

May 2020

Client Advisory

Checklist for Employers: Preparing for Return to Work Post-Quarantine

PLEASE NOTE: This checklist is intended to offer guidance for employers to consider in planning for and responding to issues as employees return to in-person workplace operations. This checklist is not intended as legal advice. Employers should continuously monitor developments from their federal, state and local governments, as well as public health authorities and consult with counsel when necessary.

Can My Employees Return to the Workplace?

A. Government Orders

Do you have to shut down, remain shut down or curtail normal business operations due to an applicable government order?

- Review Executive Orders from Governor
- Review other local orders, including county and city orders

Is there an exception to any applicable mandated closure?

- Review available essential workers list for your state and locality

B. Which Employees Will Return To Work?

- Identify minimal workforce needed to operate business
- Evaluate impact of public health directives on size and location of workforce
- If bringing back less than all employees, consider impact of agreements (particularly union contracts) and demographics which may give rise to discrimination claims

Once you have confirmed that your workplace may open, consider the following in preparing your workplace for employees' return.

How Do I Prepare for the Return of Employees?

A. Creating A Safe Workplace

- Review OSHA's Guidance on Preparing Workplaces for COVID-19, available [here](#):
- Prepare and implement basic infection prevention measures
 - Promote hand washing
 - Adopt appropriate social distancing guidelines
 - Require appropriate and available personal protective equipment ("PPE").
 - Perform routine environmental cleanings of the workplace
 - Perform enhanced cleaning and disinfection if an employee is suspected or confirmed to have COVID-19
- Educate employees regarding best practices for hygiene in the workplace
- Consider protocols for mandatory temperature screening of employees and other persons who enter the workplace
 - Consistent with EEOC guidance, protocols should be consistently applied and results maintained confidentially
 - "Contactless" thermometers may allow more efficient testing and reduce need for associated PPE

- Conduct a risk assessment and determine which of OSHA’s four categories of job classifications your workplace falls into, depending on the employee’s exposure risk associated with the job. By way of example only, here are the four OSHA categories and some of the workplaces or workforces that fall within these four categories:
 - Very High: Healthcare workers and laboratory personnel working on known or suspected COVID-19 patients or samples
 - High: Healthcare support staff and medical transport worker on known or suspected COVID-19 patients
 - Moderate: Employees requiring frequent or close contact (less than 6 feet) of known or suspected SARS patients (but not COVID-19 patients), including those with frequent contact with travelers from international locations with widespread COVID-19 cases
 - Lower: Essentially everyone else, i.e., those without contact with known or suspected SARS or COVID-19-infected persons
- Based on which of four OSHA categories that applies to your business, review the specific recommendations from OSHA associated with your workplace’s risk category and implement all feasible measures

B. Dealing with Symptomatic or Ill Employees

- Develop procedures for prompt identification and isolation of sick employees or visitors
- Designate a contact for employees to report to when they feel sick at work
- Require employees who become ill with symptoms of COVID-19 to stay home or leave work as appropriate
- Consider requiring medical clearance from a doctor before permitting employees with COVID or quarantined due to COVID to return
- Consider implementing workplace testing and review EEOC’s Guidance on Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, available [here](#):
 - Is the chosen test job-related?
 - Is the test consistent with business necessity?
 - Is there a reasonable belief, based on objective evidence, that the employee has COVID-19 or symptoms of COVID-19? Employers should refer to assessments made by the CDC or public health authorities in determining whether such objective evidence exists. If not, the workplace test is not permitted under the ADA.
- * A medical exam may not always be necessary as the EEOC has explicitly stated that an employer may send an employee home if the employee has COVID-19, or symptoms associated with it.
- If an employee is diagnosed with COVID-19 and has been in close contact with coworkers, inform coworkers of potential exposure without disclosing the employee’s identity (“Close contact” is defined as within 6 feet for more than ten minutes per day)
- If an employee received a positive diagnosis for COVID-19, consider whether to record the exposure on the OSHA 300 log

