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Return To Work Guide: An Employer's Post-Pandemic Handbook

As many states and municipalities begin lifting stay at home orders and implementing steps for a phased reopening of businesses, employers should be developing a written "game plan" to minimize the risks of transitioning from a COVID-19 complete or partial shutdown to resumption of business as usual, or business in the post-Pandemic workplace. In addition to following local, state, and federal orders relative to a particular business's ability to reopen, employers should be cognizant of any guidance, including guidance issued by the Centers for Disease Control ("CDC"), Occupational Safety and Health Administration ("OSHA"), and other state and local government agencies. Employers should also carefully consider implementing policies, procedures, and practices to promote a safe return to work and to mitigate any risks as they bring employees back to work. Employers should likewise create a plan for determining when and how to return employees to the workplace. After developing an appropriate written timeline and developing a "return to work strategy," employers should be cognizant of unique issue that are likely to arise as they seek to resume business as usual. The myriad of employment issues which employers will likely face include paid and unpaid leave issues, disability accommodation issues, safety issues, wage and hour issues, and managing employee complaints, among others. This reference guide is meant to provide a general overview of these requirements and other critical considerations for employers.

Preliminary Considerations

Timing of Reopening

An employer's ability to reopen should be guided, in part, based on the type of business and by geographic location. Employers should review any applicable state, county, and municipal orders for determining next steps prior to reopening. Stay up to date with our guidance on the current status of any state and local shelter in place orders, which is available at: https://www.dykema.com/assets/htmldocuments/State%20Level%20Shelter-in-Place%20Orders%20and%20Essential%20Services%20Provisions.pdf.

For instance, California has permitted some non-essential Employers to reopen given certain operating limitations; however, some counties in California, such as Los Angeles, have implemented more stringent reopening guidelines which continue to require employees to telework if they can do so and require Employers to provide face masks to employees who come into close contact with others. In Florida, restaurants are now allowed to offer outdoor seating with six-foot spacing between tables and indoor seating at 25 percent capacity. Retail can also operate at 25 percent of indoor capacity, but bars, gyms and personal services such as hairdressers will remain closed. Illinois will begin reopening certain manufacturing, offices, retail, barbershops on May 29 at the earliest. However, the City of Chicago has indicated it may implement a slower phased reopening for businesses within its jurisdiction. In New York, certain regions of the state which have met established metrics

may reopen as early May 15. Although varied in timing and other substantive aspects of the orders, states have generally indicated that any reopening of businesses would be phased, starting with certain sectors of the economy or with particular types of businesses. Knowing the applicable orders for each workplace is essential to successfully timing reopening of operations.

Drafting and Revising Policies and Procedures for Reopening

Before reopening, Employers should consult federal, state, and local orders to determine what requirements apply to the employer. Although many guidelines generally require Employers to continue to comply with social distancing requirements and implement cleaning and sanitization protocols, these orders may vary in the methods of achieving social distancing and cleaning and communicating such information to employees, contractors, vendors, and customers.

OSHA has recommended that Employers develop an infectious disease preparedness and response plan, if one does not already exist, to help guide protective actions against COVID-19. OSHA's Guidance on Preparing Workplaces for COVID-19 is available here: https://www.osha.gov/Publications/OSHA3990.pdf. The CDC has also issued guidance on resuming operations. For example, it has issued guidance titled "CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again," which is available here: https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf#page=53. In accordance with such guidance, employers should develop policies and procedures to address social distancing in the workplace, wearing protective equipment (e.g., face masks and gloves), symptom checks, handwashing, respiratory etiquette, and cleaning and sanitation requirements. These protocols should inform employees of the measures taken to ensure employee safety and containment measures in the event that an employee contracts COVID-19. Critically, these COVID-19 protocols should be clearly communicated to employees through internal communications and intranet or on-site posters. Employers should also provide employees with training on these policies and procedures, and develop a consistent enforcement mechanism for such policies through supervisory level employees trained in addressing what may prove to be sensitive issues.

Additionally, Employers should review personnel policies to determine whether any policies need to be updated in light of COVID-19. For instance, Employers may want to update their Injury and Illness Prevention Program, paid leave policies (e.g., Family and Medical Leave Act, PTO, Paid Sick Leave), reasonable accommodation policies, teleworking policies, timekeeping policies, meal and rest break policies, policies for reporting workplace safety concerns, travel policies, Information technology and usage policies, and other relevant policies.

