

Working from Work – How to Develop a Plan for Bringing Employees Back

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Government Directives

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Complying with Government Directives

- Where to Find and How to Interpret Re-Opening “Plans” and Executive Orders
 - State-by-State
 - Phased Approach
 - Where to Find Orders and Roadmaps
 - Be wary of press releases and other summaries
 - Plan Examples: Restore Illinois Plan and Responsible Restart Ohio Plan
 - County-Level Restrictions - “Nothing in this Executive Order shall, in any way, alter or modify any existing legal authority allowing a county or local government body to enact provisions that are stricter than those in this Executive Order.”

Complying with Government Directives

- Coalitions of States – Neighboring states have developed “coalitions” and are discussing re-opening plans, but this does not mean that these plans will be the same
- Penalties
 - Example: “Pursuant to Minnesota Statutes 2019, section 12.45, a worker who willfully violates this Executive Order is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed \$1,000 or by imprisonment for not more than 90 days. Any business owner, manager, or supervisor who requires or encourages any of their employees to violate this Executive Order is guilty of a gross misdemeanor and upon conviction must be punished by a fine not to exceed \$3,000 or by imprisonment for not more than a year. In addition to those criminal penalties, the Attorney General, as well as city and county attorneys, may seek any civil relief available pursuant to Minnesota Statutes 2019, section 8.31, for violations of this Executive Order, including civil penalties up to \$25,000 per occurrence from businesses and injunctive relief. Nothing in this Executive Order is intended to encourage or allow law enforcement to transgress individual constitutional rights.”

Complying with Government Directives

- Watch-Outs
 - Some states require that plans to ensure a safe environment for employees, customers, clients and members are provided to each employee or staff and posted publicly
- Seek Counsel or Other Resources for Interpretation
 - Indiana - Critical Industries Hotline, for business and industry questions only: 877-820-0890 or covidresponse@iedc.in.gov
 - Ohio - The ODH coronavirus disease 2019 call center can be reached at 1-833-4-ASK-ODH (1-833-427-5634). ODH staffers operate the center seven days a week from 9 a.m. to 8 p.m. daily, including weekends

Safe & Healthy Work Environment

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Physical Workspace Considerations

- Analyze workplace modifications required to maintain social distancing
- Consider new seating or working time arrangements
- Evaluate physical workspace layout
- Consider moving copiers and other shared equipment
- Consider assigning work groups to different areas

Special Cleaning Supplies & Masks

- Special cleaning supplies may be needed
- Hand sanitizing stations in common areas
- Other protective materials or supplies (gowns, gloves, masks)

Additional Health Protocols

- Deep cleaning the workplace in the event of exposure
- Offices or individual workspaces should be prepared with necessary supplies
- Consider signs and instructions for employees and visitors

Response Team

- The Company should designate a person or small group to communicate with the public and employees

Protocol & Procedures

- Employers should implement and enforce infection control practices and procedures
- Employers should inform employees of the safety or prevention measures they have taken
- Employers should provide employees with the protocols that employees are expected to follow
- Employers should provide employees RTW training

Taking Temperatures

- Employers can measure employees' body temperature
- Temperature check options
- Notify employees of temperature screening in advance
- Non-exempt employees will be compensated
- If testing is done onsite, how to maintain social distancing for employees waiting to be tested
- What to do if an employee has an elevated temperature

Health Screening & COVID Testing

- Employers may test employees before they enter the workplace to determine if they are infected with the virus
- Employers must ensure that tests are accurate and reliable
- Request that employees entering the workplace self-monitor and report any COVID-19 symptoms
- Employees to notify supervisor and go home
- Keep employee medical records in a separate file
- No requirement for employers to provide COVID-19 tests

Local Health Department

- Reporting exposures to local health department

Masks/Face Covering

- What if employee declines to wear a face covering?
- Employer or employee provided face masks or coverings
- When special accommodations are required

Reopening the Workplace - Personnel Issues

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Consider Actual Company Needs

- ***Don't Move Too Fast*** - Just because you can reopen, that does not mean that everyone should return to the workplace
- ***Productivity*** - Some employees may be just as productive while working remotely
- ***Essential Sectors First*** - Essential job functions that cannot be conducted remotely should be first priority for returning to the workplace

Embrace the Shift to Remote Working

- ***Changed Perspectives*** – COVID-19 will change long-term how companies and employees view physical presence in the workplace. ***Be mindful of whether physical presence is always necessary to do the job.***
- ***Embrace Progress*** - Embrace the more successful aspects of the business that have been shifted to virtual, and do not undo technological progress merely because the office has reopened.

Consider a Phased Approach

- Different types of phased approaches for returning to work:
 - Prioritize essential sectors first
 - Allow employees to return on a voluntary basis
 - Alternate schedules or stagger shifts
 - Have specific employees serve as a “skeleton staff”

Of paramount importance is good communication. The safer the employee feels about being in the workplace, the more likely he or she will embrace returning to the workplace.

