



# Return to Business and Post-Pandemic Planning Checklist

Developing a Return to Business Action Plan





# Planning and Executing a Strategic and Successful Return to Business

As shelter-in-place orders are lifted, your business will enter uncharted territory. COVID-19 will permanently alter supply chains, workforce planning, service models, and growth strategies. How will you respond?

Seyfarth is pleased to offer our expertise to clients through our cross-disciplinary Recovery and Renewal team who can advise you on the current business impacts arising from COVID-19, and what the future holds, as business begins to reopen and resume operations in a “new normal.” Our designated team of 100+ lawyers that make up our COVID-19 Task Force is already deeply credentialed, having advised thousands of clients on the developments and effects of the rapidly changing pandemic across the globe. We have a deep understanding of how the pandemic is affecting businesses and industries deemed essential and non-essential, and we know how to work through the related and specific legal, business, and workforce issues created. Likewise, we are already helping clients build phased return-to-work plans by modeling various scenarios for how business might resume—from continued social distancing to a full engagement of their workforces in full operations.

## Getting Started

The foundation of a successful plan contemplates the people involved, the place of work, and elements of business. We have created our complimentary “Return to Business and Post-Pandemic Planning Checklist” to help you get started.

### This planning checklist covers the following topics:

- Selecting Employees to Return to Work
- Finding Your Workplace’s New Normal
- What Logistical Concerns Must Be Addressed Before Bringing Your People Back?
- When an Employee says “No”: Refusals to Return to Work and Requests to Continue Telework
- Benefits and Executive Compensation
- Customers, Vendors, and Visitors
- Planning for Future Outbreaks
- Physical Space Coordination
- Social Distancing At Work
- Business Travel
- Keeping Clean and Safe: OSHA and Beyond
- Covering Up: PPE
- What to Do When OSHA, the Police, or a Public Health Official Pays a Visit
- Economic Stimulus Loan and Forgiveness Programs
- Taxes, Including Credits and Deferrals
- Insurance Policies and Claims
- Contracts, Including Supply Chain and Vendor Commitments
- Credit and Liquidity
- Corporate Governance
- Workouts and Distressed Situations

## Next Steps: Beyond the Checklist

**Members of our COVID-19 Task Force are ready to leverage our knowledge to help you reengage in business—and grow. We recognize that your business is unique and that the legal landscape faces unprecedented complexity. As part of an engagement with a Seyfarth attorney, we can help you put together a fully customized return-to-business strategy, which can include the following critical components:**

- Assistance with goal setting and overall business strategy for the near, mid and long term.
- Identification of legal landmines with strategies for minimizing risk.
- Creation of a customized toolkit with resources for multiple areas impacting businesses, from labor & employment, to employee benefits, to stimulus funding and beyond.
- Access to Seyfarth's COVID-19 Tracker Repository which includes 50-state surveys on shelter-in-place orders, paid and sick leaves, executive orders and regularly changed and updated legislation.
- Collaboration with you and your team as you work to finalize policies and templates for this new era of business, representative samples of which could include:
  - Return to Work Protocol Letter
  - Selection Process Guide
  - Letter for Furloughed Employees
  - Fit for Duty Form
  - Employee Self-Certification Form
  - Employee and Guest Questionnaire/Self-Declaration
  - Employee "Go Home" Letter (due to registered temperatures)
  - Guest/Customer "Turn Away" Letter (due to registered temperatures)
  - COVID-19 Diagnostic Test Policy
  - COVID-19 Diagnostic Test Consent Form
  - Employee Health Screen Log
  - HIPAA Form and Policy
  - California COVID-19 Privacy Notice
  - Social Distancing Policy/Protocol
  - Face Covering/Mask Policy/Protocol
  - Travel Policy
  - Pet/Service Animal Policy
  - Work from Home Policy
  - Leave of Absence/Reasonable Accommodation Policy and Form
  - Accommodation Request Guide
  - Updated Paid Sick Leave Policy and Form (including for FFCRA)
  - Updated Emergency Family Medical Leave Policy and Form (including both for FMLA and FFCRA)
  - Post-return Reimbursement of Expense Form
  - Post-return Wage/Hour Certification Forms (for Meal and Rest Breaks, etc.)

**For more information on how we can help you get back to business, contact a Seyfarth attorney, or visit our website:**

- Our Post-Pandemic Recovery & Renewal practice can be found at [www.seyfarth.com/postpandemic](http://www.seyfarth.com/postpandemic)
- Our Beyond COVID-19 Resource Center can be found at [www.seyfarth.com/covid19](http://www.seyfarth.com/covid19)

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## GETTING STARTED

Getting started with your return-to-business plan involves a comprehensive understanding of how to move forward into the new legal landscape. The foundation of a successful plan contemplates the **people** involved (both your workforce and the leaders of your business functions from HR to communications), the **place** of work (including health and safety and continuing requirements around social distancing), and **elements of business** (such as stimulus, taxes, insurance and more). This document provides a roadmap to navigating those issues, with three overarching themes:

- **Past experience should inform future decisions.** Tackling the shutdown and reacting to the pandemic was brand new for all of us, but it also gave us tools to prepare for the nation's reopening—leveraging lessons learned during the pandemic will position you for a smoother transition back to work.
- Learn more: [Critical Return to Work Issues for Employers](#)
- **Plan, plan, then plan again.** Guidance is constantly changing (as are local, state, and national directives), so implement appropriate social distancing and health and safety measures now, but stay flexible, knowing that you will need to revisit and re-tweak your return to work plan many times over the coming days, weeks, and months.
- Learn more: [Strategies for Developing a Return to Work Plan](#)
- **This is a NEW normal.** Return to work is not a return to normal—and may never be. How has the pandemic impacted your business goals, and what is the impact of that on who you want to return to work and when?
- Learn more: [Three Ways COVID-19 Is Changing How We Will Work In The Future | Employment Law Lookout](#)