Returning Employees to Work

Creating a Return to Work List

Based on business needs and applicable orders, business may want to have employees voluntarily return to work or select certain employees to return to work. If the employer is selecting employees to return to work, the employer should create a list of employees to return to work based on objective factors, such as physical location, department, job duties, seniority, employment agreements, and collective bargaining agreements (if applicable). The list should document the legitimate business needs for selecting which employees will return to work.

Employers should review their return to work list carefully to ensure that its plan does not have a disparate impact on protected categories of workers or lead to an inference of discriminatory or retaliatory treatment of certain workers. For instance, employers should not use age or disability status in determining who to return to work, even if the employer believes this category of workers may have a higher risk of contracting COVID-19. Employers likewise should not assume women with school-aged children will prefer to stay at home or that employees who have complained about the employer's response to COVID-19 prefer to remain off from work. Similarly, employers will also want to ensure employees who have taken protected leaves of absences (e.g., protected paid leave for issues related to COVID-19) are returned to work in accordance with the applicable leave law.

Due to the potential claims for discrimination and retaliation, employers should carefully document the legitimate business criteria used when selecting employees to return to work and any adjustments to an employee's position, schedule, wages, and other relevant employment actions.

Returning High-Risk Employees to the Workplace

The CDC has set forth that high risk individuals include those individuals who have underlying medical conditions, such as diabetes and lung disease, individuals who are 65 years or older, and individuals living in nursing homes or long-term care facilities.

Businesses developing return to work plans may wish to provide greater protections to high-risk employees. Despite any good intentions, directing high-risk individuals to stay at home or not selecting them to return to work may run afoul of laws prohibiting discrimination in the workplace, including but not limited to the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA") and state anti-discrimination laws. Employers should not make presumptions about employees, ask employees to identify underlying health conditions (except as allowed pursuant to U.S. Equal Employment Opportunity Commission ("EEOC") guidance), or determine who should return to work based on age or past requests for accommodation.

Instead, Employers should provide an opportunity for high-risk employees to self-identify and voluntarily report any concerns with returning to work. If an employee expresses concerns about returning to work, the employer should discuss those concerns with the employee. In some instances, if an employee has an underlying medical condition that qualifies as a disability under the ADA or state disability laws, the employee may be entitled to a reasonable accommodation. Similarly, an employee's health condition may qualify for unpaid time off under the Family and Medical Leave Act ("FMLA") or state leave laws.

For Employers that are subject to the ADA, the employer has an obligation to engage in the interactive process with employees who may have a disability to identify any accommodations, if any, that the employer may provide that does not impose an undue hardship. If a disability is not apparent, an employer may request for the employee to provide reasonable medical documentation regarding the disability. Similarly, if the employee is seeking a leave of absence, the employer may require the employee to have the employee's health care provider certify the need for leave consistent with the FMLA and/or state leave laws.

The EEOC's guidance recommends that employers and employees be flexible in determining reasonable accommodations, which may include temporary job restructuring of marginal job duties, temporary transfers, or modifying work schedules or shift assignments. The EEOC also reminds Employers that due to the health crisis that some employees may not be able to provide reasonable documentation and to consider providing an accommodation on a temporary basis until documentation can be provided.

Employers may provide alternative work arrangements to high-risk employees who are not covered by the ADA, FMLA, or state disability laws. However, in those instances, the employer should ensure its practice is consistent (i.e., offering all high-risk individuals alternative work arrangements). Employers that wish to provide high-risk employees with alternative work arrangements should craft a clear policy regarding the provisions of the alternative work arrangements.

Before making potentially negative employment decisions, Employers should consult with legal counsel to determine whether the high-risk employee has any other types of protections (i.e., complained about unsafe work practices). Employers should also document all discussions with employees and criteria about whether or not to offer alternative work arrangements.

Employees Who Have Children at Home Due to School and Day Care Closures

In some instances, employees may not wish to return to work because of issues related to school and day care closures. For business with less than 500 employees, these employees may be entitled to time off under the Families First Coronavirus Response Act ("FFCRA") or extended paid FMLA. Under the FFCRA and the extended paid FMLA, an employee who needs to care for a child whose school or place of care is closed or when the childcare is unavailable, may receive:

• 80 Hours of Paid Sick Leave; and

• 10 weeks of Paid FMLA Leave

Please note that paid sick leave applies to all employees of covered employers and paid FMLA leave applies to employees after 30 days of employment with a covered employer. Some small Employers may qualify for an exception from the FFCRA and the extended paid FMLA; however, Employers should carefully review the requirements for these programs before taking any adverse action against an employee who needs to stay home with a child due to school and daycare closures.

