

As the federal government and states begin the process of gradually lifting “stay-at-home” orders implemented in response to the coronavirus disease 2019 (COVID-19) national public health emergency and work toward reopening the US economy, employers will confront situations they have never faced before: how to restart their business after a prolonged government-mandated closure, or after changing to a complete or near-complete remote working protocol, or after operating under vastly different circumstances as a designated “essential business.”

The following checklist is intended to assist legal and human resources personnel identify those issues that should be addressed as business operations resume, as well as those that are likely to arise going forward in the new workplace environment that will exist for an uncertain duration as the country emerges from the COVID-19 global pandemic. Although intended to be comprehensive, this checklist is not exhaustive of every potential issue that may arise as employers reestablish operations, nor does it address every unique industry-specific issue employers should address. Accordingly, this checklist should be used as a guide to assist employers. Specific issues should be addressed with counsel, as the legal landscape relating to employer obligations arising out of or relating to the pandemic is continually changing.

Workplace Environment Issues

Prior to returning employees to the workplace, employers must prepare the workplace environment for their safe return.

✓ Sanitation

- Workplaces may not have been thoroughly cleaned while idled. Employers need to make arrangements for deep cleaning, including disinfection, of workplaces, equipment, personal protective equipment and machinery using methods targeted for neutralizing the presence of the coronavirus.
- Ensure ready availability of alcohol-based hand sanitizer, wipes and cleaning supplies for ongoing cleaning of offices and communal workspaces.

✓ Vendor Services

- Contact vendors to ensure necessary services are available, including janitorial, custodial, mechanical, engineering, security, parking, hospitality and others.

✓ Personal Protective Equipment (PPE)

- If necessary, ensure adequate supply of PPE for all employees, sourcing and entering into contracts for procurement of PPE before employees' return.
- Develop a PPE protocol to be provided to employees explaining when and how PPE is to be used.
- Prepare to train employees on proper use (and cleaning and re-use) of PPE.

✓ Training

- Retrain staff, hospitality and security personnel on limitations on access to the physical premises by vendors and visitors, for general safety reasons and to limit unnecessary virus exposure.

- ✓ Determine whether to begin (or continue) medical testing or symptom screening, such as symptom checks, fever testing or more invasive measures, such as antibody testing, nasal swab testing or the like.
 - If implementing more invasive testing procedures, consider the types of written consents required to test employees in order to avoid claims of assault/battery or invasion of privacy; determine whether the test is job-related and consistent with business necessity under the Americans with Disabilities Act (ADA); consider whether the method of testing implicates the Genetic Information Non-Discrimination Act (GINA); and be mindful of whether employee refusal to participate in such testing is protected under state public policy laws, such that their termination or discipline may run afoul of state law.



✓ Physical Modifications

- Evaluate the workplace layout, determining whether changes are needed to allow for maintenance of social distancing and other infection mitigation protocols, such as relocating work stations and installing Plexiglas dividers to slow the spread of contamination and enhancing air filtration measures.
- Consider temporarily closing or limiting access to employee break rooms, locker rooms, conference rooms and other shared workspaces.
- Evaluate any employer-provided meal and snack benefits (e.g., vending machines, office coffee service, potluck or buffet meals at in-person meetings).
- If downsizing office space, ensure appropriate lactation and/or wellness rooms are available, and comply with any applicable legal requirements for disability access such as clear turning space in offices and hallways, and sufficiently wide paths of access in hallways and doorways.
- Add appropriate signage informing employees to maintain social distancing guidelines wherever possible, reminding employees to frequently wash hands and to engage in other CDC-recommended best practices and implementing demonstrations and training, if required or recommended by the CDC for the industry.

Employee Scheduling

- ✓ Assess whether work shifts can be split, staggered or otherwise adjusted to result in fewer employees in the workplace at a single time.
 - Particularly consider staggered work shifts for employees in shared or open offices to maintain social distancing.
- ✓ Assess whether employees should be reinstated in phases rather than reinstating all employees at the same time.
 - Be mindful of selection criteria if some furloughed or remote working employees will be returned before others to avoid discrimination claims.
- ✓ Determine whether any remote work/teleworking arrangements can be continued.
- ✓ Develop a communications plan for employee return-to-work, covering key issues (e.g., testing, training, maintenance of social distancing and other CDC best practices).



