



PEOPLE | IDEAS | SOLUTIONS



Return to Work Strategies WEBINAR June 24, 2020

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Timing and Scope of Reinstating Employees

Reinstating Employees Now

- No particular notice is required, but be practical and considerate of employee planning



Order of Reinstating Employees

- No requirement to bring back employees in the same order or reverse order of how they were laid off (but see next section on Pitfalls)



Number of Reinstated Employees

- No requirement to bring back all employees, BUT...
- You may have serious Paycheck Protection Program (PPP) loan forgiveness considerations



PPP Loan Forgiveness and Employees

PPP Loan Forgiveness can be reduced for a reduction in Full-Time Equivalent (FTE) employees

Application requires the borrower to report the average FTEs during the covered period (8 weeks OR 24 weeks)



Pitfalls When Reinstating Employees

Hiring or Rehiring Workers

- Age, race, disability, gender, pregnancy, etc.
- Are you hiring new rather than reinstating employees? Why?
- Do your employees have reinstatement rights?



Hiring or Rehiring Workers

- Recommendation: document the reasons and develop written criteria based on non-discriminatory factors



Wage and Hour/FLSA Concerns

- Non-exempt employees still get overtime
- Employees still can't be treated as independent contractors



Employers Can't Require Certain Employees To Return To Work

- ADA leave
- FMLA leave
- Military leave
- Workers' comp



Employers Can't Require Certain Employees To Return To Work

- If employee is qualified for the FFCRA (Families First Coronavirus Response Act) which has the EPSLA (Emergency Paid Sick Leave Act) and the EFMLA (expanded FMLA)



FFCRA Refresher

- Effective April 1 through Dec. 31, 2020
- EPSLA: Six reasons to be out for up to two weeks. (2/3 daily rate capped at \$200/day; or full daily rate capped at \$511/day)
- EFMLA: One reason to be out for up to an additional ten weeks. (2/3 daily rate capped at \$200/day)



FFCRA Refresher

- Employer cannot force other benefits prior to FFCRA – *employee* chooses order of benefits
- Employers with 25 or more must reinstate employee after EFMLA; under 25 no requirement if employee was out due to child care or position eliminated
- Business reimburses itself for 100% of the FFCRA benefits paid by keeping social security payroll taxes.



FFCRA Small Business Exception

Small business exception for less than 50 employees exempt *only* from child care benefits, *only* if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.



FFCRA – Summer Camps

The EPSLA and the EFMLA can
apply to lack of child care and
closing of summer camps



Employee Refusal: Unemployment

“I’m making more on unemployment than working” [PUC benefit of \$600/wk stops as of July 31, 2020]

Employee can be left on furlough, reduced hours, disciplined or fired; unemployment notified of voluntary resignation



Employee Refusal: Fear

“I’m scared I’ll catch the virus”

Recommendation/Part 1:

- Medical certification?
- Work it out with employee through accommodations?
- Special case such as health condition or family situation?



Employee Refusal: Fear

Recommendation/Part 2:

Employee can be left on furlough, reduced hours, disciplined or fired; unemployment notified of voluntary resignation



Employee Refusal: Fear

Recommendation/Part 3:

- Document the circumstances
- Ask employee to sign a statement
- Provide clear consequences in writing to employee
- Make certain the business has complied with current local, state and federal health and safety guidelines



Best Practices for the Return

- Provide reasonable notice of the return to work date
- Advise if permanent or temporary
- Advise of salary level
- Advise of change of duties



Best Practices for the Return

- Advise of health and safety measures
- Provide “Return to Work Plan”



Best Practices for the Return

Think twice! And be flexible.

Many requirements, deadlines, obligations, etc. have been changed or extended (e.g. COBRA payments and deadlines, tax deadlines, borrowing from 401(k) and many more)



Health and Safety Considerations

Health and Safety of Returning Employees

Can we ask employees to stay home if we suspect they have been exposed to coronavirus?