Also depending on the locality, employees may have additional time off protections. For instance, in California, Employers with 25 or more employees need to provide up to 40 hours of leave per year for school-related emergencies, such as the closure of a child's school or daycare by civil authorities. (https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm.)

Other Concerns Employees May Have With Returning to Work

Other employees may not desire to return to work for a variety of other reasons, such as fear of contracting COVID-19 and living with a family member who is high-risk.

Generally, Employers are not required to provide employees an accommodation based on their fear of contracting COVID-19 or due to the fact that they live with a family member who is high-risk. Employers should carefully review requests from

these employees to determine whether any federal, state, or local laws offer these employees protections, such as whether returning to work poses an imminent threat or danger to the employee, the employee has engaged in concerted activity, and other types of protected activities. Employers should also ensure that if they are providing alternative work arrangements to employees based on concerns of returning to the workplace or living arrangements, they are doing so on a consistent basis and documenting all accommodation requests and decisions.

Employees Declining Offers of Employment Due to Unemployment Benefits

Some employees may not wish to return to work because they are earning more on unemployment. In those instances, an employer may want to notify the employee of its efforts to ensure safety in the workplace, share the employer's understanding of the available unemployment benefits, and that the position may not be available in the future.

Employers can remind employees that the extra $600 provided by the federal government is temporary and is currently set to expire in July 2020. Employers may also advise employees who refuse to return to work for this reason that the employer will notify the state of the refusal to work. Employers should check the state's guidelines to determine the employer's obligation to notify the state of any refusals to return to work and how the employer should communicate this information to the state.

The Workplace

Reviewing Relevant Resources

Employers should review applicable state, county, and city orders regarding reopening the workplace. Some orders are specific to geographic location and type of business. Employers may need to comply with more than one order depending on the industry (e.g., health care employers or restaurant employers) and the physical location of the workplace Some state, county, and city orders also provide employers with detailed guidelines and checklists for preparing to reopen. For instance, Texas has issued checklists for various industries outlining the minimum recommended protocols for businesses in those industries to reopen. Similarly, in California, the Governor has issued guidelines for a variety of industries and several counties, such as Los Angeles and San Mateo County, have provided checklists for employers.

In addition to complying with any guidelines or checklists provided by states, counties, or other applicable orders, Employers should also review the CDC's "Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020," [available at: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html] OSHA's Guidance on Preparing Workplaces for COVID-19" [available at: https://www.osha.gov/Publications/OSHA3990.pdf] and the EEOC's guidance "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." [available at: https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act] These sources provide information regarding recommended procedures for implementing social distancing, providing proper cleaning supplies and protective equipment, criteria for screening employees and visitors, and response to employees who have COVID-19 or are exposed to COVID-19.

Implementing Social Distancing

Employers first must consider federal, state, and local requirements for social distancing. Some states, counties, and cities have specific directions for social distancing, such as limiting the number of individuals in the physical location, requiring the use of face masks, requiring Employers to post social distancing requirements and so forth.

Generally, Employers may want to consider staggering work hours, alternating days of work for groups of employees, continuing to allow employees to telework, reconfiguring the physical workspace to facilitate social distancing, placing physical markers in high traffic areas, and installing physical barriers (e.g., plexiglass, tables, etc.) to minimize direct contact with others.

Employers will also want to consider restricting the use of common areas, such as conference rooms, lunchrooms, shared refrigerators, and restrooms, by staggering rest breaks and lunch breaks, removing tables and chairs, and removing buffet-style food options. Employers should also discourage employees from congregating in high traffic areas and limit sharing of equipment and supplies.

Cleaning and Protective Equipment

Before bringing employees back to work, Employers will want to make sure they have all the proper supplies needed to ensure the employer is complying with cleaning and sanitation requirements and any requirements to provide face masks, gloves, and other protective equipment.

Generally, Employers should provide soap and water, disinfectant wipes, hand sanitizer, no-touch trash cans, tissues, and related supplies so employees may readily clean their workspaces and maintain proper hygiene.

