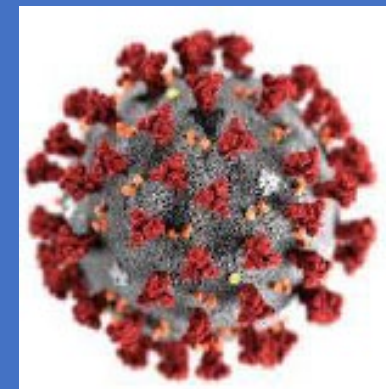


Issues for Returning to Work During COVID-19

An Overview for Employers



Presented by Manier & Herod

www.manierherod.com



Disclaimer:

This presentation is for educational purposes and not intended to be legal advice. In any general presentation on legal topics, the audience should seek separate legal advice on their specific cases and facts. In this unique environment dealing with the impacts of a worldwide pandemic, this advice is even more important. The legal analysis of your claim may be dependent on facts, contractual language, laws of your jurisdiction and other issues beyond the scope of this presentation. We hope you find this brief presentation beneficial.



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Employment Law Issues in the COVID-19 Era

COVID-19 has created an unprecedented health crisis that has turned into an economic crisis.

As the economy begins to re-open, businesses are faced with difficult decisions regarding how to return to a safe work environment while promoting efficient operations and productivity.

This presentation will focus on best practices for returning to work in a safe manner.

The focus for all employers should be the safety of all employees.

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Develop Protocols and Policies for Re-Opening Your Office

Employers should develop **return-to-work protocols** that address issues including at a minimum:

- i. when and how employees will return;
- ii. which employees will return to work, when, and why they are being asked to return at this time, and who is allowed to stay home;
- iii. social distancing measures (e.g. physical changes to workspaces or other rules regarding limitations concerning common areas);
- iv. use of supplies (e.g. personal protective equipment (PPE), thermometers, cleaning supplies, etc.);
- v. health information policies;
- vi. cleaning procedures; and
- vii. third-party and visitor limitations or rules.

Preparing to Return to Work

- Employers should establish a **COVID-19 task force** to lead the planning and execution of returning employees to work. This task force should include:
 - Human resources
 - Safety and risk managers
 - Facilities managers & security personnel
 - Production management
 - General counsel or outside counsel
 - IT
 - Public relations
- Appoint a member of your task force to document all the ideas discussed and adopted by the group, which will ultimately be drafted into a final return-to-work protocol.

Understand Things Are Changing Rapidly

- Keep in mind that your task force's job doesn't end once it has drafted a final protocol – when the plan is executed and employees return to work, the task force should continue monitoring and adjusting its protocol as needed.
- Additionally, because our communities may be subject to similar stay-at-home orders that impact the workforce in the future, your task force should meet to debrief after employees have returned to work – discuss what went well and what didn't, and how to implement improvements in the future.
- Keep monitoring local and state laws and the CDC for any changes in the law or best practices.

Understanding the Reasons to Open Office

- Keeping in mind that the CDC has advised companies that can do so to continue working from home for the time being, it is important to clearly delineate why you want to return your workforce now.
- If your reason concerns employee performance issues while working remotely, consider other remedies – such as PIPs and individual employee counseling – which do not require you to bring the entire workforce back.
- You should also carefully weigh the potential for public relations fallout that other businesses have faced when reopening too quickly, especially when they have done so in a way perceived by the public to be unsafe.

Understanding the Reasons to Open Office

- Once you determine returning your workforce is the right decision for your business, your task force should **conduct a risk assessment** and address mitigation opportunities. For example, you should address areas in your workplace that are high traffic or prone to crowding, such as cubicles and timeclock areas. And remember to be flexible as you develop your protocol – it should be a living breathing document that adapts as you execute your plan.

Best Practices for Re-Opening

- Consider returning only your business's **essential workers** to the workplace first.
- You might also consider allowing employees to **self-select** whether they want to return to work – doing so allows potentially high-risk employees the option to stay home longer.

Best Practices for Re-Opening

- As you recall your workforce, especially if you have laid-off or furloughed employees, you may experience communication issues.
- As a best practice, send letters to employees with firm return-to-work dates.
- It is crucial to not only send these letters but also to log that you did so and document any response you receive from your employees. Your documentation may be important for your state department as it make decisions around unemployment benefits eligibility, especially for employees who do not return to work in a timely manner.