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## People

### Gather Your Team

- Step 1 in preparing your RTW plan is to determine who is on your team. Be sure to include **key stakeholders** and remember that they may not just be in your C-Suite:
  - Consider HR, Labor Relations, IT, facilities, health and safety team, office managers, and senior management who can make company-wide policy decisions, as well as PR and communications folks who can help share your message.
  - Are there key employees who stood out during the shutdown whose leadership should be leveraged in the RTW?
  - Are there labor considerations? Or third party vendors and supply chain folks that should be included in a subset of your team?
- Determine an **organizational approach** that is right for the business and the workforce.
  - There is no one-size-fits-all approach to reopening. Consider your business goals and resources (and how the reopening will impact those).
  - For example, is the focus on speed (as many folks back as quickly as possible)? Or a phased approach (fewer, critical employees to start; reopen certain departments before tackling others)? Can some work continue productively through telework?
  - How cooperative will the union(s) representing your employees be with the changes that will be required to effectively operate in the new environment? Will it be necessary to deviate significantly from industry standards? Are the changes likely to be viewed as enhancing employee safety/rights or givebacks?
  - Are you and your employees ready to come back?
- Step 2 is to take an **internal assessment** of your business and resources.
  - Get the lay of the land: What policies do you have in place (and what interim policies have you implemented)? Which of your locations and who are the employees impacted by various state and local orders? Unprecedented regional coordination in places like the Northeast and the West Coast may mean that some parts of your business are ready to reopen while others shift to telework or remain closed. What is the state of your supply chain and vendors?
  - Are there specific labor considerations? Identify locations and employee work groups covered by a CBA and respective union counterparts. Are there any work groups represented by a union, but not covered by a current CBA? Are there restrictions on moving operations or production between covered/non-covered locations? Can you reach interim verbal and written agreements in response to COVID-19?

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*With your team in place and your facts gathered, it is time to figure out what your RTW plan looks like.*

## Selecting Employees to Return to Work

- **Who should return? And when?**
  - Look at your workforce and make a **priority list** of who you want to bring back and when based on all relevant information driving that decision—business needs, budget, etc.
  - Remember: You **don't** need to make one single selection plan for all of your workforce, nor is a single selection plan likely feasible or reasonable for most companies. You **do** need to document your selection criteria and implement it according to a plan. Make sure your selection criteria are based on **legitimate, non-discriminatory business needs** and that the criteria do not **inadvertently** have a disparate impact on protected classes of workers. In other words, make your plan, then **check it twice!**
  
- **Who to bring back:**
  - Start with your data regarding laid off, furloughed, and remote working employees.
    - Who do you *need* to have come back first? Are some teams able to continue telework while others need to be in a physical location?
    - Who do you *want* to come back first and why?
  - In making selection criteria, consider the risks and your business needs. Retuning all employees at the same time, by seniority, or everyone in a facility will carry less risk than more detailed selection criteria.
  - If you are selecting based on other criteria, like past performance, versatility, or other creative solutions, make sure that the criteria is not based on a discriminatory purpose and consider whether it may have an inadvertent impact on certain populations of your workforce.
  - You **must not** use age, disability, or other protected category as your selection criteria—even if the CDC says, for example, workers over 65 are at higher risk of contracting COVID-19.
  - Alternatively, should you start with employees who **volunteer** to return to work?
  - Identify legal provisions that are inconsistent with current collective bargaining agreements, e.g., orders requiring consideration of at-risk employees for furlough/recall and light duty instead of by seniority.
  - **Determine whether optimal staffing is permitted by current collective bargaining agreements.**
  - Recall and leave by classification instead of bargaining unit.

- Exception to granting leave for high-risk employees.
- Ability to shift work to different work groups or locations.
- Change of schedules to reduce commuting time / employee density.

*Practical pointer: Not all choices will be within your control. Determine which employees are legally permitted to return to the worksite—some locales will permit certain essential workers to return before a full re-opening or broaden the definition of critical or essential businesses that may operate, leaving a portion of the your workforce benched.*

- **When to bring folks back and how much will they be working:**
  - Timing: Not all shelter in place orders will lift at the same time or in the same ways. The consensus seems to be that **phased reopening** (and likely renewed shutdowns) will occur in different phases in different localities.
  - What are your priorities? Staggering return to work dates makes it easier for employees as well as HR, and gives you an opportunity to evaluate whether your RTW plan is working. For example, the first group can teach you a lot about your onboarding or training process and whether your social distancing protocols will work.
    - Staggered work schedules can mean bringing back groups of workers at a time, or bringing back employees with a reduced schedule or partial furlough (watch for unemployment eligibility considerations as well as classification issues—more on that below). Some employers have considered **adding a new shift** or **staggering shift start times** to reduce traffic during shift changes. Others are combining telework 3 or 4 days a week with onsite work 1 or 2 days per week.
    - Note that workshare, partial furloughs, or modifications to schedules each come with a host of considerations including impact on employee eligibility for unemployment, bargaining concerns, state and local notice or election requirements (for example, California) as well as potential impacts on worker classification.

## Finding Your Workplace's New Normal

*You've brought your employees back—now what? What will your workplace and new normal look like?*

- Considering **reductions in pay** or hours?
  - Reductions in pay may trigger notice requirements to the employee or impact exempt status for employees dropping below the salary basis/threshold for exemption in your state.
- Changes to **work schedules**?
  - Reducing work schedules may impact unemployment opportunities. Consider whether your employees are receiving increased income as a result of the Paycheck Protection Program (PPP)



and state unemployment laws dictating whether a return to work on a reduced schedule would permit continued benefits.

- Changing work schedules may also trigger notice requirements in jurisdictions with predictive scheduling ordinances in order to avoid potential employer penalties, and it may have bargaining implications in unionized environments.
- Or changes to **duties**?
  - Consider whether changes in duties require a new job description. Be aware that these changes may impact worker classification for exempt status purposes as well as the essential functions of the job for purposes of determining reasonable accommodations.
  - If changes in duties warrant temporary or permanent reclassification, add reclassification protocol to your Policy Checklist.
- **Increasing pay** through raises, bonuses, **incentive pay**, or other benefits?
  - Consider whether your incentive needs to be included in the regular rate—forget this step and it may cost you.  
  