Depending on the state and county orders, employees may need to wear face masks and in some instances the employer must provide the face mask at no cost to the employee. Employers should ensure that employees who are providing their own face mask understand what is appropriate, similar to workplace dress codes. Employees must also be trained on the use of any Personal Protective Equipment ("PPE") provided by the employer. Employers must also ensure that PPE is selected based on hazard to the worker, properly fitted and periodically refitted, consistently and properly worn, regularly inspected, maintained, and replaced, properly removed, cleaned, and stored. Remember when providing PPE, reasonable accommodation requirements still apply.

Screening Employees and Visitors

It is recommended for Employers to screen employees and visitors for symptoms of COVID-19. Employers should also recommend that sick employees to stay home. The EEOC's most recent guidance has approved the use of employee screening and questioning relating to COVID-19 symptoms, meaning such screening, tests, and questions would generally not violate federal law relating to disability discrimination. The EEOC's COVID-19 guidance is available at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws and https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act. In some instances, state and counties require employers to conduct employee screenings before allowing employees to start work for the day. For instance, Los Angeles County requires symptom checks before an employee enters the workspace, which must include a "check-in" concerning cough, shortness of breath or fever, and any other symptoms the employee may be experiencing, and a temperature check should occur at the worksite (if possible). Employers must be mindful that the information provided in screenings is private and confidential and any recorded information should not be maintained with personnel records. Employees who have any symptoms of COVID-19 should be sent home to self-isolate as set forth by the CDC and any applicable orders.

If an employee does not report any symptoms of COVID-19 but exhibits symptoms in the workplace, the employer should send the employee home and take appropriate steps as necessary to limit potential exposure.

Responding to Employees Who Test Positive to COVID-19 or Come Into Contact With Someone Who Has COVID-19

Employers should develop plans to respond to an employee who tests positive for COVID-19 or who has come into contact with someone who has COVID-19. If an employee tests positive for COVID-19 or has close contact with someone who has tested positive, the employee should self-isolate as recommended by the CDC and applicable orders.

When an employee tests positive for COVID-19, the employer should close off any areas used for prolonged periods of time by the employee and wait 24 hours (if possible) before performing deep cleaning of that area. CDC cleaning recommendations include cleaning dirty surfaces with soap and water before disinfecting and using disinfectants that meet EPA-approved disinfectant labels with claims against emerging viral pathogens. If it has been at least seven days since the employee was at the employer's workplace, additional cleaning and disinfection may not be necessary. CDC recommends for Employers to determine which employees have been exposed to COVID-19 and instruct potentially exposed employees to stay home for 14 days, telework if possible, and self-monitor for symptoms. However, Employers should be careful not to disclose the identity of any employee who has tested positive.

Employers should also consult applicable state, county, and city orders regarding any additional measures for responding to employees who test positive to COVID-19 or exposed to COVID-19.

Wage and Hour Considerations

Changes in Compensation

Employers should provide employees with advance notice to any changes in compensation, preferably in writing. Advance notice should occur before the start of the period in which the change in compensation will take effect (e.g., for exempt employees before the beginning of the workweek in which the change will occur). Any changes in bonus programs, should also be communicated to employees before the start of the bonus period.

Employers cannot reduce employee compensation below federal and state minimum wage requirements and must still

pay non-exempt employees overtime pay as required by state and federal law. If employers offer employees additional compensation for working certain shifts (a.k.a. “hazard pay”), employers may need to include the additional compensation in the calculation for overtime owed to the employee. Employers should also review any applicable employment agreements or collective bargaining agreements before implementing changes in wages, bonus programs, and other compensation.

Exempt Employees

As businesses begin to reopen, employers should determine what changes, if any, are being made to exempt employees’ salary and job duties. As a reminder exempt employees must satisfy the salary basis test and perform certain job duties as set forth in federal and state law to qualify as exempt.

Employers must be mindful of any changes that may reduce an exempt employee’s salary below the salary threshold as set forth by federal and applicable state law (currently $684 per week based on federal law). If employers wish to reduce an exempt employee’s salary below federal and state thresholds, employers should consider re-classifying exempt employees as non-exempt. Reclassifying exempt employees poses some risks of liability for wage and hour violations, so employers should carefully review this option and consult with legal counsel before reclassifying exempt employees.

If the employer is requiring any changes to an exempt employee’s job duties, the employer should ensure that the employee satisfies the job duties for that particular classification. For instance, an employee who qualifies for the executive exemption, must continue to supervise at least two full-time employees, and primarily engage in managing the enterprise, department, or subdivision.

