

# Returning to Work After COVID-19:

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Legal Considerations and Best  
Practices for Concerned Employers

June 2020



# Today's Agenda

- Establishing a “return to work” plan
- Managing employee re-entry to the workplace
- Addressing employee concerns
- Revisiting workplace policies and training
- Employer testing and monitoring
- Implementing new workplace practices and rules

# Developing a “Return to Work” Action Plan

# Who's in Charge

- Designate a point person or create a task force for clear accountability
  - Include key business stakeholders, HR, legal, risk management and safety
- Task force or individual oversees all phases of reopening
  - Daily or weekly check-ins
- Establish formal communication

# Developing a Re-Entry Plan

- Conduct a risk assessment
  - Rely on OSHA and CDC guidelines
- Legal requirements vary by industry, workforce and location
- Be ready for more change

# Phased Return to Work

- Consider needs and restrictions
  - Location, number of employees, social distancing guidelines and protective measures
- How will you implement your phased return to work plan?
  - Pre-return survey to determine who has obstacles to returning
  - Partial remote work to accommodate staff and reduce onsite head count

# Managing Workplace Employee Re-Entry

# Returning Employees to the Workplace — HR Considerations

- Consider returning employees in stages
  - Assess how many workers are needed for essential operations, and whether anyone can continue to work remotely
  - Have a neutral, nondiscriminatory justification for which employees return
  - Consider making return to the workplace voluntary, initially
- Plan for requests to continue remote work



# Returning Employees to the Workplace — HR Considerations (cont.)

- Prepare a “return to work” notification that covers:
  - Appreciation for employees during this time
  - Desired return to work date
  - New policies/procedures regarding temperature testing, social distancing, PPE requirements
  - Where to direct questions regarding return-to-work/COVID-19 issues

# Returning Employees to the Workplace — HR Considerations (cont.)

- Have a process for determining which employees can safely return
  - Questionnaires, self-certifications, temperature checks or other screenings
- What will the job look like when employees return?
  - Reduced wages, exempt, nonexempt, full-time or part-time, changes in duties

# Returning Employees to the Workplace — HR Considerations (cont.)

- Communicate, communicate, communicate
  - ‘Stay home if sick’ and physical distancing policies to protect employees
  - New postings on workplace safety and disinfection protocols
  - Have exposure-response communication ready to go to any affected employee

# Returning Employees to the Workplace — HR Considerations (cont.)

- COVID-19 resurgence contingency planning
  - Increased worker absences
  - Government orders changing
  - Capture what you have learned
  - Evaluate what worked and what didn't
  - Be prepared to handle it again

# Returning Employees to the Workplace — Legal Considerations

- Reasonable accommodation for employees with disabilities under the Americans with Disabilities Act
  - Qualified person with a disability
  - Essential functions
  - Undue hardship
- EEOC guidance: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

# Returning Employees to the Workplace —Legal Considerations (cont.)

- “Vulnerable individuals” under the “Opening Up America Again” guidelines
  - Elderly individuals with serious underlying health conditions
    - High blood pressure
    - Chronic lung disease
    - Diabetes
    - Obesity
    - Asthma
    - Cancer

# Returning Employees to the Workplace —Legal Considerations (cont.)

- Special cases
  - Pregnant employees
  - Older employees
  - Other potentially at-risk individuals
- Avoid disparate discrimination issues

# Addressing Employee Concerns



# Handling Employee Refusals to Return to the Workplace

- Prepare to respond to employees who refuse to return to work
- Response depends on the reason the employee refused to return

# Handling Employee Refusals to Return to the Workplace (cont.)

**“I don’t want to return because I’m making more money on unemployment than I’d make working”**

- Avoid making assumptions or threatening an employee
- Emphasize that you must report truthful information to DES about the employee’s unemployment claim
- Tell employees their unemployment benefits may be impacted; may have to return payments received after the offer of employment
- Encourage employees to review the DOL FAQs before deciding
  - <https://www.dol.gov/coronavirus/unemployment-insurance#faqs>

# Handling Employee Refusals to Return to the Workplace (cont.)

**“I’m not comfortable returning. I don’t want to get COVID-19”**

- Reassure the employee by communicating everything you’re doing to make the workplace safe
- Ask the employee if there are specific things that would make them feel safer
- Try to address any specific concerns
- Otherwise, it’s generalized fear and not a sufficient reason to refuse to work
- Follow the same guidance as previous scenario

# Handling Employee Refusals to Return to the Workplace (cont.)

**“I can’t return because I’m in a high-risk category for getting COVID-19”**

- Consider a statement like this to open the door for discussion when offering return to work to employees:
  - “Please remember that if you have a high-risk factor or any other concerns that you would like to discuss with us before returning, we are happy to engage in those conversations in a confidential manner. Our goal is to make all our employees as safe as possible while returning to normal operations and that will require good communication and mutual efforts.”