[Regular Rate Refresh: Calculating Overtime for California Employees](#)
  - If paying a return or retention bonus, consider potential characterization and treatment under state unemployment laws that might result in a refund of paid unemployment benefits.  
  
[Bonuses in the Time of COVID: Avoiding California Pitfalls](#)
- **Labor considerations:** In most cases, change to pay, hours, schedules and duties will require negotiations with the union. In negotiating with the unions representing your employees, the Company should consider:
  - Sun-setting incentive or hazard pay
  - Convincing the union of the Company's financial status and need for pay or hours reductions
  - Identifying possible win-win provisions such as 4x10 schedule to reduce days at work
- Practical Pointer: For any changes in pay, ensure you include appropriate notices to employees.
- Think about breaks—changes to meal and rest periods.
  - Consider whether you need to make changes to your meal and rest periods—making sure not to run afoul of your state's requirements.
  - Do you need to add additional hand-washing breaks throughout the day due to local ordinances (Los Angeles is one example) or for safety or employee confidence reasons?

- Can you reschedule (or schedule for the first time) meal and rest periods in a staggered fashion to reduce interactions with other employees?

## What Logistical Concerns Must Be Addressed Before Bringing Your People Back?

*Before you bring back your workforce, make sure you have covered the logistics of bringing employees back. This includes ensuring you have updated policies and protocols in place, a plan for training employees on any new policies or practices, and that you have prepared the physical spaces where employees work for their return.*

- Update employment policies and develop new (interim) protocols:
  - If you have temporarily permitted remote work due to the shutdown, now would be a good time to consider putting together a **comprehensive telework agreement, reimbursement guidelines** and policies, and to revisit **confidentiality and cybersecurity agreements** and protocols.
  - Remember that some of the pandemic legal requirements may have sunset provisions. Set a date for reevaluating your policies at key junctures as you reopen.
  - Consider whether the changes you are implementing belong in the employee handbook or as temporary standalone policies.
  - Make necessary updates to payroll and HRIS systems.
  - Confirm accuracy of sick, vacation, and PTO banks.
- **Make a notice/posting requirements checklist** and ensure copies are posted and/or provided electronically to appropriate employees (and keep a log of these materials and where they are posted in the event of an inspection). Don't forget to include new requirements from state and local ordinances and the FFCRA.
- **Make a policy checklist** for the policies you will need during this transition and revisit the ones you implemented during the shutdown:
  - Consider implementing/updating Infectious Disease Control Policy.
  - Update social distancing guidelines/protocols and travel policies.
  - Update **paid time off policies** and consider whether you need a separate policy for coronavirus-related leaves. (Note that some jurisdictions prohibit reducing the number of vacation days after COVID-19.)
  - Update leave of absence policies, paid time off policies, and protocol for handling requests to **work from home**.
  - Evaluate whether to make changes to your **bereavement policy**.

- Review complaint process and develop a plan for investigating/handling complaints related to real or suspected exposures to COVID-19.
  - Note any new whistleblower protections.
- Pets in the workplace (if any such policy)—returning employees may want such a policy and newly germ-averse employees may want restrictions on such policies already in place.
- **Expense reimbursement** policies may also need to be revised to address telework expenses and in anticipation of new expenses related to employer-mandated policies such as home temperature checks.
- Develop a policy regarding **face coverings or masks**—some jurisdictions will require these coverings, others will permit employers to require that masks are *not* worn. Make sure your policy complies with the rules and requirements applicable to each employee in all of your locations.
- If you will implement **temperature screenings** or other screening questionnaires, ensure that these are compliant with all applicable laws and are communicated to all employees, including their supervisors *prior* to implementation.
- For collective bargaining agreements that are set to expire in the near term, determine changes to accommodate new laws and avoid double paying for required benefits.
- Determine whether there is a need to bargain with any union(s) regarding additional workplace health/safety protocols and other changes to policies and practices. Are there any tradeoffs that the Company can secure in exchange for adopting new restrictions and providing new benefits required by federal/state/local laws?
- Labor Considerations: Many, though not all, of the changes identified above cannot be implemented unilaterally and will require negotiations with the union representing the Company's employees. In the negotiations for an interim or successor agreement, the Company should consider the following:
  - Determine if the Company needs to re-bid vacation or other leave opportunities.
  - Update CBA benefits package in consideration of required COVID-19 related leave
  - Revise no-strike provisions to reduce the risk of a safety-related job action
  - Memorialize collaborative process for future COVID-19 outbreaks of similar emergency situation
- New and returning employees—onboarding and training:
  - Evaluate hiring practices in light of COVID-19. For example, what changes will you make to screening requirements, if local ordinances prohibit fingerprinting?

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- If you need to hire new recruits, what do you need in place to be able to make those decisions and onboard those individuals? What will you do if an individual is determined to have COVID-19 at the time of offer? Will you delay start dates?
  - For any new hires during and after the shutdown, include a plan for completing their background screens, fingerprinting, onboarding paperwork, I-9s, and any processes that may have been interrupted during this period. Don't let these employees fall through the cracks.
  - If you are bringing back employees after a long furlough, you may be required to re-onboard them as new hires—check your local requirements.
  - *How* will you conduct new hire orientation? Can you revise processes to reduce in-person contact? How will you track and compensate employees for required time?
  - Bringing the workplace back from home to the office:
    - Consider whether to obtain certifications upon return that all time and expenses have been properly recorded and submitted.
    - Verify time was accurately recorded and meal/rest periods were maintained—consider certification as such from non-exempt employees.