Best Practices – Low Density and Social Distancing

- Be mindful of your physical workplace as you recall employees and consider ways to **reduce employee density** throughout your workplace.
- One way to achieve less density is through implementing **staggered shifts**. For example, you may split your workforce into a morning shift and afternoon/evening shift so that only half your workforce is on the premises at a given time. Staggering shifts may also provide some relief for employees who are experiencing childcare issues during their normal work hours.
- Another option to maintaining a less dense workforce involves **alternate workday schedules**. For example, half your workforce may work Monday-Wednesday-Friday while the other half works Tuesday-Thursday on a given week, and the groups switch days the following week.

Best Practices, Cont.

- One major challenge to alternate workday schedules involves items your employees must bring with them to work. If your workforce has taken their office hardware (e.g., computer monitors, keyboards, etc.) home while operating remotely, bringing that hardware back and forth to the office on an alternate workday schedule may be extremely cumbersome. A third option to lowering employee density is, of course, to continue allowing employees to telework.

Best Practices, Cont.

- Consider changes you can implement to **encourage social distancing** in the workplace. First, there may be physical changes you can make to your work areas. For example:
 - maintain at least six feet between workstations
 - place dividers between employees working production or other line work
 - use plexiglass or sneeze barriers between workers and the public
- Employers should also implement and communicate rules that encourage social distancing in common areas such as breakrooms and bathrooms.

Best Practices, Cont.

- Consider allowing one person at a time in the bathroom, space out breakroom tables and limit the number of people per table, limit elevator capacity, and stagger break and meal period times.
- You should also utilize conference calls and other virtual meeting platforms when possible to limit in-person group meetings. When in-person meetings are unavoidable, employers should think about limiting occupancy levels in conference rooms and other meeting spaces.
- Finally, make sure that you clearly communicate these rules throughout the workplace through signage (especially at your facility's bottleneck locations) and encourage managers to lead by example.

Best Practices, Cont.

- Don't forget about your **third-party vendors** and other visitors who may be present in your workplace. Your task force should consider strictly limiting all outside visitors to the workplace, including the public, vendors, consultants, and other third parties.
- Consider implementing new or updating protocols for receiving and handling deliveries – for example, keep delivery persons outside the facility, handle deliveries with gloves and other appropriate PPE, and disinfect packages where possible – and implement other safeguards for required third-party entry such as temperature screening and testing, requiring third-parties to wear masks and acknowledge for symptoms, exposure and other risks.

Best Practices, Cont.

- As you begin returning your employees to the workplace, employees may make **accommodation requests** pursuant to the ADA. Keep in mind that allowing a high-risk employee to remain off work or work remotely while infection risk remains high is considered a reasonable accommodation.
- But remember that an employer is not required to agree with a specific accommodation requested by an employee; the employer may come up with other more reasonable options – for example, temporarily changing an employee’s minor job duties that would otherwise put the employee in a high-risk situation or temporarily transferring a high-risk employee or modifying their shift assignment or schedule to allow them to interact fewer people.

Best Practice - Cleaning

- All employers should develop and implement **enhanced cleaning measures** as a part of their protocol to help maintain a sanitary workplace. If you use professional cleaning assistance, you should require certification or acknowledgement from your third-party cleaning professionals that their procedures and supplies meet the CDC guidelines.
- Implement procedures for disinfecting equipment, tools, etc., and keep accurate cleaning records that reflect the areas cleaned, the time at which they were cleaned and by whom. Consider posting your cleaning records in areas visible to your employees, which may provide them with peace-of-mind.
- In addition to your new cleaning procedures, encourage employees to regularly clean their workspaces and equipment, and provide hand sanitizer, hand wipes, or disposable hand towels as much as possible and in as many different areas as possible.

Best Practices, Cont.

- You may also need to provide new PPE, or personal protective equipment, for employees, keeping in mind the OSHA standards applicable to your industry for the use and fit of these PPEs. Remember that PPE is only effective to the extent that you **train your employees** on how to use it – focus your training around what kind of PPE is necessary, when it is necessary, how long can it be worn properly, and proper care, maintenance and disposal.
- Also keep in mind that your state or local guidance may recommend or require employers to provide other protective measures that are not considered PPE, such as face coverings and masks.