# Handling Employee Refusals to Return to the Workplace (cont.)

**“I can’t return because I’m in a high-risk category for getting COVID-19”  
(due to an underlying health condition)**

- Refusal to work for medical reasons may be a request for an ADA accommodation

# Handling Employee Refusals to Return to the Workplace (cont.)

“I can’t return because I’m in a high-risk category for getting COVID-19”  
(due to an underlying health condition)

- If no reasonable accommodation exists enabling the employee to work:
  - Employee may be entitled to paid leave for up to two weeks under new federal leave laws
  - After two weeks, continued unpaid leave may be a reasonable accommodation
  - Consider extended paid/unpaid leave available under company policy and applicable federal, state and local laws

# Handling Employee Refusals to Return to the Workplace (cont.)

**“I can’t return because I’m in a high-risk category for getting COVID-19”  
(due to an underlying health condition)**

- If no reasonable accommodation can return the employee, leave is exhausted, AND the employer/employee relationship has been severed
  - Employee will likely be able to continue receiving unemployment benefits because they are unable to return to work due to COVID-19

# Handling Employee Refusals to Return to the Workplace (cont.)

“I can’t return because I’m in a high-risk category for getting COVID-19”  
(due to age)

- While Age Discrimination in Employment Act (ADEA) does not include an obligation to reasonably accommodate, the EEOC logic still applies
- Approach as a reasonable accommodation, and follow the same guidance as an underlying health condition



# Revisiting Workplace Policies and Training

# Review and Update Employment Policies

- Review policies and consider modifications
  - Remote work
  - Sick leave
  - Attendance
  - Vacation

# Review and Update Employment Policies (cont.)

- Ensure Families First Coronavirus Response Act (FFCRA) compliance
- Track FFCRA leave usage for compliance
- Maintain documentation for tax credits

# Review and Update Employment Policies (cont.)

- Consider other policies that may help minimize transmission
  - Employee travel
  - Social distancing
  - Employees coming and going from the facility during the day (such as lunches and breaks)
  - Employees receiving personal mail and packages at work
  - Temperature testing
- Create a COVID-19 policy resource

# Training Should Be Top Priority

- Training for all employees prior to returning to work, if possible
  - Entry procedures
  - Precautionary measures
  - Social distancing guidelines
  - Health screenings
  - Any other new safety policies
- Plan to deliver separate training to supervisors and managers
  - How to handle employee requests for leave
  - What to do if an employee exhibits symptoms while on site
  - How to address and enforce any new policies

# Employer Testing and Monitoring

# Establish Health Screening Policies and Procedures

- Considerations when developing a policy
  - Will you request medical clearances for all employees?
  - Will temperature checks be conducted onsite?
  - How will you test, how often will you do it, and what if someone has a fever?
- Compliance with applicable privacy and anti-discrimination laws
  - Americans with Disabilities Act
  - State-specific privacy laws

# Establish Health Screening Policies and Procedures (cont.)

- Other considerations
  - Wage and hour issues
  - Establish and uphold clear and uniform standards
  - Self-reporting procedures
  - Responses to employees who refuse to be tested
- Follow developments in COVID-19 related guidance



# Establish Health Screening Policies and Procedures (cont.)

- Develop an exposure plan
- Set procedures for employees who:
  - Fail a health screening
  - Exhibit COVID-19 symptoms
  - Test positive for COVID-19
- Be aware of OSHA requirements for certain industries
- Keep information confidential

# Preparing Physical Workspaces and Implementing Pandemic-Specific Work Rules

# Physical Changes to Offices and Worksites

- Manage workplace entry points
- Establish a health screening area
- Use directional signage
- Control the flow of people
  - Limit visitors
  - Consider establishing traffic rules
  - Promote one-way traffic
  - Restrictions with elevators

# Physical Changes to Offices and Worksites (cont.)

- Modify workstations
  - Desks and cubicles
  - Put up temporary dividers or partitions
  - Shared workspaces and equipment
- Limit access to common areas
  - Limit and/or space chairs accordingly in common areas
  - Stagger lunchtimes and breaks

# Physical Changes to Offices and Worksites (cont.)

- Address restroom overcrowding
- Ensure that ventilation systems operate properly
- Increase circulation of outdoor air

# Personal Protective Equipment (PPE)

- Determine use of face coverings and other PPE
- Follow all federal/state/local guidelines and OSHA risk classification
- Train on proper use, removal and disposal of PPE

# Cleaning and Disinfecting Procedures

- Hand sanitizer and disinfecting sprays/wipes available to employees and visitors
- Frequent cleaning and disinfecting of all work areas
- Special attention to restrooms, light switches, door handles, elevator buttons and other high-touch areas
- Training on availability and use of cleaning supplies
- Preparations to decontaminate the workplace thoroughly in case of COVID-19 diagnosis

# Social Distancing in the Workplace

- Remind workers and visitors to maintain a safe distance
- Limit in-person interactions and physical contact
- Coordinate optimum employee scheduling
  - Continued remote work
  - Staggered return to work date
  - Adjust schedules



# Promote Personal Hygiene

- Post signs reminding employees and visitors to:
  - Wash their hands frequently
  - Cover coughs and sneezes
  - Wear masks or face coverings
- Some state and local orders also require certain businesses to display postings notifying employees and visitors of certain cleaning, hygiene and PPE practices

# Solutions to Protect Your Business

- Return-to-Work Safety Essentials Kit
- COVID-19 safety notices, posters and window clings

Learn more at: [HRdirect.com/COVID-19](https://hrdirect.com/COVID-19)