

April 27, 2020

*COVID-19 Daily Briefing Recap*

## Returning Employees to Work

Please note that the following is a recap of our COVID-19 Daily Briefing from April 27, 2020. Due to the rapidly evolving nature of the pandemic, we recommend that you consult the most up to date materials possible. Visit Jackson Lewis P.C.'s [COVID-19 resource page](#) for updates on workplace impacts and [sign up here](#) to receive invitations to future daily COVID-19 webinar briefings and email updates on ongoing legal and workplace health challenges.

### Returning Employees to Work

Ongoing concerns about a resurgence of COVID-19, continuing childcare needs, and relaxed teleworking conditions will all have an impact on employees returning to the workplace. In addition, the number of new state and federal regulations enacted in response to the pandemic has led to a significant lack of clarity in the law. Therefore, while we understand that everyone is eager to reopen quickly, we encourage employers to take time to think through potential pitfalls and opportunities.

As you return laid-off, furloughed, or teleworking employees to your workplace, you should consider the following:

- Determine which state and local mandates will impact your reopening.
- If you are returning employees gradually:
  - Use neutral selection criteria like seniority, performance, or job classification to determine when employees are returned.
  - Consider performing a disparate impact analysis.
- Consider which employees can continue to work remotely:
  - Do not assume an employee should not return based on childcare needs, caregiving responsibility, or inclusion in a government-defined vulnerable population.

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- Vulnerable populations are generally defined by age, disability, or pregnancy, meaning decisions based on these attributes can lead to discrimination claims.
- Be aware of employment law considerations related to telework, some of which may have been overlooked in the initial rush to move employees out of the workplace.
- If you have a union, consider obligations under collective bargaining agreements and negotiate with the union as appropriate.
  - You may have an opportunity to renegotiate some terms.
  - This may also be an ideal time for non-unionized employers to implement arbitration or non-compete agreements.
- Notify employees regarding their return to work:
  - Return to work letters will typically provide information on return date, schedule, and changes to pay or benefits.
  - Changes to pay or hours may be subject to advance notice requirements under state law.
- If you want to bring back employees who were terminated, you will need to rehire them:
  - Drug tests and background checks may take longer due to court and college closures.
  - Make sure you obtain all of the on-boarding paperwork typically needed for new hires.
- Decide whether or not to screen employees and/or visitors:
  - Ensure the screening programs you select are permissible in your jurisdictions.
  - Any medical tests required for employees must be job-related and consistent with business necessity; if COVID-19 tests are required, employers must make sure they are accurate and reliable.
- Ensure employees who are returning to work are properly classified as exempt or non-exempt, especially when redefining job descriptions and duties.
- If you have fewer than 500 U.S. employees or are a public employer, expect some employees to request FFCRA leave.
- Be prepared for employees who refuse to return to work or request to continue telework due to health and safety concerns:
  - Consider whether leave or accommodation are required under ADA, FMLA, FFCRA, or state and local law.
- Encourage employees not to report to work when sick.
- Given that many employees will have become accustomed to more casual environments, consider refresher trainings on workplace expectations.
- Evaluate implications for your employee benefit plans:
  - Are waiting periods required or can they be waived?
  - Do employees have to be automatically reinstated to benefits?
  - What impact does layoff or furlough have on counting service credits under retirement or 401k plans?

## Workplace Modifications

- Consider changes to reduce risk of exposure to COVID-19, including social distancing protocols.
- Implement cleaning and disinfection protocols consistent with CDC and OSHA guidance.

- Consider staggered scheduling and group scheduling to minimize the impact of a COVID-19 exposure on your workforce.
- Evaluate mandatory or voluntary use of PPE, obtain necessary equipment, and consider related training.
- Determine protocols for interaction with customers or the public, including:
  - Eliminating handshakes.
  - Posting customer-facing signage.
  - Installing plexiglass barriers.
- Post notices with respect to FFCRA, hygiene and social distancing requirements, and any local or state requirements.
- Consider industry-specific guidance from OSHA and the CDC.

## **Update Workplace Rules**

- Update sick leave and other leave policies.
- Consider a temporary policy for FFCRA leave, including preparing a request form to obtain the documentation required to obtain the tax credit.
- Develop policy and protocols for employees with reported COVID-19 symptoms or diagnosis and follow CDC, state and local guidance for returning those employees to work.
- Impose appropriate limits on business travel.
- Where permitted, consider restrictions on off-duty activities.
- Impose appropriate limits on the size of in-person meetings and proximity of seating.
- Consider closing or limiting access to common areas and break rooms.
- Train employees on new policies, protocols, and rules.
- Update job descriptions to account for any changes in job duties.

## **Prepare for Potential Second Wave**

- Develop “lessons learned” from first COVID-19 shut down.
- Review technology to enhance and improve remote work capabilities, including privacy and security capabilities.
- Cross-train employees.
- Expand or leverage geographically diverse work populations and suppliers.
- Expand products or service offerings that do not require customer on-site presence.
- Procure appropriate sources of PPE.
- Explore additional or different insurance to support business interruption.
- Consider strategies for potential furloughs, closings, or reductions in force.
- Revisit wellness and health offerings to respond to employee physical, mental and emotional health needs.

## What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with [Jackson Lewis' latest available information and resources](#).

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.