



## **Back to Work?** **Considerations for** **Re-Opening the Workplace**

*The laws are changing rapidly in the current pandemic/crisis. Therefore, the legal issues discussed here are subject to constant change. It is best to consult with your counsel concerning any specific legal advice you may need.*

Governments are making plans to re-start the economy and, in some parts of the country, moving forward. Although in most states, shelter-in-place orders are still in effect and most non-essential businesses remain closed, companies are also starting to plan for restarting operations and re-hiring downsized workforces. When business resumes, things will move quickly and companies will need to consider safety issues, legal compliance, staffing concerns, and many other logistical and economic factors.

We've compiled the below summary of some legal issues that employers will want to keep in mind as they start to resume on-site operations:

### ***Safety Protocols and New Policies***

As employees may return to on-site work locations (or continue to work on-site at essential businesses), companies should implement safety rules, protocols, and policies to make best efforts to keep employees safe from exposure to the COVID-19 virus. Unfortunately, there have already been lawsuits filed against companies for allegedly failing to take appropriate safety measures, which is even more reason to ensure workplaces are as safe as possible. Government agencies such as the CDC, OSHA, and EEOC have all issued guidance for employers to take certain steps and precautions before and upon reopening ([see our prior alert](#)). Employers should consider implementing practices and new policies on issues such as:

- Social distancing;
- Staggering of clock-in times, mealtimes, or other high traffic events and spaces;

- Use and issuance of personal protective equipment, or PPE;
- Temperature checks and virus testing;
- Monitoring employees' symptoms and employees' self-reporting of symptoms;
- Cleaning and disinfecting workspaces;
- Hand washing and other personal hygiene policies.

These are just some measures that companies will want to consider. Implementing each of these new practices comes with some legal risks. Government agencies are updating and changing guidance on a near-daily basis, so it is advisable to discuss these new practices with employment counsel before implementing them.

### ***Re-Hire Documentation***

Depending on what information was communicated to employees and how it was communicated (temporary layoff, furlough, leave of absence, permanent layoff, etc.), companies may have varying obligations to provide certain re-hire paperwork and documentation to their employees when the worksite re-opens. For example, even if employees are still considered employed during a furlough, if the company changes employees' pay rates when business resumes, it is advisable (and potentially required in certain states) to inform employees of their new pay rates in writing, such as with New York's Rate of Pay form. Companies should also tread carefully when it comes to employees' paid time off (PTO), vacation, and sick time banks, as company policies, state and local laws, and company communications (not to mention union agreements, if applicable) may all affect whether employees start off again with their prior time-off balances or whether they start from scratch.

Other considerations include determining whether the company needs to fill out new I-9 immigration forms, provide new offer letters and benefits election documents, or provide state-required notices and documents (such as anti-harassment flyers and policies). Employers should also carefully consider the scope and language of pre-existing agreements with employees, such as employment contracts, confidentiality, arbitration, and non-compete agreements, to determine whether such agreements stay in effect and whether they should or should not be re-executed or revised. We recognize that re-onboarding large groups of employees may be extremely burdensome and logistically difficult, especially if the employees are treated like new hires, but failing to provide the required forms and notices could come with significant risk.

### ***Paid and Unpaid Leave***

As previously discussed in prior alerts, both the federal government (through the Families First Coronavirus Response Act or "FFCRA") and the state and local

governments have passed numerous laws related to employee leaves of absence and paid time off for COVID-19 related reasons. In particular, the FFCRA remains in effect until at least December 31, 2020, and therefore, upon return to work, covered employers will still need to comply with, and administer, the FFCRA and its paid leave provisions. Employees may also be eligible to use sick days or paid time off, or be entitled to other paid and unpaid leave (such as family leave in some states) when work resumes, so businesses should ensure they are familiar with these laws and how these leaves need to be administered. Employers should also plan for coverage and attendance issues, considering that there still may be large numbers of employees out sick, showing symptoms and needing to remain out of the workplace, or on protected leaves.

### ***Disability Accommodation and Other Discrimination Issues***

Finally, the COVID-19 era has also brought companies many new risks when it comes to disability (or perceived disability) discrimination, accommodation issues, and the usual discrimination risks surrounding group layoffs and rehires.

With respect to rehires, companies should carefully consider implementing objective criteria when making employment decisions regarding which employees will be rehired or brought back to work. Without proper documentation and the use of objective non-discriminatory factors (such as performance ranking and/or seniority), companies could be exposed to discrimination claims by protected classes of employees who could claim they were not rehired because of such a protected class (such as race, religion, national origin, disability, etc).

Companies will also likely have to handle unique accommodation requests from employees who contract the virus, exhibit symptoms, fear they have or will contract the virus, or are otherwise at greater risk to contract the virus (i.e. people with pre-existing conditions or employees of a certain age). Employers should be cautious not to discriminate against employees on the basis of disabilities or *perceived* disabilities under federal, state and local laws, and ensure that they appropriately handle any requests for accommodations under applicable laws. Due to the pandemic, employers will also likely have more access to employee health information than in normal times, and therefore need to ensure that they have appropriate policies and privacy practices in place, so as to prevent any inadvertent actions that could result in a discrimination or failure to accommodate claim.

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As we optimistically look forward to a time when employees can safely return to work, employers should tread cautiously, prepare and plan in advance, and consider safety and legal compliance as a priority when bringing back the workforce.

For additional articles on related topics please go to

[COVID-19 Employment Law Resource Center.](#)

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