

**CORONAVIRUS RESOURCE CENTER**

# Considerations for Developing a Back-to-Work Plan

May 7, 2020

The COVID-19 pandemic has upended businesses and created a host of new human resources challenges for employers in all fields and locations. We previously prepared a list of 10 employment law considerations to keep in mind when planning for a return to more normal operations, available [here](#). With many states beginning to lift stay-at-home restrictions and the country looking toward a gradual reopening, a new set of challenges is emerging for employers as they develop plans for returning employees to the workplace. The details of a particular company's back-to-work plan will be highly dependent on the geographies and industries in which that company operates, but the core considerations can be broken down into three steps.

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## Step 1: Understand State Return-to-Work Orders

The first step in developing any back-to-work plan is to take into account what is required or permitted under applicable state orders, what will become permitted, and on what timeline. We have been closely monitoring state orders, and our chart of state developments through May 6, 2020 is available [here](#).

Each state's plan to reopen is unique and requires a state-specific and fact-specific inquiry to determine the proper course of action for any particular business. However, there are a few common themes:

- **Many states that have announced plans are following the Center for Disease Control's guidance.** Based on the CDC's recommendations, once a region experiences a 14-day decline in hospitalization rate, number of cases, or rate of positive COVID-19 tests, the state may begin reopening.

- **States are taking a phased approach to reopening.** While these phases look different for every state, most states are choosing specific industries to open up before others based on whether risk of infection while on the job is considered high and whether a business is considered “more essential.” Most phases will last anywhere between two and four weeks before assessing if the state has reduced the spread of COVID-19 sufficiently to further relax stay-at-home orders.
- **States are taking a relatively consistent approach as to which industries can open up sooner and which will open up in a later phase.** Almost all states, including some that are taking a more conservative approach, like New York and California, have started allowing certain regions or the whole state to resume elective outpatient treatments and surgeries. A handful of states are also allowing restaurants, museums and libraries to reopen. These kinds of businesses are only allowed to operate with limited capacity—anywhere between 25% capacity to 50% capacity depending on the state.
- **Larger or more populous states are taking a regional approach to reopening.** For example, Governor Cuomo of New York has announced that he plans to do this and will likely allow businesses in the Northern part of the state to open first, in phases, before allowing businesses in the Southern part of the state—like New York City—to open. California, Pennsylvania and New Jersey, among other states, have announced similar approaches.
- **Many states are forming regional coalitions to coordinate reopening plans.** Some states, particularly those in the South, are taking a more aggressive approach to reopening the economy. Other states, including those in the Northeast and on the West Coast, are agreeing to take a more conservative approach.

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## Step 2: Plan for Health and Safety

The second step in developing a back-to-work plan is outlining the specific new policies, practices and procedures that each workplace should adopt for promoting the health and safety of those in the workplace and mitigating litigation risk arising from health and safety issues. In doing so, employers should monitor and ensure compliance with federal, state and local guidance—and develop and maintain a record of that compliance—as the most crucial means of both advancing worker safety and reducing liability risk. Some broad categories of safety considerations that employers will need to grapple with as they develop their plans include:

- **Timing.** A key question is whether to reopen as soon as restrictions are lifted or to wait or ramp up over time, in light of the continuing risk of infection. Employers should consider which workers are truly needed on-site and who can work remotely or rejoin the workplace later; what preparation is needed before returning, such as engaging in deep cleaning or modifying the physical workspace; and whether employees may have relocated or may reside in different counties and states still subject to differing restrictions.
- **Density.** Many state orders specifically limit business capacity when reopening, and even as restrictions are lifted, it is clear that distancing will be an essential and ongoing tool to limit infection. So employers may want to consider a variety of options for limiting density in the workplace. Options include: beginning with a “soft” opening in which returning to work, at least for some workers, is optional; starting with a skeleton team and then building up the workplace over time; staggering start times; dividing workers into an “A Team” and “B Team” who come in on different days. Employers may also want to adopt policies to limit the number of people in certain physical spaces at one time—for instance, limiting customers entering a store or having a maximum number of people permitted in an elevator.
- **Workplace Changes.** A return to work will inevitably involve changes in business operations and the physical work space itself, at least temporarily. Policies limiting in-person meetings and other gatherings, as well as business travel may be appropriate for some period. New policies may also be appropriate for shared spaces, such as breakrooms, conference rooms, and even highly visited areas around printers or clock-in technology, for reducing shared equipment, and for increasing distance between individual work stations. A few other ideas include adding barriers between work stations, adding markings or notices to remind employees of distancing, implementing one-way traffic flows, and enabling contactless mechanisms for doors or other objects. Employers must be mindful, however, that any workplace changes aimed at promoting health and safety should not discriminate against employees on the basis of age, disability, national origin, or any other protected status, regardless of whether employees in particular groups are or are perceived to be at heightened risk for infection.
- **PPE.** Employers likely should provide and/or permit certain protective equipment for employees. In particular, many states require workers in reopening businesses to use masks or face coverings and some require employers to provide face coverings at the employer’s expense. Employers should make sure employees understand how to wear and maintain any protective equipment and should be on the lookout for related safety issues, such as masks fogging up glasses to impair vision or bandanas getting caught in equipment.

- **Employee Monitoring.** Employers will need to decide what monitoring or assurances are appropriate for allowing employees back into the workplace and what ongoing monitoring may be required once the workplace has reopened. Protocols could include temperature screening, employee health certifications, or eventually testing. Employers should also have clear protocols about what to do when informed of employee illness or exposure and how to maintain privacy in responding. Employers may also want to consider how they will respond if, despite best efforts, a significant outbreak of new infections occurs in a re-opened workplace.
- **Employee Communications.** Employers should keep employees apprised about steps taken to advance their safety and about changing guidance, policies or protocols. Engaging in dialogue with employees about concerns they have or specific risks that may not have been foreseen when drafting a back-to-work plan can help avoid both workplace safety and employee relations issues.

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### Step 3: Anticipate and Plan for Employee Relations Challenges

The third step in developing a back-to-work plan is planning for how the company will address the inevitable employee relations challenges. Proactive planning for how to handle the following challenges will help to alleviate burdens on management time later:

- **Employee Complaints.** Employers should consider implementing a well advertised internal reporting mechanism for employees to report health and safety complaints. Some employers may choose to advertise that their existing whistleblower hotline is open for such complaints, including on an anonymous basis. Others might direct complaints to a certain team or department, such as Human Resources. Complaints should be taken seriously and investigated when warranted, and employees should be told that they are free to report health and safety concerns without fear of reprisal.
- **Disciplinary Action.** There are bound to be some employees who violate new policies and workplace safety rules to varying degrees, for example, by refusing to wear masks or other PPE, failing to comply with social distancing rules, declining to participate in new COVID-19 screening tests or by refusing to physically return to the workplace at all. Employers will need to determine their approach to disciplinary action in the current environment in a manner that appropriately balances several considerations, including business needs, the desire to be responsive to employees' understandable anxieties about safety in the workplace, and recognition of employees' rights to engage in certain protected conduct for raising legitimate health and safety concerns.

- **Reasonable Accommodations.** We anticipate an uptick in the number of requests for reasonable accommodations that employers are fielding from employees with underlying health conditions, pregnant workers and those with caregiver responsibilities. Employers should take steps now to assess whether any changes to existing reasonable accommodations processes and related policies are warranted in anticipation of such requests and whether the processes and policies comply with current applicable law.
- **Frequency of Communications.** Increasing the frequency of employee communications can serve to foster good will and trust in the workplace. Aside from regular employee communications in emails or newsletters, employers may wish to implement more frequent virtual town hall meetings with senior executives or focus groups or anonymous surveys to provide a forum for learning about employees' COVID-related concerns.

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

Please do not hesitate to contact us with any questions.

#### NEW YORK



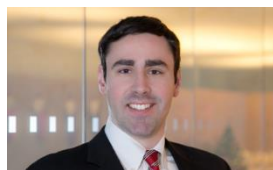
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