Best Practices - OSHA Recommendations

- OSHA also recommends certain **engineering controls** that may be implemented as part of your return-to-work protocol. These include:
 - Installing high-efficiency air filters
 - Increasing ventilation rates
 - Implementing physical barriers such as clear plastic sneeze guards
 - Installing drive-through windows for customer needs

Workplace Policies

- As businesses begin reopening, many state and local guidelines recommend employers perform **health screenings and temperature checks**. Depending on your state and local requirements, you may allow employees to self-certify that they are not experiencing COVID-19 symptoms, or you may be required to screen employees on-site.
- Note that the EEOC has clarified that temperature checks by employers are permissible, but it has not issued guidance on best practices for how to do so. Accordingly, if your return-to-work protocol includes health screenings and/or temperature checks, your task force should spend time deciding how you are going to implement these measures.
- One less obvious aspect to consider is where you're going to conduct your health screens – do you have room inside your facilities to safely screen employees without creating crowded bottlenecks, or do you have an outdoor space more suitable for maintaining social distancing?

Workplace Policies, Cont.

- If you perform temperature checks or other screens onsite and log that information, make sure you implement **confidentiality policies** for maintaining these records. Store these records separately from employees' personnel files and ensure that they are secure – if you maintain separate medical files for your employees, you may store this information in those medical files.

Workplace Policies, Cont.

- Employers should also develop procedures for **employees who experience fever or exhibit other symptoms** of COVID-19 at work or during an employer screening. First and foremost, employers should have protocols in place to isolate and separate that employee from others while at the workplace. Employers should send symptomatic employees home and instruct them to self-isolate and seek medical attention in accordance with CDC guidance. Employers should create a contact list and notify other employees of potential exposure, without identifying the symptomatic employee or disclosing his or her medical condition or symptoms.

Workplace Policies, Cont.

- Your business may also need to implement a **COVID-19 illness policy**. This part of your protocol may require employees to report symptoms, exposure, or certainly any COVID-19 diagnosis to the employer. As a part of your policy, you may include that violations may result in employee discipline. Importantly, once you create your policy, require your employees to review the policy and sign a form acknowledging they understand it.

Workplace Policies, Cont.

- You should also consider policies and procedures for **returning employees to work** who have been out with suspected or confirmed cases of COVID-19. Be aware of and follow CDC guidance on when to end self-isolation, which varies based on, for example, whether the individual has been diagnosed with COVID-19 or recently had close contact with a person with COVID-19. Also keep in mind that although EEOC guidance permits employers to require medical certification from employees to return to work, you should also consider the practical issues in requiring certification: for example, if medical professionals do not have the time to provide certifications, this may delay how quickly the employee can return to work.

Workplace Policies, Cont.

- You should review at your **vacation, PTO, and other leave and attendance policies** and consider ways to encourage employees to stay home if they are sick. Note that Congress has passed the Families First Coronavirus Response Act which expands FMLA leave and requires paid sick leave for certain employees affected by COVID-19 – our firm has a presentation dedicated to explaining employer obligations under this Act, which can be found [here](#).
- Keep in mind that an employee's fear of exposure is not a valid basis for obtaining paid leave under the Act.
- Your protocol should also consider employer **travel policies** that prohibit all non-essential travel and require employees to quarantine after personal travel.

Workplace Policies, Cont.

- If you don't already have a **telework policy**, now is the time to create one. Make sure that your policy identifies which position can telework and employees are aware of whether their positions are expected to telework as needed. Accurate **job descriptions** will be crucial to identifying positions capable of telework, so be sure to review your job descriptions at this time for accuracy and incorporate language that certain jobs must be performed in the office, as applicable.

Workplace Policies – ADA Policy

- Be sure to review your **ADA policy**. Remember that accommodation requests require the employer to engage in an interactive process to identify reasonable accommodations for qualified employees.
- Also keep in mind that the CDC is issuing guidance on groups that are considered high-risk, including those over 65 years old, who are pregnant, or who have compromised immunity systems, and you should address accommodation requests by high-risk employees on a case-by-case basis. But be careful not to treat high-risk employees differently based on their real or perceived disability, which may result in ADA violations. Note too that the Families First Coronavirus Response Act prohibits employers from treating employees differently for taking leave under the Act.
- As you recall your existing and new employer responsibilities, now is an excellent time to review your **discrimination, harassment, and retaliation policies** and remind employees that your workplace is an equal employment environment.

