CDC guidelines regarding the appropriate time to discontinue isolation and return to work.
- **Temperature Check.** An employer may also take an employee's temperature (or applicant's temperature as part of a post-offer, pre-employment medical examination so long as the employer follows the same practice for all offerees in the same type of job).
  - **DO** treat any information collected during temperature checks as confidential medical information, and distribute only to those with a true need to know.
  - **DO NOT** disclose an affected employee's name.
  - **DO** compensate non-exempt employees for time spent in temperature screening.
  - **DO** pre-determine how the company will handle an employee who refuses to be screened. Most employers are initially sending such employees home on PTO and then re-assessing, after some reasonable period of time, if the employee continues to refuse the screening. Consult with counsel prior to imposing discipline.
  - **DO** protect the screeners. If an employer will rely on its own employees to screen, limit who will be designated as screeners, provide proper PPE and minimize physical contact with the employees being checked. Employers should review practical issues to ensure safe screening, including type of thermometer being used, physical layout of the screening station, and maintaining proper sanitation procedures.
- **Delay Start/Withdraw Offer in Event of Symptoms.** An employer should delay a return to the physical office for any employee who has COVID-19 or its symptoms. For applicants, an employer may delay the start date of an applicant who has COVID-19 or associated symptoms. If the employer needs the position to start immediately, an employer may withdraw an offer made to an individual who has COVID-19 or the symptoms of it, because based on CDC guidelines, this individual cannot safely enter the workplace. Nonetheless, the employer should confer with counsel to assess if withdrawing an offer is prudent.
  - **DO NOT** withdraw the offer merely because the applicant has a condition or status that the employer determines could make him/her higher risk to COVID-19 (for example, over 65, pregnant, etc.). You may discuss postponing a start date or allowing telework on a temporary basis, but the job offer cannot be withdrawn.
- **On-Site Safety and Social Distancing Strategies.** Employers must plan in advance for how to comply with their OSHA and other obligations when employees return to the office while also maintaining social distancing and other recommended health and safety controls.
  - **Means of Ingress and Egress.** Consider alternate scheduling if arriving for and leaving from work increases the crowding of employees at these start or end times or otherwise.
  - **Public spaces.** Employers should address whether they will keep common areas (break rooms, meeting rooms, etc.) initially closed for some period of time.

- ***In-house sanitation.*** Assess current sanitation/janitorial vendor services and whether supplemental services are needed.
- ***Review office layout and daily functions to minimize contact.*** Analyze generally if day-to-day administrative functions can be re-designed to enforce social distancing and minimize unnecessary touching of surface areas. Conduct an assessment of the workplace configuration to allow appropriate spacing between workstations.
  - **Consider Alternate Strategies:** Consider staggered shifts and other measures to allow employees to maintain the appropriate distance recommended by local health authorities or the CDC. If these are not viable, understand what OSHA obligations may exist in implementing PPE or other safety controls.
  - **DO** allow **voluntary** cloth masks, consistent with CDC guidance. However, if an employer provides cloth masks for voluntary use, it should ensure employees understand the limitations of such masks as they are not respirators (such as N-95 face masks).
  - **DO NOT** mandate cloth masks or other masks without first considering if they are required for safety reasons and what OSHA or other obligations may exist in providing them. See our previous [guidance](#) on this issue.
  - **DO NOT** issue N-95 face masks unless the employer has designed and implemented an OSHA-compliant respiratory protection program.
- ***Respond to COVID-19 at Work.*** If there is a confirmed or suspected case of COVID-19 in the workplace as more employees return, ensure that appropriate steps are taken consistent with the CDC guidance (including suitable cleaning of affected areas).
  - **Notify** employee's co-workers who may have come into contact with the employee at work within the past 14 days that they may have been exposed to COVID-19 and may wish to see a healthcare provider.
    - **DO NOT** identify the infected employee by name.
    - Consider how to allow affected employees to self-quarantine (including whether leave may be available for the same).
  - **Review** whether the outbreak is recordable on the OSHA 300 logs in light of OSHA's recent [guidance](#).
  - **Follow** current guidance regarding return-to-work documentation. Currently, the EEOC cautions that while employers may request a doctor's note, as a practical matter doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.
- ***Train Supervisors/Managers on How to Respond to Employee COVID-19 Issues.*** As employees return to work and are concerned about their health and safety, managers and supervisors should be prepared to address an uptick in leave and accommodation issues and need to understand how not to run afoul of the ADA, FMLA, FFCRA, and other laws. Additionally, employers should prepare for novel issues in the workplace such as complaints about employees who are coughing or perceived as being sick by co-workers, employees not wearing masks correctly, dress code infraction and accommodation issues over masks, and employees who are observed not following social distancing, sanitation or good hygiene practices.
- ***Follow Local Rules.*** Comply with any other local requirements regarding pandemic prevention in essential business workplaces.