Health and Safety of Returning Employees

Can we ask employees to inform us if they have come in contact with someone who has or is suspected to have coronavirus, or is quarantined?



Health and Safety of Returning Employees

Can we tell other employees about an employee who has or may have coronavirus?



Health and Safety of Returning Employees

Can we require employees to get an antibody test before returning to work?



Health and Safety of Returning Employees

Can we require
employees to wear
masks or gloves?



Health and Safety of Returning Employees

Can we prohibit employees from wearing masks or gloves?



Health and Safety of Returning Employees

Can we impose travel restrictions? What if the employee's duties are to travel, e.g. sales?



Health and Safety of Returning Employees

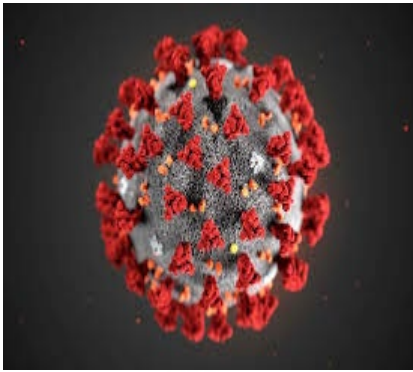
Can we prevent visitors and guests from our premises if we believe they have coronavirus, or otherwise?



Health and Safety of Returning Employees

Is the company liable
if someone catches the
virus?





COVID-19

Back to Work Location Strategies and Check List

■ Outline of Issues

- Overview of Key issues
- Plan for Common Sense
 - Scheduling
 - Building and Facilities
 - Testing
 - HR Issues
 - In-Floor Areas
 - Other Considerations
 - Resources

Overview of Key Issues

- ❑ Each organization should develop a Back to Office (“BTO”) Task Force to address key issues related to a return to work locations post pandemic restrictions being lifted. BTOs should include a cross representation of professionals from HR, legal, IT, finance, operations, etc.
- ❑ Their primary focus of each organization’s BTO should include:
 - ❑ (1) a focus on the safety of staff
 - ❑ (2) creating guidelines to address the fluid situation consistently across all locations
 - ❑ (3) developing (and modifying) plans to develop protocols to return to usual operating levels
- ❑ Where possible, BTO Task Forces should seek counsel from medical professionals

Apply Common Sense

- ☐ Key aspects of the program will rely on basic, common sense in light of the new-normal
- ☐ Have to be comfortable we have the right people worthy of our trust
- ☐ Basic common sense:
 - ☐ Stay home when one is ill
 - ☐ Wear masks in common areas
 - ☐ Socially distance
 - ☐ Prevent large gatherings in office
 - ☐ Limit use of common areas
 - ☐ Take advantage of open space that may be available
 - ☐ Apply guidelines consistently
 - ☐ Over communicate

Scheduling

- ❑ Ideally, employers have a schedule that gets staff back to the office safely and swiftly and over a condensed period. However, employers need a plan(s) that also provides options for a staged return based on government requirements
- ❑ Some may consider a staged return where a percentage of their staff are returned over a period of weeks; easing the workforce back in vs. an “all at once: approach
- ❑ Some solutions may include staff having alternating schedules of working “on site” and “off site” on an alternating basis. For example:
 - ❑ Team 1: In office Monday, Wednesday and Friday one week and Tuesday and Thursday the next week
 - ❑ Team 2: In office Tuesday and Thursdays one week and Monday, Wednesday and Friday the next week
 - ❑ Team 3: Comprised of those in need of special accommodations

Building and Facilities

- ❑ Here is the primary list of building and facility issues for consideration:
 - ❑ Masks (company provided or personal) should likely be worn at all times when in “common areas” like the lobby, elevator, staircase, etc.
 - ❑ Ensure the use of proper cleaning fluids and materials per CDC guidance and the scheduling of advanced and additional cleaning
 - ❑ Regarding the use of elevators, limit the number of employees allowed per car based on 6-feet social distancing
 - ❑ Verification and safety checks related to HVAC, ventilation systems, etc. per CDC guidance should take place regularly
 - ❑ Provide increased sanitizing stations, wipes, “door opening” wipes, etc.
 - ❑ Perform on-site temperature screening of “visitors and vendors” using hand held devices or other similar devices in private, secure areas
 - ❑ Enhance signage that promotes distancing
 - ❑ Ensure a process is in place for shared communication among all tenants when there is a “test positive” and what the protocols shall be by way of notices, cleaning, etc.

