



1. Which employees should an employer bring back to work first?

If an employer expressly told employees about how recall selection decisions would be made, it should make every effort to follow the announced criteria. The same goes for any guidelines established by an employer in its employee handbook. If the employer did not advise employees about the order of recall, then employers may recall employees in a way that meets its business needs—e.g., job function, performance, knowledge of the employer’s business operations. Employers should avoid any possible inferences of discrimination or retaliation in recall decisions by ensuring that a disproportionate number of employees in a protected class are not adversely affected.

2. May an employer recall younger employees or employees without childcare responsibilities first?

No. Employers may ask for volunteers to return first, but employers who recall workers based on age, women with school-aged children, or perception of disability risk a discrimination claim. Employers should leave the choice to the employee, and consider requests to return to work later based on a documented medical condition. Similarly, employees with child care responsibilities should be allowed to decide for themselves if they want to return to work. Employees may choose to take FFCRA family leave, if available.

3. What guidelines should employers consult in reopening the workplace?

Various government entities have issued orders and ordinances to address safety protocols and timetables for reopening the workplace, including but not limited to CDC Guidelines, state and local executive orders and ordinances, and the White House Guidelines. In addition, the federal Occupational Safety and Health Administration has issued Guidance on Preparing Workplaces for COVID-19 addressing the safety procedures to be followed to satisfy OSHA’s general duty clause and other applicable safety and health standards and regulations promulgated by OSHA ([click here](#)). Such authorities may require PPE, health screening, increased hygiene practices, and/or additional social distancing.

4. What pay and benefits should employers provide to those returning to work?

Absent an employment contract or a collective bargaining agreement, an employer may generally alter the compensation and benefits that were provided to recalled employees prior to the furlough or layoff. However, employees should receive advance notice of any changes in the terms and conditions of their employment. Employees may be returned to work on a reduced hours schedule, but employers should make sure that their exempt status is not jeopardized by improper deductions from salary.

5. How should an employer respond to an employee who prefers to stay out on leave when recalled to work?

An employee who refuses to return to work out of a generalized fear of contracting the virus may be deemed to have resigned. Employees' requests to work from home for medical reasons should be analyzed on a case-by-case basis to determine whether a physical presence in the workplace is an essential job function or instead can be reasonably accommodated. The same standards and interactive process under the Americans with Disabilities Act apply, but employers and employees may now have additional information on the feasibility of remote work.

If an employee refuses to return to work because he or she prefers to receive unemployment compensation benefits, the employee may also be deemed to have resigned. In such instances, the employee may be disqualified from receiving further unemployment compensation.

6. What may employers ask employees about their health?

Employers may ask employees if they are experiencing COVID-19 symptoms, and may take their temperatures. Employers may also require COVID-19 testing, if the testing is accurate and reliable. All such information must be treated as a confidential medical record in compliance with the ADA.

7. What medical documentation may an employer seek before bringing employees back to work?

According to the EEOC, employers may request fitness for duty certifications from employees' doctors. Certain state laws may limit an employer's ability to require medical documentation, so employers should check to see if such state laws or local ordinances exist.

8. Must employers provide personal protective equipment?

Under the Occupational Safety and Health Act, the workplace must be free of hazards likely to cause death or serious physical harm. Consequently, PPE should be provided consistent with the level of risk in an employee's position. Such equipment may be a reasonable accommodation for disabled employees.



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