Specific Types of Employees

- Employees impacted by school and child care closures
- Employees who depend on public transportation (high risk COVID areas)
 - Offer incentives such as parking reimbursement or single occupancy ride shares
 - Allow employees to shift their hours to commute during less busy times
- Employees who are at ***higher risk for severe illness***

Employees at Higher Risk for Severe Illness

- Recent CDC Guidelines
 - COVID-19 creates higher risk for severe illness for older adults (over 65) and people with “serious underlying medical conditions”
 - Chronic lung disease, severe asthma, serious heart conditions, immunocompromised systems, severe obesity (BMI 40 or higher), chronic kidney disease (dialysis), liver disease
 - CDC encourages employers to “support and encourage options to telework if available” and offer such workers duties that “minimize their contact with customers and other employees”

Employees at Higher Risk for Severe Illness

- Recent EEOC Guidelines (which are updated constantly)
 - **ADA Considerations** – generally employers cannot make disability-related inquiries except under limited circumstances, such as where there is a “direct threat” – a significant risk of substantial harm to self or others even with a reasonable accommodation
 - **COVID-19 Pandemic Standards (which have been triggered for now)**
 - Relaxes certain ADA standards during a pandemic and allows employers to make certain inquiries to maintain a safe workplace.
 - ***What to do with this information?*** Depending on circumstances (which differs for each person), may need to engage in interactive process and provide a reasonable accommodation of telework where available
 - ***Be careful with forced teleworking***

Recalling Temporarily Laid Off Employees

- **Business Needs** - Consider the business necessity and the Company's finances
- **Documented Criteria** - Use objective criteria and avoid discrimination issues – make recall decisions based upon job functions, business needs and documented criteria.
- **Reprocessing** - Reprocess employees correctly

Change the Way You Do Business

Four Important *Safety* Changes

- Eliminate Unnecessary In-Person Meetings
- Restrict Third Party Visits
- Restrict Unnecessary Travel
- Enforce Social Distancing Policies

Change the Way You Do Business

Four Important *Business* Changes

- Coordinate Physical Office with Remote Workforce
- Communicate Changed Expectations
- Revisit Job Duties and Evaluation Criteria
- Track Company Devices and Safeguard Confidential Information

Handle Exempt Employees Correctly

- Three biggest COVID pitfalls:
 - ***Failing to pay on a salary basis*** – Generally, employee must be paid on a predetermined amount for each workweek, even if employee only works part of the week
 - ***Improper deductions*** – deducting pay when an employee takes a personal day or other time off could undermine salary basis under federal or state law
 - ***Changed job duties*** – Exemption can be lost if duties change in a way that fails the “duties test” for claiming exemption

Off the Clock Compensation Issues

- EEOC guidance now allows for employers to take COVID temperature screens and administer required COVID tests. Is this time compensable? What about waiting times?
- Federal standards / state standards
- Case by case basis
- Employee morale – Just because certain compensation may not be legally required does not mean that an employer shouldn't consider paying for it – workforce culture and reputation issues

Track Benefits Correctly

- FFCRA Benefits (E-Paid Sick Leave and E-Family Medical Leave)
 - Benefits may be triggered depending upon changes to workforce or the circumstances of a particular employee
- Unpaid FMLA (serious health condition)
- State law considerations
- Company Additional Leave Policies and Accrued Benefits
- No retaliation for leave requests and use!

Protective Measures for Safety & OSHA Precautions and Guidelines

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OSHA Enforcement

- OSHA does not have a specific standard for infectious disease or pandemic preparedness/response.
- Other standards may apply:
 - Personal Protective Equipment (PPE) requirements, such as eye/face, respiratory, and hand protection (29 CFR 1910.132-134, 138)
 - Sanitation/housekeeping requirements (29 CFR 1910.141)
 - Access to employee medical and exposure records (29 CFR 1910.1020)
 - Bloodborne pathogens (29 CFR 1910.1030)
 - Hazard communication (29 CFR 1910.1200)
 - Injury and illness recordkeeping and reporting (29 CFR Part 1904)

OSHA's Interim Enforcement Response Plan for COVID-19

- Inspections of COVID-19-related complaints of workplace hazards limited to high and very high risk jobs/workplaces
 - E.g., hospitals treating COVID-19 cases, first responders, biomedical laboratories, etc.
- Otherwise area offices are to use rapid response investigations (RRI)
- On-site inspections are to be done virtually to the extent possible, limited in-person enforcement activity

Return to Work Considerations

- Communication with employees is critical
 - Educate employees on workplace reentry, operating, and health and safety protocols
 - Encourage open line of communication with response team or point person(s)
 - Provide training on relevant safety issues, and frequent reminders on safety and health protocols
- Be cognizant of potential for retaliation claims when making personnel decisions

Return to Work Considerations

- Conduct hazard assessment of the workplace and job tasks to determine risk levels and necessary precautions
- PPE selection and provision
 - What PPE must employers pay for?
 - What type of masks to use?
 - Voluntary versus mandatory?
 - Determine whether a written respiratory protection plan is necessary
 - PPE cleaning protocols
 - Employee training
 - What to do if you encounter supply issues
 - Enforcement of PPE requirements is critical

Return to Work Considerations

- Consider other administrative or engineering controls that may be necessary to protect workers and enforce social distancing
 - Physical barriers
 - HVAC/ventilation adjustments, maintenance schedules, etc.
 - Adjustments to traffic patterns in tight office spaces
 - Move workspaces

Return to Work Considerations

- If an employee becomes infected:
 - Remove from the workplace
 - Disinfect pertinent areas
 - Trace pre-diagnosis contacts with coworkers, provide notice, implement quarantines
 - Determine whether any OSHA recordkeeping obligations exist
 - OSHA has relaxed recordkeeping obligations for COVID-19 cases due to the reality of community spread and difficulty of determining whether an infection is work-related

Thank You!

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