Learn more: [WFH is the New Black Avoiding Wage and Hour Pitfalls as Work From Home Hits the COVID-19 Mainstream](#)

    - Return/inventory of equipment such as computers, printers, etc.
    - Do you have any other cybersecurity issues that need to be addressed?
    - Confirm all employer confidential information is returned and protected.
    - What additional activities will they be performing prior to returning to work and is any of that time compensable?
      - Consider **mandatory refresher training** for all employees transitioning back to work.
      - Include training on new policies and protocols.
      - Refresh training on anti-harassment policies (note: the EEOC *specifically* recommends that employers remind employees about anti-harassment policies when reopening the workplace).
  - Practical concerns for employees with barriers to returning to the worksite:
    - For employees who need to travel to and from the worksite while shelter in place orders are in transition or commute *from* a different jurisdiction with a shelter in place order in effect, [consider providing documentation indicating that the employee is an essential worker or a business card](#)

with contact information for HR in the event they are stopped (make sure that person's hours coincide with the individual's commute time!).

- Is your company's child care program back up and running?
- Do you have a health care worker or nursing staff already trained to administer tests?
- Have you considered employee child care and/or other dependent or senior care obligations?
- Consider possible public transportation obstacles; commuter benefits; rideshare.
- Assess whether mid-term changes to the collective bargaining agreements are possible and prepare strategy for successful negotiations and implementation.
  - What immediate issues are mandatory subjects of bargaining? What immediate issues are covered by management rights?
  - Force Majeure? CBA changes needed to address current or future quarantine orders, fear of COVID-19 (note: potential ADA and whistleblower issues)
- Identify long-term collective bargaining goals for expiring and open contracts, including long-term social distancing and workplace sanitizing protocols
- What If an employee exhibits symptoms, has COVID-19, or has recently been in contact with an infected person?
  - Consider maintaining (or developing) your policy requiring employees to stay away from work for 14 days following exposure to or experiencing symptoms of COVID-19. Be sure your documentation/certification requirements comply with both state and local law *and* the FFCRA.
  - Where will employees go?
    - For prescreening? And is the physical space up and running?
    - If they have COVID-19 related concerns? Consider designating a pandemic response contact or hotline.
    - To enter or leave work? Consider whether you can designate specific entrances or exits for ingress or egress to control the flow of traffic and reduce contact with other employees.
    - If they are not feeling well?
- Documenting the why and how of your RTW plan:
  - Make your plan and then **write it down**. Document your selection criteria for returning employees to work and ensure it is consistently implemented.

- Make sure there are written guidelines on what to do with important records generated by your plan (results of temperature checks, which should be separated in confidential files; new policies; requests for continued telework; protocols on everything from contracting provisions to social distancing rules for the kitchen).
- If your plan incorporates lessons learned from the shutdown, make a note of those to incorporate into future planning for subsequent shutdowns or emergency re-allocation of company resources.
- For each piece of your RTW plan, what is your communications plan to accompany it?
- How much notice will you give employees before recalling them and how will you communicate that message?

## Reporting for Duty: Determining Employee Fitness to Return

- Consider the type(s) of **health screens/testing** to implement on an ongoing basis (and when to end the additional steps).
  - Are **self-checks** before entering the workplace sufficient (self-certifications, questionnaires)? Or, should you use employer-administered checks? Per CDC guidance:
    - Confirmed illness
    - Designated symptoms
    - Exposure to others with symptoms
    - Travel to heavily infected areas
    - Certification not in a high-risk population
  - Can you use **daily temperature checks** using thermometers or thermal scanners?
    - **At home** + self-certification
    - **Onsite** + consider who will administer, training, and Personal Protective Equipment (PPE)
    - Periodic (e.g., weekly, biweekly, monthly, etc.) employer-provided COVID-19 testing when such testing is more widely available for all employees or certain employees in more high risk positions (e.g., public facing positions, positions involving close contact with other employees or other third parties).
  - Where does **antibody testing** fit? Gaining popularity, some employers are providing voluntary COVID-19 antibody testing or reimbursement for any out-of-pocket costs associated with voluntary COVID-19 antibody testing as an incentive to employees to get tested (when such

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testing becomes available), and privacy considerations regarding the same. Consider the following:

- EEOC issued guidance on April 23 that testing may be permissible **so long as employers remain in compliance with ADA.**
- **Accommodations in place** to work around test limitation (e.g., sinus issues with nasal swabs)
- Waiting for test results and asking employees to remain at home
- OSHA implications—employees administering tests must be trained and provided with PPE
- California—Civil Code Section 56.21 (disclosure of medical information).
- California—compliance with the CCP
- May require informed consent
- HIPAA issues
- Additional issues with minor employees and their consent

*Practical Pointer: As you develop your plan, consider where and how you will store (and limit access to) employee medical information (e.g., temperature screenings, reports of COVID-19 symptoms, diagnosis, and other confidential medical information). It does not belong in an employee personnel file.*

- Establish your protocols for employees who have tested positive, demonstrated symptoms, or otherwise have suggested risk of infection through testing or self-certification.
  - Is remote work possible?
  - Consider **CDC guidance regarding essential employees**, who may otherwise have been affected, can remain in the workplace under certain safety conditions such as social distancing.
- Labor Concerns:
  - While the unions representing the Company's employees should support the implementation of new safety guidelines promulgated by the CDC or other government agencies, the Company should provide the union with as much notice as possible and be willing to consider legitimate input from the unions.
  - To the extent that the Company is considering restrictions/qualifications beyond those required by applicable law, it must determine if negotiation is required prior to implementation .

- Determine whether current collective bargaining agreements prohibit employees from working for another employer. If they don't, consider whether the Company would want to include such a provision when modifying the agreement.