Additional Health Considerations

- In addition to updating your workplace policies and procedures, consider **employee resources** available to help safeguard their physical and mental wellbeing.
- **Telehealth** is an extremely valuable resource for employees interested in maintaining physical wellness while avoiding unnecessary person-to-person interaction. If not already part of your healthcare plans, ask your group health provider about the telehealth options available to your workforce. You may also want to research and consider public health resources and options.
- Your healthcare plans may also incorporate **Employee Assistance Programs (EAPs)** that can provide other emotional assistance to employees. The most important thing here is to make your employees aware that these resources are available to them if needed, without singling out individuals.

Employment Contracts and Hiring

- If you have **employment contracts**, consider renegotiating those to include a “force majeure” clause related to pandemics. Also consider any other necessary negotiations around start dates, remote work, etc.
- Similarly, you may need to revisit **job offers for at-will employees**. Note that you can screen applicants after making conditional job offers but remember to be consistent – if you’re going to screen applicants, you need to screen all of them and do so equally to avoid discrimination claims. Additionally, the EEOC has indicated you may take the temperature and delay the start date of an individual who has COVID-19 or associated symptoms. Keep in mind that the CDC has expanded its list of COVID-19 symptoms for your consideration. Finally, the EEOC has advised that you may withdraw a job offer in an individual is needed immediately but is unable to start his or her job because of a confirmed diagnosis of COVID-19 or associated symptoms.

Potential Legal Liability Sources

- The COVID-19 pandemic has already begun to impact **workers' compensation**, with employees claiming workplace injuries based on coronavirus diagnoses. Keep in mind that workers' compensation claims are subject to state-specific laws and should be examined on a case-by-case basis. Accordingly, I highly recommend you work with your legal counsel in dealing with these issues.
- Also be aware of the potential **employment discrimination** issues that may arise as you return employees from furlough or implement restrictions or changes in employment terms, and ensure your motivations are based on legitimate non-discriminatory reasons.

Potential Legal Liability Sources, Cont.

- As previously discussed, remember your obligations to engage in an interactive process to comply with the **ADA** when employees request accommodation.
- Be careful about **OSHA** retaliation complaints as you return your workforce. Employees may complain about returning to work, and to the extent their complaints target workplace safety concerns, employees may be protected under the Act.
- As discussed earlier, be aware of your obligations under the **Families First Coronavirus Relief Act** pertaining to leave and sick pay.
- Also, be mindful of relevant **wage and hour** laws as you alter employee schedules and hours. For example, note that improper salary reductions can harm employees' exempt status, and hazard pay can adversely affect hourly employees' overtime pay.

Mitigating Risks of Potential Liability

- LIABILITY AND RISK
 1. OSHA complaint or on-site inspection
 2. Workers Compensation
 3. Local health or government citations/penalties
 4. Shutdown due to positive test results
 5. Massive outbreak
 6. Union activity
 7. EEOC Charges
 8. Lawsuits – safety or employment related

Theories of Liability for COVID-19 Injuries

- Failure to properly screen employees for COVID-19
- Failure to protect employees from other employees (who may be ill even if asymptomatic)
- Failure to cleanse and sanitize the workplace
- Failure to provide personal protective equipment
- Failure to implement social distancing policies
- Failure to implement a telework or work-from-home policy
- Failure to implement or follow government guidelines or policies

Communication Plan

- Remember that we are all operating in uncharted territory here, which can lead to fear and anxiety. The best way to combat this in your workplace is to **communicate** effectively and to do it often.
- Inform your employees that you take their safety and health seriously and are instituting measures to mitigate potential workplace exposure to COVID-19. Notify your employees of their expected return-to-work dates and any required pre-return certifications or surveys, any notable policy changes or new policies, procedures, and other action being taken to protect your workforce (e.g., screening, social distancing, testing, PPE, and other requirements).
- Set a regular schedule for communicating updates to your employees and decide the medium through which you're going to do it. If done well and done often, communicating your return-to-work protocol to your employees will help ensure that your employees are safe and effective as you resume your business operations.
- Maintain an **Open Door Policy** (with safe Social Distancing!).