Testing

- ❑ Temperatures should be measured daily for the foreseeable future. It is suggested that in all possible instances that temperatures be taken “at home” to avoid staff coming into the workplace who may be ill:
 - ❑ There are various vendors that have the technology to confidentially capture results daily, including temperatures and responses to other health questions
 - ❑ Employees may enter their temperatures into a secure web site and be advised based on their result as to whether to report to work or stay home and speak with a physician. This ensures that someone who is potentially ill does not enter a facility to then be sent home.
 - ❑ Employers may implement spot testing on site as a check and balance
 - ❑ The cost for most solutions is reasonable
 - ❑ In the event this process is not selected or practical based on industry type, employers should contract with a firm that can safely take temperatures

HR Issues

- ❑ HR issues will be fluid and new challenges will arise as we return to the workplace
- ❑ Issues all employers need to address include:
 - ❑ Documenting business travel policies
 - ❑ Evaluating processes on requests for unique accommodations for medical or personal issues related to working remotely
 - ❑ Having a policy to address those able to return to the workplace but who refuse to do so
 - ❑ Establishment of written procedures for temperature testing, etc.
 - ❑ Establishment of written procedures documenting all safety measures taken
 - ❑ Review of PTO and policy issues related to the use of such time post pandemic
 - ❑ Continue to follow new federal requirements related to approved Leaves related to COVID-19 (which are effective through 12/31/2020)

In Floor Issues

- ☐ In-floor issues to be considered include:
 - ☐ Doors off elevators should remain open to avoid contact (if permissible under fire prevention standards)
 - ☐ Staff should wear masks when they are in the corridor, bathroom or open areas
 - ☐ Conference rooms should be limited to not more than 6 people (or whatever state or federal guidelines may dictate), provided social distancing at 6 feet can be established (excess chairs will be removed)
 - ☐ Kitchen areas should be closed for coffee and microwave use. This includes, for now, limiting the use of refrigerators and coffee making devices. A consideration may be providing bottled water, in the near term. Employees should eat at their desks
 - ☐ Only identified staff should operate equipment like copy machines. Machines should be regularly cleaned
 - ☐ Signage around social distancing should be prominently displayed
- ☐ Each employee should receive a “back to work” kit that includes masks and other supplies recommended by CDC
- ☐ Organizations should determine what excess space may be available in certain offices where workstations are too close. Organizations need to identify any workstations that may be too close for discussion and address working conditions (i.e., use of partitions, etc.)

Other Considerations

- ❑ Employers will need to also consider other issues, as developments unfold:
 - ❑ Having a swift plan to re-remote staff in the event of a flare up or change in state/federal rules
 - ❑ Once further advanced, the encouragement of anti-body testing for staff
 - ❑ Ensure that c-suite and other leaders regularly communicate with staff / lead by example

Resources

CDC's Visual Road Map of "Re-Opening" Guidelines:

https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/workplace-decision-tree.pdf?utm_campaign=Memb_US_CVR_Daily_Fri%205.15&utm_medium=email&utm_source=Eloqua

Overall Business and Workplace CDC Guidance:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

Targeted Business CDC Guidance:

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

EEOC Guidelines

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

DOL Pandemic Guidance

<https://www.dol.gov/agencies/whd/pandemic>

Note

This material is being shared in order to assist employers in developing BTPO plans. This material is not intended to provide legal, regulatory, clinical or HR guidance. The information contained herein is in intended to provide an outline of issues for consideration. Employers should consult with applicable professionals in developing and finalizing their respective BTO plans, including evaluating state and federal guidance.



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