## When an Employee says “No”: Refusals to Return to Work and Requests to Continue Telework

*You've made your priority list and are ready to bring back your workers, but what if your employees don't want to return to the workplace, or cannot return?*

- Certain employees may not be able to come back to work as early as other workers, due to:
  - Diagnosis or symptoms of COVID-19, mandated quarantine due to potential exposure.
  - Impediments to travel or commutes, including closed or reduced public transportation systems, dissolution of carpools.
  - Child, dependent, or senior care obligations.
  - Membership in a vulnerable population.
  - Member of household in a vulnerable population.
  - Identify conflicts with, and/or necessary gap fillers for, current collective bargaining agreements and determine if negotiation is necessary prior to implementation
- Other employees will want to continue teleworking either out of fear of returning to the workplace (which potentially implicates ADA and whistleblower issues) or a newfound preference for remote work.
  - Develop a **process for approval of these requests**. Make sure you follow your protocol, but pay close attention to whether the request is actually a request for a reasonable accommodation, health related, or otherwise legally required (or if it is purely based on an employee's preferences). Make sure HR is involved in developing the protocol to respond to these requests—these are not always simple business decisions.
  - Make sure not only HR, but key managers or supervisors are trained on the protocol and pushing requests to the proper parties or department. Add it to your Policy Checklist.
- Requests for time off and reasonable accommodations:
  - Anticipate that there will be an uptick in requests for time off and reasonable accommodations and develop a process for approving those requests.<sup>1</sup>

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<sup>1</sup> See the EEOC's What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (<https://www.law360.com/employment/articles/1264865/eec-adds-return-to-work->



- For reasonable accommodation requests, consider the impact of COVID-19 on those requests. Just because you implemented emergency remote work during the shutdown does not necessarily mean that permanent remote work is a reasonable accommodation—but it might be.

Learn more: [Updated EEOC COVID-19 Guidance: The Commission Adds New Q&A To Help Employers Understand Their EEO Obligations In These Trying Times | Employment Law Lookout](#)

- Anticipate that some [high-risk employees](#) will have concerns regarding RTW and develop a protocol for addressing those concerns (including options for accommodations if appropriate, permitting election to participate in later phases of return to work (on a voluntary basis) and how to respond to leave requests.<sup>2</sup>

## Benefits and Executive Compensation

- Health and wellness plans:
  - If employees were covered while out but didn't pay premiums, **collect arrearages** (though consider authorization requirements and potential impact of minimum wage).
  - If employees lost eligibility/coverage while out, **provide re-enrollment opportunities** (though may need to coordinate with life and disability insurers regarding Evidence of Insurability requirements upon a return from lapse of coverage).
  - Consider whether employees can **change elections** under a welfare benefit plan.
    - Largely driven by whether employee has had a change in eligibility
    - Dependent Care FSA—participant who lost coverage may re-enroll
    - Health Care FSA—consider whether adjustments to the account balance are needed if not covered while not working or changes in elections
    - ACA Break in Service rules—ACA permits an employee to be treated as a new employee for measurement period purposes if not credited with an hour of service for 13 or more weeks.
  - **Emergency day/senior/family care**—consider benefits availability and communicate with employees accordingly.
- Defined Contribution Retirement Plans (i.e., 401(k) plans):

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[section-to-virus-guidance?nl\\_pk=99c22c75-1133-443e-8a57-6a1fcd4af482&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=employment\)](#)

<sup>2</sup> The CDC has identified a list of individuals. See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>.

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- Review plan terms for rules on treatment of those **returning from furlough**.
    - Was the individual **eligible to participate** in the plan before furlough? Determine appropriate plan entry or re-entry date; consider whether the individual continued to earn service credit or if break-in-service occurred—if the latter, confirm whether service is bridged.
    - How should employee **deferrals** be resumed and at what rate? If individual was eligible to contribute before furlough, determine at what rate they contributed; review applicable enrollment and automatic contribution escalation provisions to determine impact on contribution rate.
    - Did an individual have **outstanding loans** under the plan? Clarify whether payments were suspended while on furlough—if so, confirm whether payments will need to restart upon return to work—consider whether re-amortization is necessary-- consider whether the plan will be amended to provide COVID-19 loan relief or other IRS loan repayment relief.
    - Send **enrollment or regulatory notices** as required, including potentially the SPD.
  - Review plan terms for rules on treatment of **rehires** (if employment was terminated).
    - Was an individual **eligible to participate** before termination? Consider whether break-in-service occurred and whether service was bridged.
    - How should employee **deferrals** be resumed and at what rate? Determine at what rate they contributed before termination; review applicable enrollment and automatic contribution escalations provisions to determine impact on contribution rate.
    - Did an individual have **outstanding loans** under the plan? Clarify whether payments continued after termination or if loan was deemed distributed; consider whether there may be eligibility for loan relief.
    - Did an individual take a **distribution** from the plan account after termination? If so, consider whether it could be reclassified as a Coronavirus-Related Distribution (and therefore not subject to early withdrawal penalty and eligible for repayment).
    - Send **enrollment or regulatory notices** as required, potentially include the SPD.
  - Defined Benefit Pension Plans:
    - Review how any furlough impacts participant benefits under the plans, confirm desired results, and consider amendments.
      - Consider **amending plan to credit employees with service during the furlough**; service credited under the plan depends on a number of factors, including the plan's method of earning service (e.g., counting hours, elapsed, time, etc.) and the length of the furlough.

- Consider **amending benefit formula to exclude furlough period from final average pay calculation**—typically, the calculation is based on the average of an employee’s last 5 or 10 years of annual pay before termination from employment; a period of unpaid furlough could contribute to a year of significantly lower compensation and lower the ultimate plan benefit.
- However, ability to amend may be limited under Code Section 436 based on the plan’s funded status.
- Executive compensation:
  - Furloughed executives returning to work within six months—deferrals to non-qualified deferred compensation **should resume**.
  - Executives on furlough for more than six months—non-qualified deferred compensation distributions **should be triggered on a “separation from service”**; employers should review specifics of the executive’s account balance to determine continuation of deferral upon return to work.
  - Vesting of non-qualified deferred compensation and equity will vary by plan; employers should assess the **impact of furlough on option exercise rights**.
- Labor Considerations: Changes to benefits plans will need to be negotiated with the unions representing the Company’s employees.
  - Identify short-term changes necessary to implement new COVID-19 environment.
  - Evaluate long-term stability of benefit plans.
  - Determine strategy for upcoming and open negotiations.

## Customers, Vendors, and Visitors

- Determine how and in what respects the above return to work plan will apply to temporary workers, staffing agency workers, independent contractors, vendors, clients, customers, delivery workers, visitors, and others when they are in the workplace.
  - Consider joint employer issues.
  - Consider independent contractor classification issues.
  - Work with staffing agencies on protocols.
- Consider limiting visitors to the workplace. Certain times? Staggered?
- Require any visitors to complete a questionnaire before entering an office, facility, or other work location.