Returning Employees From Furlough

Employers returning employees who were temporarily furloughed (i.e., put on a brief unpaid leave of absence) due to COVID-19-related reasons should address the following issues.

- ✓ Comply with federal and state law regarding partial workweek payments for salaried, exempt employees if beginning mid-week.
- ✓ If employee benefits were suspended during furlough, arrange for resumption of benefits.
- ✓ If employee benefits were provided by the employer during furlough subject to an employee repayment obligation, develop a plan to recoup deferred benefit premiums, being mindful of minimum wage and salary basis considerations.
- ✓ Address issues relating to accrual of leave during furlough, ensuring consistency with policies applicable to other unpaid or paid leaves of absence, as applicable.
- ✓ Address issues relating to requests for use of time off (both statutory entitlement and policy-based) following return from furlough.
- ✓ Address seniority issues during furlough (continued accrual or deferral during furlough).
- ✓ If employees will be recalled from furlough in stages, be mindful of selection criteria (consider performing adverse impact analysis) and Affordable Care Act (ACA) compliance issues.
- ✓ Initiate interactive process for ADA accommodation needs prior to return, if applicable.

Extension/Conversion of Furloughs to Layoffs

Employers that previously furloughed employees may need to convert furloughs to permanent layoffs due to reduced business demands, supply chain challenges or other economic pressures.

- ✓ Evaluate whether Worker Adjustment and Retraining Notification Act (WARN Act) or state mini-WARN Act notice is required, and determine the employees, employee representatives and government officials that must be notified.
- ✓ Determine whether COBRA or state mini-COBRA obligations are triggered by layoffs.
- ✓ Review whether employees selected for layoff have conversion rights with regard to other insured benefits.
- ✓ Accurately compute paid time off (PTO) benefits available to employees and determine deadlines for payment of final wages, including PTO where applicable.
- ✓ Assess whether any grants or customer contracts are impacted by the termination of key employees.
- ✓ Review employment contracts and collective bargaining agreements to determine prerequisites to termination, severance eligibility, accelerated vesting of equity, payments under incentive compensation plans and post-termination obligations of both parties.
- ✓ Review and assess selection criteria to avoid disparate impact on protected classes.
- ✓ Evaluate whether to offer severance to terminees, either in accordance with existing severance plans or in consideration for releases and waivers of claims.
- ✓ Comply with state law regarding forms of notice of termination.
- ✓ Review whether the number of terminations is a significant enough decrease in the percentage of plan participants so as to constitute a partial termination of a qualified retirement plan.
- ✓ Prepare for questions regarding unemployment eligibility and applications.
- ✓ Reassess ACA coverage and reporting obligations.

Leaves of Absence

- ✓ Review existing paid sick leave and federal Family and Medical Leave Act (FMLA) policies and amend to comply with the Families First Coronavirus Response Act (FFCRA), or adopt a temporary FFCRA policy through December 31, 2020, if applicable based on employer size.
- ✓ For large employers not subject to FFCRA paid leave requirements, assess whether requests for leave for COVID-19 related reasons may nonetheless be covered by non-paid requirements under FMLA.
- ✓ Review all state and municipal paid sick and unpaid leave laws – both those in existence prior to COVID-19 and those adopted in response to COVID-19 – and ensure that existing policies meet or exceed such requirements.
 - For multijurisdictional employers, determine whether company will comply with requirements of each jurisdiction or apply the most generous leave requirements uniformly nationwide.
- ✓ Refresh training on non-FFCRA FMLA leave requests and ensure that managers and human resources professionals understand what triggers notice of a potential serious health condition of the employee or employee's spouse, parent or child, and deadlines for providing notices of FMLA eligibility.
- ✓ Review existing personal leave of absence and non-FMLA medical leave of absence policies to determine availability of such time off for COVID-19-related issues, including related to childcare for those ineligible for FFCRA paid family leave.
- ✓ Refresh training on unpaid leaves as potential ADA accommodations, including reviewing past precedent for permitting time off, the burdens (if any) associated with doing so, and the circumstances under which such leaves were granted and for how long.
- ✓ Designate personnel responsible for coordinating requests for temporary sick, FMLA/FFCRA, short-term disability, workers' compensation and ADA leaves of absence to ensure all types of leaves have been considered and employees' rights fully protected.
- ✓ Plan and prepare for disciplinary measures for employees who are proven to fraudulently request leave, including falsifying reasons for leave or doctoring medical forms.