C. Reviewing Employment Policies and Updating or Implementing as Necessary

Infectious Disease Preparedness and Response Plan

- Consider developing an infection disease preparedness plan as recommended by OSHA
 - Identify potential sources of infection in and outside of the workplace
 - Identify and implement controls to reduce exposure, such as use of PPE
 - Consider options for conducting operations with a reduced workforce

Telecommunication Policy

- Consider whether telework is a feasible option, taking the following into consideration:
 - Can the employer adequately supervise employees working remotely?
 - Can the employer monitor hours worked off-site?
 - Whether employees' duties require access to equipment or tools not available outside the workplace
 - Cybersecurity issues and the employer's ability to mitigate risks
 - Consider whether employees may need accommodations to work remotely from home
- If employees will be working from home, review or adopt a telework policy and/or telework agreements
- Describe the process for requesting a telework arrangement
- Clearly state expectations and performance objectives for telework:
 - Perform all duties satisfactorily
 - Keep home workspace in a safe condition free from hazards
 - Comply with all employment policies, including timekeeping, overtime and paid-time off policies
- Outline what, if any, telecommuting expenses will be reimbursed (telephone charges, internet service, office supplies) and how
- Outline instructions to mitigate potential security risks
 - Require teleworkers to use a secure connection
 - Prohibit teleworkers from using public wi-fi to conduct work
 - Require all work to be saved on a central database rather than locally on their computer
 - Train employees to identify suspicious email files and report suspected breaches to management

* NOTE: Various federal and state laws require employers to post notices advising employees of laws and regulations applicable in the workplace. To ensure compliance with this requirement, consider alternatives such as posting the notices on your intranet or physically mailing or emailing with a return receipt the teleworkers a poster.

Insurance Policies

- Consult with insurance brokers to determine whether adjustments to liabilities are necessary to cover additional exposures, especially where employees are engaging in telework
- Consult with your workers' compensation broker to determine whether adjustments to liabilities are necessary to ensure employees are protected from any risks associated with COVID-19

D. Training

- Provide training to employees on new safety precautions and procedures, including the proper procedure for reporting sickness/calling out
- Provide training to managers on how to respond to assumption-based comments about the virus and employees from countries most heavily affected
- Provide training to managers and other appropriate employees on the distinction between permissible inquiries to an employee who is experiencing symptoms of COVID-19 and impermissible disability related inquiries

E. Evaluating Employees' Requests for Leave

1. Is the employee entitled to paid leave under the newly enacted provisions of the Families First Coronavirus Response Act?

- Effective between April 1, 2020 and December 31, 2020
- Applies to most employers (private employers with fewer than 500 employees and public employers; employers of health care/first responders may opt out)
- a. **Emergency Paid Sick Leave Act** – Up to 10 days of paid leave if one of following criteria relating to COVID-19 is met:
 - The employee is subject to a government-ordered quarantine or isolation
 - A health-care provider advised the employee to self-quarantine due to COVID-19
 - The employee is experiencing symptoms related to COVID-19 and is seeking a medical diagnosis
 - The employee is caring for an individual – not necessarily a family member – who is subject to a government-ordered COVID-19 quarantine or isolation
 - The employee is caring for a child if their school is closed due to COVID-19; OR the employee is caring for their child because their normal child care provider cannot provide care due to COVID-19
- b. **Emergency Family and Medical Leave Expansion Act** – Up to ten weeks of paid leave (following 10 days of Emergency Paid Sick Leave) for employee caring for minor child because the child's school or daycare is unavailable due to COVID-19
- c. **Notice:** Employers must post/distribute notice of FFCRA rights, similar to other “bulletin board” labor law posters

2. Is the employee entitled to leave under state or local paid leave laws, some of which have been expanded to address COVID-19?

3. Even if unrelated to COVID-19, is the employee entitled to leave under previously-existing laws such as FMLA, or the employer's leave policies?

- * Do not forget to consider whether the request for leave is a request for a reasonable accommodation for a disability, which in some cases, may require additional leave.

4. Can employees refuse to report to work based on generalized fears, concerns relating to living with at-risk individuals, etc.?