- Consider implementing measures to ensure vendor safety, including:
  - Disabling/suspending access (e.g., temporarily suspending all non-employee truck drivers from entering stores, warehouses and manufacturing plants).
  - Transitioning to contactless signatures/e-signatures for deliveries.
  - Adjusting store delivery windows to spread out deliveries.
  - Requesting that vendors accessing your store locations to direct their employees follow all social distancing guidelines and health directives issued by the applicable public authorities.

## Planning for Future Outbreaks

*Planning for the future also requires planning based on the past. Employers must develop a plan to quickly respond to any COVID-19 diagnosis, symptoms report or exposure.*

- Develop protocol for employee reports of diagnosis, symptoms, exposure.
  - What specific information is the employee required to disclose?
  - To whom should the employee provide such disclosure?
  - With whom is the information shared?
  - Where is any written information securely maintained?
- Develop workforce contact tracing protocol to identify and inform those individuals who have been in close contact with the affected employee, in compliance with privacy and disability discrimination law requirements.
- Determine if there is any requirement to notify any government or other public authorities and, if so, develop protocol to provide such notice.
- Develop protocol for temporary shutdown and deep cleaning of the workplace.
- Determine whether to notify the workers' compensation insurance carrier.
  - Note that some states have enacted or are considering enacting legislation that creates a presumption that certain employees contracted COVID-19 in the workplace.
- Determine whether a case must be recorded on your OSHA 300 log.
- Develop protocol for responding to questions and concerns raised by other employees, temporary workers, independent contractors.
- Labor Considerations: Many of the above considerations may have to be negotiated with the union prior to implementation. As importantly, the Company should encourage the union to collaborate on

safety issues, in lieu of an adversarial posture towards employee safety. This requires transparency, an openness to feedback from the employees' representative and responsiveness to legitimate requests for information.

- PR plan in the event of negative publicity, need to notify public, etc.

## Place

### Facilities: Deciding Which Location/Office to Open

- Economic Analysis: Pre-crisis performance vs. re-opening projections; also, cost of lease termination should a given location no longer prove viable post-COVID.
- Co-Tenancy Considerations: Have COVID-19 closures implicated one or more co-tenancy provisions in your portfolio? If so, have you taken any necessary steps to claim the relief provided under your lease(s)?
- Evaluate the Landlord/Tenant Relationship: Is this a multi-site Landlord with cross-default considerations? Is this a location where you did not pay (or short-paid) April or May rent? If so, has a strategy been devised to restore that landlord relationship?
- Sublease / Assignment / Give Back / Repurposing Opportunities: Is this a site where it might make more sense to seek an alternative user or convert to a support use (e.g., ghost kitchen, BOPIS, curb-side delivery, or dark store)? Do you have rights in your lease to "give back" square footage and shrink your footprint?

### Physical Space Coordination and Retrofit

*Do the costs of post-COVID retrofits (to meet new health and safety requirements - including social distancing) render a site no longer financially viable?*

- Talk with landlords and building management to:
- Obtain early access to office/store location to ready it for return-to-work (deep cleaning, retrofitting as necessary for new regulations, installation of new signage [see below], etc.).
- Thoroughly inspect facilities for any damage or issues caused by vacancy including mechanical, air, and water systems.
- Clean and prepare equipment for startup; install sneeze guards or other protective measures, as necessary and/or required.
- Consider facility enhancements such as increased fresh air circulation, installing highest efficiency rated filter recommended or allowed by manufacturer.
- Identify which vendors and/or distribution centers are functioning, and the extent to which they may be delayed or limited in their operations. Establish contingency plan for vendor disruptions.

- Establish protocol for monitoring office/store occupancy (metering) in compliance with any applicable laws.
- If applicable, establish procedure for use of escalators and elevators to avoid crowding (e.g., elevator attendants, queue management for waiting passengers, etc.).
- In multi-tenant situations, obtain clarity on what customer screening (e.g., temperature) may be required and who will perform it (landlord on behalf of all office tenants, landlord on behalf of all mall tenants, each individual tenant, etc.).
- If visitor/customer screening is to occur within your office/store, identify an appropriate location for such screening (such that privacy and social distancing protocols are respected).
  - Ensure adequate cleaning in all common areas (including elevators).
  - Understand and negotiate social distancing measures taken in all common areas (building policy regarding elevator max capacity to enable social distancing).
  - Consider the possibility of staggering work hours among building tenants.
  - Require landlord notification in the event of confirmed COVID-19 cases.
- Develop a plan in the event of an outbreak at a nearby business.

## Signage

- Familiarize yourself with new signage requirements & needs (occupancy, social distancing, customer flow, BOPIS, etc.).
- Consider the public relations and health & safety (e.g., capacity) concerns related to any promotional signage you might otherwise normally employ.
- Do you need to limit quantities per customer for certain items or implement other anti-hoarding signage?

## Social Distancing At Work

*What's your social distancing protocol? Are you subject to any specific state and/or local laws? What do you need to do to prepare your physical spaces for more limited interaction?*

- Spacing the space
  - Reconfigure **workspaces** to ensure that they are at least 6 feet apart, where feasible and legally required.
  - Rethink your **open workspaces**. How can you limit interaction in a space intended to bring people together?