Extended Teleworking/Remote Working/ Work-From-Home

- ✓ Determine whether the nature of the workplace, customer demands and essential job functions permit granting requests for extended teleworking by employees without access to childcare due to school and daycare closures, and whether doing so obviates FFCRA leave requests.
 - Pay particular attention to whether employees will be permitted to telework and tend to childcare/elder care concerns, or if doing so will be unduly disruptive to business needs and availability during business hours.
- ✓ Consider whether the business will grant requests to telework due to employee concerns regarding infection risk factors, whether as a disability accommodation, to assuage employee fears, or simply as a matter of employee convenience or preference.
 - Evaluate whether teleworking is required or recommended as a safety precaution for uniquely vulnerable segments of the workforce, such as those with preexisting respiratory or autoimmune disorders, chronic conditions, immunosuppressing conditions or taking immunosuppressing medications, or older or pregnant.
 - Prepare to respond to requests from employees who desire to delay return to the workplace out of exposure fears, increased COVID-19 risk factors, or their insistence on avoiding exposure due to living with persons with increased COVID-19 risk factors.
- ✓ Assess accuracy of paper timekeeping records or ability to implement electronic timekeeping systems for non-exempt remote workers, and retrain on the importance of recording all hours worked and avoiding “off the clock” work.
- ✓ Prepare training for extended teleworkers regarding reducing risks of “home workplace” injuries and need to promptly report potential workers’ compensation claims.
- ✓ Consider implementing ergonomic assessments of home workstations to avoid repetitive strain injuries and evaluations of home lighting to prevent eyestrain injuries.
- ✓ Source home office equipment that may be requested as reasonable accommodations by employees with disabilities.
- ✓ Review state income tax laws in the event of telecommuters working across state lines.
- ✓ Develop strategies for maintaining teamwork, accountability and regular communications.
- ✓ Collaborate with information technology (IT) and data security specialists to ensure protection of intellectual property, confidential and proprietary information, and company trade secrets, incorporating enhanced information security training to prevent data corruption and breaches due to use of unapproved devices, downloading unapproved software and phishing scams.

Compensation Issues

- ✓ Assess whether attendance-based incentive compensation plans should be adjusted to account for COVID-19-related absences, paying mind to whether state law permits unilateral modifications to incentive compensation plans.
- ✓ Assess whether bonus plans based on company performance or individual contributions, or a combination of both, should be adjusted in light of COVID-19-related circumstances.
- ✓ Assess whether productivity quotas should be adjusted in light of COVID-19-related circumstances, particularly where target compensation is based, in whole or in part, thereon.
- ✓ Assess whether commission plans for sales personnel should be modified based on COVID-19-related circumstances, paying heed to state law restrictions on modifying commission plans.
- ✓ For employers who may be considering implementing pay cuts or otherwise decreasing salaries or hourly rates, determine whether any prior notice to employees is required under applicable statutes. Note that some states require as much as 30 days’ notice prior to implementing pay reductions, and many require state-specific forms of notice prior to implementing such changes.
- ✓ If an employer has implemented “hazard pay,” shift differentials, retention bonuses or discretionary bonuses to incentivize employees working during the COVID-19 pandemic, particularly at essential businesses exempt from shelter-in-place or other isolation orders, ensure that such additional compensation is factored into non-exempt employees’ regular rate of pay for purposes of complying with the Fair Labor Standards Act (FLSA), applicable state wage payment laws and, where applicable, FFCRA wage replacement calculations.
- ✓ If employees were provided pay advances or permitted to accrue negative PTO or vacation balances, assess how to recoup those advances or negative accruals from ongoing pay or final wages payable to separated employees, noting state-specific limitations on withholding or deducting from pay without advanced written authorization.
- ✓ Assess whether employees who may have “volunteered” for additional work, such as sewing face masks or researching the availability of PPE, should be compensated for such work.
- ✓ If applicable under state unemployment insurance/compensation programs, employers should assess whether they can develop appropriate work sharing programs to minimize the need to reduce headcount.