- * **GENERALLY NO**, but note the following:
 - Employees who are “particularly vulnerable” to COVID, due to their medical conditions, may be entitled to a reasonable accommodation under the ADA or FMLA leave
 - Employers must apply their leave and attendance policies neutrally
 - Employers may not retaliate against employees who report, or engage in concerted action (strikes, protests, possibly even social media) regarding, unsafe work conditions or COVID-related complaints

What if I Need to Lay Off Employees or Reduce their Pay?

A. Planning for a Reduction in Force (“RIF”)

- * Before engaging in a RIF, consider first allowing employees to work remotely, temporarily reducing hours or pay

- Create a team who will plan and implement the RIF
- Document the legitimate business reasons that lead to the need for the RIF
- Establish criteria for determining which positions must be retained and eliminated, focusing on the needs of the business
- Determine the number of positions that will be eliminated and document the business reasons that lead to that decision
- Establish criteria for determining which employees in those positions will be included in the RIF
- Use only objective, non-discriminatory criteria such as: seniority, work performance, skill-set, attendance history
- Apply the selection criteria to individual candidates to determine which employees will be included in the RIF
 - In making this decision, consider including supervisors with greater insight on employee's work performance
- Consider creating a review committee to ensure selection criteria was applied appropriately and consistently
- Consider whether the employees chosen for RIF will create the potential for discrimination claims for disparate treatment or disparate impact
- Communicate layoff decision to selected employees, focusing on business justification for the layoff

B. Planning for Layoffs, Furloughs and/or Paycuts

- Consider same issues addressed above for RIFs, particularly as cuts which do not impact all employees will create potential claims
- Evaluate how a layoff, furlough, or pay cut may impact benefits program
- Review guidance on the availability of unemployment benefits for employees who may be laid off temporarily or permanently
- Evaluate existing PTO policies; amend or clarify to address whether employees are required to, may, or are prohibited from using PTO to make up for reduced time/pay

C. Reducing Wages or Hours and Complying with Fair Labor and Standards Act

Reduced Workweek and/or Pay

- Review any employment agreements or other contracts providing for limitations on salary or compensation reductions
- In advance of any reduction of employees' workweek or pay, notify affected employees in writing of the changes
- Do not decrease non-exempt employees' wages below minimum wage, continue paying overtime, and continue enforcing meal period/rest break policies
- Consult counsel before reducing exempt employees' hours or wages, as this may negate exempt status
 - Consider converting employee to an hourly, non-exempt employee
- Consider whether the employees chosen for reduced schedules or other cost-saving measures will create the potential for discrimination claims for disparate treatment or disparate impact
 - To mitigate such risk, use only objective, non-discriminatory selection criteria to reduce these risks such as: seniority, work performance, skill-set, attendance history

Full-week Closures

- Prohibit employees from performing any work during the closure
- Consider eliminating employees' ability to work remotely by removing access to email or remote connectivity

D. Complying with Workers Adjustment and Retraining Notification Act (WARN)

- WARN and comparable state and local laws require advance notice of closings, mass layoffs, etc., including those that impact employees over an extended time period
- These laws typically do not apply to temporary closings/layoffs/furloughs, or those caused by unforeseeable conditions or disasters
- Consult counsel as criteria are complex and consequences of violations may be significant

How Do I Ensure Compliance?

- Consult with a member of Archer's Labor and Employment Practice Group or labor/employment counsel

This checklist is intended to provide a baseline to help employers navigate the issues that may arise as their employees return to work. Please keep in mind that while implementing new policies and handling employment-related issues, employers should consider any state-equivalent laws, including, but not limited to, limitations on reducing hours or wages, notice requirements, mini-WARN Acts and discrimination laws.

Depending on your business, your checklist may be different and even more complex. If you would like further guidance, please contact us. Our attorneys are prepared to help you navigate the complexities of the law during these uncertain times.

If you have questions regarding any items in this checklist, or otherwise need advice in navigating the complex employment issues arising as a consequence to the pandemic, please contact any one of the attorneys in our [Labor and Employment Practice Group](#) or any member of [Archer's COVID-19 Task Force](#).

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