- Adjust **paths** to travel to work stations and other frequently used areas to maximize social distancing.
  - Duct-tape arrows on the floor?
  - One-way aisles?
- Consider redesign or slowing down of **production lines** to allow for more space between employees.
- Can you use **physical barriers** (e.g., Plexiglas between cubicles or workstations, in lunchroom areas, etc.)?
- Repurpose conference rooms, lunch rooms, and other **communal spaces** to allow for more distance or close them altogether. Consider whether these closures or limitations impact your meal or rest periods.
- **Use time to your advantage.**
  - Consider **changing work schedules** and/or shifts to limit the number of employees physically present in a specific office, facility, plant, or other work location at any one time.
  - Consider **staggering of meal periods** and rest breaks to the extent consistent with applicable law, and consider permitting employees to eat their work stations. Be careful to consider whether state or local laws regarding duty-free meal or rest periods impact your options regarding spaces used for meal or rest breaks.
- Did **work-from-home arrangements** work for you during shelter-in-place? Can you continue work from home, either full-time or a number of days each week?
- Limit in-person meetings.
  - Conduct meetings by videoconference.
  - Keep numbers down.
  - **Get creative!** Can you hold in-person meetings outside? Or, if you must, hold any in-person meetings in well-ventilated, open spaces.
- **Tap your talent.** Crowdsourcing. Ask your employees for ideas.

## Managing Your Supply Chain and Inventory

- Assess supply needs and explore options for sourcing additional supplies required for business operations; assess how to best leverage existing relationships with vendors.

- Create a plan for how you will source and distribute cleaning products and PPE, accounting for existing and/or future shortages. Establish a protocol to monitor this on a frequent basis as rules and health guidance ebb and flow with the prevalence of the virus.
- If you have international operations, consider current challenges with respect to shipping certain products (such as PPE) across borders. You may have to modify your traditional supply chain routing.
- Establish procedure for regularly disinfecting inventory and newly-received deliveries.
- Establish protocols for handling and processing shipping and receipts (including disinfection).
- Evaluate current situation as it relates to ports of entry and trucking logistics for your product. Will this impact your ability to timely re-supply, both now and in the medium term? Keep an eye out for future legislation which might have the effect of requiring truck drivers to quarantine upon crossing state-lines, etc., thereby further disrupting the supply chain.

### Business Hours

- Adjust store hours of operation, as necessary, to support social distancing efforts by limiting store/office traffic.
- Ensure staff has sufficient time to rest, sanitize and restock inventory.
- Consider offering seniors and other high-risk individuals exclusive early hours.
- Consider increasing pickup hours to serve more online customers.

### Business Travel

- Consider curtailing all non-essential business travel.
- Explore business travel alternatives.
- Develop protocol for handling fear of travel.

### Keeping Clean and Safe: OSHA and Beyond

- Determine minimum legal requirements—OSHA (safety), EEOC (discrimination), CDC (health) guidance, state and local shelter-in-place orders; identify a point person to keep track of changes.
- Perform a hazard assessment as required by OSHA.
- Perform a thorough **workplace cleaning** prior to reopening an office, facility, or other work location and consider implementation of more frequent or robust routine cleaning.
- Should you retain an outside safety consultant to advise regarding COVID-19 measures?



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## Covering Up: PPE

- Is PPE required and will you provide it? If not, will you reimburse employees to purchase and launder?
  - Face coverings, gloves, and other PPE.
    - All the time, or just when employees cannot maintain 6 feet from other people?
  - Will you provide **cleaning supplies**?
    - What if employees want to use their own? (There are potential liability and reimbursement issues).
  - Don't forget about **reasonable accommodations** for disabilities (e.g., non-latex gloves, modified face masks, gowns designed for wheelchairs) or for religious reasons.
  - For **consumer facing locations**, consider **cashless transactions** (but note some jurisdictions may prohibit this).
- Develop protocol around **cleaning work stations** (e.g., potentially have employees clean their own work stations daily before starting and after finishing work).
- Consider temporarily **removing shared items** (e.g., staplers, three-hole punchers, and other office supplies; coffee mugs; etc.).
- Develop a protocol for **shared tools** and other items (e.g., leave it for the other employee to pick up rather than handing it off in person, cleaning tools before and after each use, etc.).
- Develop a protocol around **locker areas**; ask employees to leave items at home or in cars to the extent possible.
- **Donning and doffing?** Consider whether uniforms and PPE can be put on/off at home or in the car (note: potential wage hour issues).
- Consider temporarily switching to **disposable items where possible** (kitchenware, desk blotters, etc.).
- Limit unnecessary mail. Consider prohibiting employees from receiving personal mail at the workplace.
- Develop handwashing protocols.
- Stock the workplace with hand sanitizer, facial tissue, and sufficient cleaning supplies.
  - Place hand sanitizer in common areas throughout the workplace.
  - Provide employees with facial tissue.

- Consider adding additional handwashing stations.
- Reminders about proper hygiene, handwashing, and coughing and sneezing etiquette.
- Ensure adequate ventilation.
- Consider temporarily closing cafeterias or, instead, providing or selling only prepackaged foods.
- Consider temporarily stopping any fresh meal delivery (or avoid shared food items, shared utensils).
- Consider increased cleaning of high traffic areas, common areas, office equipment (e.g., copiers, keyboards, printers, etc.) and periodic deep cleaning of office, facility, plant, and/or other work locations by a professional cleaning service.
- Provide safety training and communications.

### What to Do When OSHA, the Police, or a Public Health Official Stops By

- Designate a point person to take the lead. Train managers on what to do if OSHA, police, public health officers, etc. show up onsite.
- Learn more: [OSHA Issues Temporary Guidance on Using Enforcement Discretion During the Coronavirus Pandemic](#)
- [Discretion in Enforcement when Considering an Employer's Good Faith Efforts During the Coronavirus Disease 2019 \(COVID-19\) Pandemic | Occupational Safety and Health Administration](#)
- [OSHA Publishes Interim Enforcement Response Plan for COVID-19 Inspections](#)
- Required posters should be posted. Required policies, social distancing protocols, logs, and other documentation should be up to date. Anticipate possible inspection and have key documents ready to produce promptly.
- Be able to show social distancing protocols and step.

## Elements of Business

### Economic Stimulus Loan and Forgiveness Programs

- Manage economic stimulus loan and forgiveness programs applicable to your business—including close monitoring of the PPP 8-week “covered period” for measuring loan forgiveness.
  - Payroll to constitute at least 75% of the loan proceeds used during the covered period, which starts the day the PPP loan proceeds are disbursed.
  - Further guidance anticipated from the SBA on forgiveness details.