Contract Issues

- ✓ Although most US employers employ their employees “at will,” and do not enter into written employment contracts with employees, some employers have written contracts with senior managers and executives. These agreements occasionally permit employees to terminate the agreement for “good reason,” which may include salary reduction or changing of roles, duties or responsibilities. Employers should review employment agreements of affected employees to ensure that any changes to their terms and conditions of employment do not result in unintended adverse consequences, or obtain appropriate consents and waivers in advance of any changes that would result in adverse contractual consequences in a manner consistent with contractual provisions governing subsequent modification.
- ✓ Employers also should review existing employment contracts to determine whether *force majeure* clauses may be implicated, or, whether, as a result of changed circumstances, an argument may exist that performance under a contract is impossible.
- ✓ Employers that are parties to restrictive covenant agreements – e.g., non-competition, non-solicitation (of customers and/or employees), and non-disclosure – should assess whether changed circumstances resulting from the COVID-19 pandemic impact the scope of those agreements, including whether the employer’s legitimate protectable interests may have changed.

Union Issues

Those employers with employees represented by a labor union should be mindful of the following issues.

- ✓ Changed business circumstances may require an employer to provide notice to, and offer to bargain with, its employees’ collective bargaining representative prior to making any changes to employee wages, hours, or other terms and conditions of employment.
- ✓ Employers that are party to a collective bargaining agreement containing a grievance arbitration procedure should assess the impact of any delays in grievance processing on the timeliness of those grievances and/or the steps under the grievance arbitration procedure.
- ✓ Employers of union-represented employees, like employers of unrepresented employees, must be vigilant not to take adverse action against employees for engaging in group or other collective action concerning workplace concerns, particularly as they may relate to health and safety matters, so as not to interfere with employee rights under, or engage in potential unfair labor practices in violation of, the National Labor Relations Act (NLRA).



Health and Safety Issues

- ✓ Employers must assess current practices and determine if additional measures are needed to reduce the risk of workplace exposure to pathogens, following [recommendations](#) from the Department of Labor’s Occupational Safety and Health Administration (OSHA) and state equivalents, which obligate employers to provide workplaces free from recognized hazards that are causing or are likely to cause death or serious physical harm.
- ✓ Employers should plan for and provide appropriate training on the use of any required PPE.
- ✓ Employers should review and comply with OSHA’s [Interim Enforcement Response Plan](#) for reporting and recording of COVID-19 in the workplace.
- ✓ Employers should confirm availability of any employee assistance program (EAP) providers and remind employees of availability of help provided through or by those programs.
- ✓ Employers should assess whether there are any vulnerable populations in their workforce and implement appropriate measures, where practicable, to provide enhanced safety precautions for those employees.
- ✓ Employers should review the protocols for maintaining compliance under HIPAA and any applicable state privacy laws.

Policies and Procedures

- ✓ Assess whether to conduct temperature testing of employees (and all others entering the workplace). If a decision is made to conduct fever screening, use equipment with reasonable reliability for temperature gauging and ensure proper collection and maintenance of documentation, with particular attention to confidentiality and ADA compliance issues.
- ✓ Decide whether to suspend (or leave suspended) non-essential business travel and whether to obtain consents/waivers from employees who elect to travel.
- ✓ Review any current federal FMLA policy, revising as needed to address benefits under FFCRA (if applicable).
- ✓ Review or implement (if applicable) a remote working/teleworking policy, including in coordination with ADA reasonable accommodation policies.
- ✓ Review and update the business travel policy.
- ✓ Review and update attendance and PTO policies, being mindful of likely future use for potential COVID-19-related reasons.
- ✓ Review and update job descriptions; consider designation of certain duties and responsibilities as in-office/on-site essential duties that cannot be performed remotely.
- ✓ Review and update business expense reimbursement policy to address potential expenses of remote work and cleaning/laundrying of PPE, paying attention to state-specific requirements for timeliness and thoroughness of business expense reimbursement.
- ✓ Confirm information technology (IT) and data security policies are current and that employees have received recent refresher training in light of the increase in COVID-19-related phishing schemes.

Documentation

- ✓ Employers must be vigilant in maintaining required and advisable COVID-19-related documentation, including of:
 - Cleaning/sanitizing procedures and logs of cleaning activities
 - Contracts with external cleaning agencies and records of frequency of visits
 - Dates of confirmed positive COVID-19 diagnoses, suspected positives and providing of notice to others potentially exposed
 - Temperature-testing procedures and employer-initiated isolations
 - FFCRA paid leave documentation (e.g., emergency paid sick leave and public health emergency expanded family and medical leave), including the information necessary to apply for available tax credits for those benefits, and
 - Daily employee headcount for purposes of determining FFCRA coverage and Paycheck Protection Program forgiveness under the CARES Act

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