Not only should employers be mindful of any salary or job duty changes for exempt employees, they should also be mindful of implementing any reduced workweeks or similar types of programs. Generally exempt employees are entitled to receive their full salary for any week in which they perform any work, so implementing reduced workweeks or partial furloughs may not be feasible for that category of employees, unless the employer wants to pay the exempt employee their full salary for the week. Instead, employers may want to consider alternatives, such as alternating the weeks an exempt employee works.

Employers who operate in states, such as California, should also review any particular requirements for salaried employees in those states to ensure any changes in compensation, schedule, and job duties do not transform an exempt employee into a non-exempt employee.

Changes in Schedules

Generally, employers may change employees’ schedules to respond to business needs, which may include staggering shifts and increasing hours. The Fair Labor Standards Act (“FLSA”) requires employers to pay overtime for any hours worked in excess of 40 hours in a workweek. However, employers should check state and local laws for any additional overtime requirements. For instance, California imposes strict daily overtime requirements so employers wishing to increase work hours should ensure any overtime hours are compensated accordingly.

Similarly, some state and cities have enacted predictive scheduling laws (i.e., Chicago, Emeryville, New York, Oregon, Philadelphia, San Francisco, and Seattle), which require employers to provide advance notice of schedules, changes to employee’s schedule, and other criteria. As such, changing schedules to stagger shifts or increase work hours may need to be done in advance and in compliance with any applicable predictive scheduling laws.

Employers should also review any collective bargaining agreements and other employment agreements for any limitations on changing employees’ schedules before implementing such changes.

Compensating Employees For Time Worked

Employers need to continue to ensure that they are compensating employees for time worked. In these instances, when non-exempt employees are teleworking, employers need to ensure time-keeping policies are clear that employees should report all hours worked. Employers may also want to implement measures that ensure non-exempt employees are not checking e-mail or working after hours. If non-exempt employees are working beyond their scheduled times or working unauthorized overtime, employers should still pay employees for the hours worked but notify the employee of the policy violation and any remedial action (e.g., disciplinary warning, verbal counseling, etc.).

Employees returning to the physical workplace will need to spend more time handwashing, cleaning, and disinfecting their workspaces. Employers need to ensure employees are provided this additional time and are compensated accordingly. Employers who require symptom and temperature checks before the employee reports to work or require employees to wait in line for temperature checks should consider compensating employees for this time. Although it is uncertain whether symptom and temperature checks will be considered compensable under the FLSA, some states may require employers to compensate employees for this time.

Reimbursement of Business Expenses

In the event that the employer continues to have employees working from home, employers should review any reimbursement obligations. Generally, employers may not make deductions from employee wages for items considered primarily for the benefit or convenience of the employer if doing so reduces an employee's wages to below the required minimum wage.

Certain states, such as California and Illinois, require employers to reimburse employees for business expenses incurred in the performance of their job duties. As such employers in these states, should determine whether employees have used cellphones, landlines, Internet, printers, and other equipment for the employer's business and, if so, determine the amount of reimbursement that may be owed to these employees for such usage.

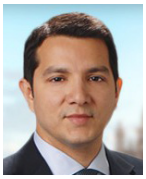
Paid Sick Leave

As many employers are well-aware, the federal government has extended paid sick leave protection to workers related to COVID-19. For detailed information about the FFCRA and extended paid FMLA, please visit our prior posts on this topic available here: https://www.dykema.com/resources-alerts-families_first_coronavirus_response_act_signed_into_law_imposing_paid_leave_requirements_on_small_and_medium_employers_beginning_april_2_2020.html and here: https://www.dykema.com/resources-alerts-In-the-Nick-of-Time-Department-of-Labor-Issues-Regulations-Interpreting-the-Families-First-Coronavirus-Response-Act.html. If an employer has not already done so, the employer should create a policy and plan to address any paid sick leave requests, track use of paid sick time, and ensure employees are properly paid for paid sick time.

Some states, counties, and cities have also enacted laws to provide additional and/or different types of paid sick leave related to COVID-19. As such, employers, should check local paid sick leave laws to determine whether these laws are applicable, whether these laws provide additional leave benefits not provided by the FFCRA and extended paid FMLA, notice requirements, and so forth.

Conclusion

The above guidance outlines policies, practices, and procedures employers should implement in developing a plan to return employees to the workplace. Each employer's return to work plan will vary depending on location, type of business, and category of employees. Employers should remain flexible in developing their plan as federal, state, and local guidance continues to develop.



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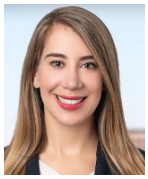

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