**Issue Two: If there are no longer state or local stay-at-home or other pandemic-control restrictions in place, is there nonetheless objective guidance regarding the severity of the pandemic in the local area?**

- **Yes.** If the WHO guidance continues to denominate COVID-19 as a pandemic, or other local health authorities concur in their assessment of the severity of the COVID-19 crisis, the above steps under Issue One would still apply.
  - In addition, evaluate how a general increase of the workplace population could potentially present an uptick of employees becoming sick with COVID-19 symptoms.
    - Re-emphasize the obligation on employees to report symptoms, avoid the workplace, etc. as the general population returns.
  - “Double-down” on sanitation procedures and encourage good hygiene practices, including by displaying appropriate hand washing posters and instructions regarding covering sneezes and coughs.
  - Attend to ADA request for accommodation issues (further discussed below), as the EEOC has stated that those who may feel that they are high exposure to COVID-19 due to pre-existing medical conditions may request to continue to telework as an accommodation or may request modifications to their workspaces to enhance social distancing, etc.
- **No.** If there is no such objective guidance, then employers should consider the issues raised below in Issue Three.

**Issue Three: If the return to work occurs when relevant health guidance states that the pandemic designation has been removed, or newly-made assessments of COVID-19 categorize it as meaningfully reduced in severity:**

- If the understanding of COVID-19 changes to the point that it is no longer perceived by health authorities as a direct threat, then the customary limitations on medical and disability inquiries under the ADA should be followed. In other words, the health-related inquiries about COVID-19 symptoms, temperature screens, and similar matters would not normally be permitted under the ADA, but the EEOC advised that the pandemic created a potential direct threat to employees under the ADA to make such inquires and actions permissible. It is anticipated that employers will need to remind managers and supervisors of these ADA rules upon a return to “normal.”
  - When COVID-19 no longer represents a direct threat, disability related inquiries and medical examinations are prohibited prior to a conditional offer of employment. The ADA permits an employer to make disability-related inquiries and medical examinations if made to all employees in the same position or job category and if such an examination or inquiry is consistent with business necessity, if the employer has a reasonable belief that an employee’s ability to perform the essential functions of the job may be impaired, or the employee will pose a direct threat.
- Examine how to treat future remote work requests as an accommodation in light of employees perceiving employers to have easily accommodated such requests during the pandemic.
- Employers may still send home an employee who exhibits symptoms of influenza or COVID-19.
- Employers should still continue to maintain the good hygiene practices discussed above.
- Employers should prepare to engage in the interactive process with any employee who may have a disability that has been exacerbated by the stresses of the pandemic.

## **Issue Four: Have you reduced salaries, wages, or benefits such as vacation accrual? Do you plan to restore previous levels or offer an increase?**

- **Wages/Salaries**
  - Employers should review applicable state law for wage changes.
  - If an employer has previously reduced schedules, and plans to increase them (for example, from 25 hours per week to 40 hours per week), for non-exempt employees, confirm whether the state imposes notice requirements regarding changes that impact an employee's pay. Even if notice is not lawfully required, advance notice of a schedule change will assist employees who may still be dealing with child care obligations due to school closures.
  - Similarly, for exempt employees, if employers intend to change salaries, provide notice in writing that complies with all state requirements regarding a wage change.
- **Vacation Accrual**
  - If an employer suspended vacation accrual, or otherwise limited its PTO policies, carefully assess how further changes may be impacted by state laws enacted in response to COVID-19.
  - Make sure all policies or proposed changes thereto comply with the FFCRA's leave policies and any state or local paid sick leave laws.
  - Consider whether any scheduling issues may arise with respect to scheduling vacation days given the returned workforce. For example, if spring and early summer travel restrictions led to lower-than-usual vacation usage, consider whether the ability to use vacation may need to be limited.
- **Paid Sick Leave**
  - Consider whether state and local paid sick leave laws require you to reinstate prior sick leave balances for employees who are returning.

We believe the above information should allow employers to start planning and discussing implementation of return-to-work procedures. We believe that based on the variables discussed and others that cannot be foreseen at this juncture, this document should be considered a work-in-progress. Employers should be planning but must be prepared for deviations as state and local leaders address how employees will return to work.

### Related Alerts:

- [Federal OSHA's New COVID-19 Enforcement Guidance](#)
- [OSHA Relaxes Requirement for Work-related Assessment for COVID-19 Recordkeeping for Certain Employers](#)
- [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#)
- [Employers Providing Face Masks Should Review Their Health and Safety Obligations](#)
- [Relief for Employers and Workers under the CARES Act](#)
- [COVID-19 OSHA Guidance: Hazard Assessments at Workplaces Considered Essential Businesses Under Shelter in Place Orders](#)
- [COVID-19 Restructuring and the WARN Act](#)
- [FFCRA - Temporary Non-Enforcement - Employer Payroll Tax Credit](#)
- [Employment Issues under the Families First Coronavirus Act of 2020](#)
- [New York Enacts COVID-19 Sick Leave Act](#)
- [Employer Checklist for Responding to a Positive COVID-19 Test](#)
- [COVID-19 and Discrimination Issues](#)
- [COVID-19 and the American With Disabilities Act](#)

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- [COVID-19 and OSHA](#)