- Seek to optimize loan forgiveness under PPP, if applicable, by restoring, by no later than June 30 2020, employee headcount reductions and 25% or greater employee salary reductions that took place between February 15, 2020 and April 26, 2020 (including by rehiring laid off or furloughed employees by June 30, 2020).
  - Webinar Recording: [Administrative Developments and Guidance for Accessing Small Business Stimulus Dollars.](#)
  - Webinar Recording: [Accessing Small Business Stimulus Dollars Under the CARES Act.](#)
  - Legal Update: [COVID-19 Business Stimulus Funding Update: Small Businesses, Large Businesses, Mid-Size Businesses, Nonprofits, and Tax Provisions.](#)
  - Legal Update: [COVID-19: SBA Economic Injury Disaster Loan Program.](#)
  - Legal Update: [Business Stimulus Funding Update: Federal Reserve Announces New Measures to Support the Economy.](#)
  - Legal Update: [COVID-19 Business Stimulus Funding: Relief for Large Businesses.](#)
  - Legal Update: [Federal Disaster Loan Assistance Program for Small Businesses Impacted by COVID-19.](#)

## Taxes, Including Credits and Deferrals

- Consider and manage tax credits and payroll tax deferral to the extent available, including taking an advance of tax deferrals/credits if available.
  - Employers that pay sick leave and expanded family and medical leave required by the Families First Coronavirus Response Act (FFCRA) from April 1, 2020 through December 31, 2020 (“qualified wages”) are entitled to a tax credits to cover the costs of such leave.
    - The tax credits are increased by the health plan expenses allocable to, and the employer’s share of Medicare tax on, the qualified wages (such costs, along with qualified wages, “qualified leave payments”).
    - A employer that pays more qualified wages than is required under the FFCRA is not entitled to a tax credit for the excess.
    - An employer can claim credits for any calendar quarter by reducing, and retaining, the amount of its federal employment tax deposits (employer share of FICA and employee income and FICA tax withholding) for that quarter by the amount of the qualified leave payments paid in that quarter.
    - The excess of qualified leave payments over the employment taxes retained and not deposited, if any, would be refunded to the employer.

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- Employer must retain certain documents to substantiate the credits.
  - Eligible employers are allowed an employee retention credit equal to 50% of “qualified wages” (up to total of \$10,000 in wages and qualified healthcare expenses) for each employee during the period March 13, 2020 through December 31, 2020.
    - An employer is an eligible employer: (i) if it carried on a trade or business during 2020, and (ii) with respect to any calendar quarter for which, (a) its operations and/or business were fully or partially suspended due to a governmental COVID-19-related order, or (b) a calendar quarter in which it suffered a significant decline in gross receipts (as defined in the Act).
    - Qualified wages mean (i) for employers with an average of more than 100 full-time employees in 2019, wages paid to an employee for time that the employee is not performing services due to a circumstance described in clause (ii)(a) or (ii)(b) in the above bullet, and for employers with 100 or fewer average full-time employees in 2019, all wages paid regardless of whether the employee is performing services for such wages.
    - An employer can claim the credit in the same manner as how the FFCRA credits are claimed.
    - The credit is not available to an employer that received a loan under the PPP that is authorized under the CARES Act.
    - Aggregation rules apply to treat certain affiliated employers as a single employer for purposes of the credit.
  - Tax deferrals.
    - Under the CARES Act, an employer may defer the deposit and payment of the employer's portion of Social Security taxes that are required to be deposited during the period beginning on March 27, 2020 and ending December 31, 2020, without penalty.
    - 50% of the deferred taxes are due by December 31, 2021, and the remaining 50% is due by December 31, 2022.
    - An employer that has received a PPP loan may defer deposits of its share of Social Security tax through the date the lender issues a decision to forgive the loan, but once the lender issues a decision to forgive the loan the employer may no longer defer deposits. However, amounts deferred through the date that the PPP loan is forgiven continue to be deferred and will be due on the dates described in the above bullet.
  - Manage new filing dates for tax filings and payments—federal, state, and local.
    - Legal Update: [The IRS Extends Filing and Payment Obligations for Most Taxpayers and Performance of Certain Taxpayer Time-Sensitive Actions Until July 15, 2020, and Extends the Time for Performance of Certain Time-Sensitive IRS Actions by 30 Days.](#)

## Insurance Policies and Claims

- Review business interruption insurance policies and evaluate claims.
  - Webinar Recording: [Insurance Coverage for Business Interruption Losses](#).
  - Legal Update: [Business Interruption Coverage for COVID-19-Related Losses under Commercial First-Party Property Policies](#).

## Contracts, Including Supply Chain and Vendor Commitments

- Review supply chain, vendor and other financial commitments to determine long-term stability of your business partners and prepare for financially distressed-counterparty situations.
- Consider alternatives to manage contract or loan defaults, and consider options for restructuring.
- Take appropriate action to terminate or modify contracts.
- Revisit your force majeure clauses and adapt as needed.
- Evaluate potential affirmative litigation claims and areas of litigation exposure, and prepare appropriate prosecution, defense, and mitigation strategies.

## Credit and Liquidity

- Evaluate existing lines of credit and renegotiate where necessary, including accessing Main Street Lending Program and other credit facilities as available.
  - Treasury guidance on the MSLP anticipated following public comment period which has ended.
  - Legal Update: [Money for Main Street: Fed Releases Terms of Main Street Lending Facilities](#).

## Corporate Governance

- Proactively engage with your board of directors/governing board to allow board input and facilitate decision making for extraordinary actions.

## Workouts and Distressed Situations

- Identify and consider alternatives to manage contract, lease or loan defaults.
  - Consider options for relief and restructuring including execution of pre-negotiation agreements, followed by forbearance or modification agreements.
- Review and manage accounts receivable aging to management bankruptcy preference claw-back risks from customer bankruptcies.
- Evaluate opportunities for acquiring distressed assets in your industry.

- Consider a representation and warranty insurance policy to mitigate risk when no seller indemnity is possible.



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