

CORONAVIRUS RESOURCE CENTER

Debevoise Coronavirus Checklists— Top 10 Return to Work Considerations for U.S. Employers

April 20, 2020

Employers of all sizes and industries continue to face unprecedented human resources challenges in the midst of the COVID-19 pandemic. We know that many employers are beginning to consider return to work plans, particularly now that the White House announced Guidelines for Opening Up America Again, available [here](#). Although the details are evolving, many of the same general risks and concerns that existed at the outset of the pandemic will persist as statewide workplace shutdown orders begin to lift. It seems very likely that, at least temporarily, the costs of compliance with employment laws and health and safety guidance will increase for all employers. Here are ten employment law considerations to keep in mind when planning for an eventual return to more normal operations.

Regularly Monitor Government Guidance for Employers. The CDC, OSHA, DOL and state and local governmental authorities continue to update their COVID-19 guidance for employers, and we expect there to be additional detailed guidance issued as states plan for reopening. Links to this guidance can be found [here](#) among our links to External Resources. Governmental guidance is rapidly evolving, and it is critical for employers to stay current on developments that could impact their operations, including in the states and cities where they are located.

Prioritize Health and Safety. Take all reasonable steps necessary to ensure employee health and safety consistent with governmental guidance. Although this guidance is likely to evolve in the coming days and weeks, requirements will almost certainly include providing employees with personal protective equipment, continuing to encourage telework for certain employees or operations, applying social distancing rules within workspaces, closing common areas, implementing employee health screening and monitoring measures (such as temperature checks or other medical tests and inquiries), maintaining environmental sanitary practices at worksites and limiting

nonessential business travel. **Robust adherence to available guidance on maintaining a safe workplace will serve employers well** as they face the challenge of addressing the safety concerns of employees being asked to return to work and the potential legal claims that could be mounted if returning employees become infected.

Be Mindful of Discrimination Risks. As always, employer policies and decisions concerning the terms and conditions of employment must comply with anti-discrimination laws. Equal employment opportunity principles apply to return to work plans, including which employees to call back to work first or at all. Employers should be careful to treat all employees equally—and without regard to any legally protected characteristics—under any employer policy or practice, including with respect to call backs, telecommuting, medical inquiries, reasonable accommodations and the availability of leave or other benefits. Navigating these principles, especially as they apply to older and disabled workers, remains important, even though governmental guidance on re-opening the economy generally identifies older and certain disabled workers as particularly vulnerable to the virus. Absent further government guidance, orders or regulations, **employers should not adopt blanket rules prohibiting older workers or workers with underlying health conditions from working or requiring such workers to work under different conditions than other employees.** Indeed, the U.S. Equal Employment Opportunity Commission cautioned in recently issued guidance available [here](#) that “[e]mployers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.”

Be Prepared to Grant Reasonable Accommodations. The recently issued White House guidelines encourage employers to strongly consider special accommodations for elderly workers and workers with underlying health conditions. **Employers must be prepared to engage in the interactive process required by the ADA with all employees who request reasonable accommodations** and to grant reasonable accommodations when warranted, while at the same time avoiding discrimination against older or disabled workers.

Make ADA-Compliant Medical Inquiries. While disability-related inquiries and medical examinations are usually prohibited under the Americans with Disabilities Act (“ADA”), COVID-19 poses a “direct threat” that has shifted the compliance requirements during the pandemic. Employers can currently measure temperatures, and indeed may be required to do so. Employers may also ask employees to disclose certain COVID-19-related health information, including why they are absent from work and whether they have virus symptoms. There is likely to be further guidance in coming days or weeks on exactly what type of screening can and should be required before a sick employee returns to work.

Protect Employee Privacy. Employers are likely to be collecting more employee medical information, test records and documentation than before the pandemic. All such information must be treated as confidential medical records and protected in accordance with the ADA and any other applicable state privacy laws. Additionally, if an employee becomes ill or exposed to COVID-19, there will be good reasons to want to share that information and use it for purposes of contact tracing, but it is also important to **maintain the confidentiality of employees' medical data as required by law**, including the medical status and identities of diagnosed employees, unless an employee expressly consents otherwise.

Comply with Federal and State Leave Laws. Assess whether an employee's leave qualifies for job-protected leave under the federal Emergency Paid Sick Leave Act (the "Sick Leave Act"), the Emergency Family and Medical Leave Expansion Act (the "EFMLA"), state law, local sick leave laws or company policy. Our client update available [here](#) describes the leave available under the Sick Leave Act and EFMLA. **Ensure that sick leave policies are consistent with current law and governmental guidance** and that employees are reminded of these policies.

Protect COVID-19 Positive Employees from Retaliation. The CDC and others have warned of the stigmatization of individuals who have tested positive for COVID-19. Employers must protect employees from discrimination and retaliation by other employees if they are known or suspected to have COVID-19. Employers must also be careful not to discriminate or retaliate against such employees for being sick or taking leave that they are entitled to take.

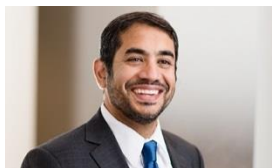
Be Prepared to Discipline Employees Who Refuse to Follow the Rules. There will undoubtedly be some employees who refuse or fail to follow new safety rules or who refuse to come to work even if they are not eligible for a reasonable accommodation or leave. Generally speaking, however, as discussed in our update available [here](#), employees do not have the right to refuse to work due to health and safety concerns unless certain relatively stringent conditions are met. Employers are going to have to address employees' preferences and concerns about safety in the workplace in a way that carefully balances several competing considerations. On the one hand, employers will want to be respectful of employees' good faith concerns and must avoid retaliating against employees for raising safety concerns in a protected manner or impairing employees' rights to engage in concerted activity for their mutual aid and protection in the workplace. But, on the other hand, employers need not acquiesce to demands that will impair a return to operations and are unnecessary under the law and not warranted under current health and safety guidance. In some circumstances, discipline for rule violations will be required.

Communication is Key. Effective employee communications can often mitigate legal risks. Take steps to effectively communicate with employees, whether through regular email updates, virtual or telephonic town halls, an intranet site or memos to employees distributed at the worksite. Establish clear points of contact for employees to direct questions and concerns.

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Many of these employment issues involve legal judgments, and managers should check with human resources or internal or external counsel if there are questions about specific situations. If you have any questions or require assistance with compliance with federal and state employment laws during this challenging time, please do not hesitate to reach out.

For more information regarding the coronavirus, please visit our [Coronavirus Resource Center](#).



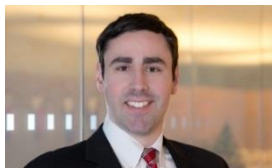
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