

ANDERSON KILL EMPLOYMENT LAW INSIDER

ALERT

10 Critical Considerations for Employers Returning Employees to the Workplace

By Bennett Pine and John P. Lacey Jr.

The White House recently unveiled the “Opening Up America Again” guidelines on April 16, 2020, which include a three-phased approach for state and local officials to consider when reopening their economies and getting people back to work, while continuing to protect American lives. Many states have since reopened their economies, and many employers have reopened or are proposing to do so.

Employers, however, face unique and unprecedented challenges as they reopen their businesses. Below are 10 critical considerations for employers before determining whether employees should physically return to the workplace.

1. Communicate Reopening Plans with Employees and Stay Flexible

Initially, employers should communicate with their employees, and give advance notice of when they intend to reopen the workplace. In doing so, employers should consider whether and to what extent employees will be physically returning to the workplace, given the safety concerns. Before deciding to reopen, employers should plan how and to what extent they will implement alterations to the workplace and workflow outlined in point three below.

Employers should be guided by local, state and federal guidelines as they develop their plan to reopen the workplace. They should keep abreast of any developments in those guidelines, and should remain flexible, particularly for employees who may be wary of physically returning to the workplace. Employers should also expand counseling available through existing employee assistance programs to help employees work through these issues, particularly if employees are experiencing anxiety or emotional distress as a result of COVID-19.

2. Develop Appropriate Safety Policies

Even before reopening the workplace, all employers should develop appropriate workplace safety policies to maintain employee safety and

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prevent the spread of COVID-19. Communicating these policies to employees is critical, particularly to any employees who are wary of physically returning to the workplace. Employers should be guided by federal, state and local regulations in developing workplace safety policies, and should emphasize:

- Healthy hygiene practices.
- Social distancing.
- Use of personal protective equipment (PPE).
- Minimal use of any shared items and spaces.
- Sanitation.

Employers should certainly consider providing PPE to any employee who requests it once they return to work.

3. Keep the Workplace Safe

CDC guidelines offer crucial instructions for employers on how to keep the workplace safe. Employers should be prepared to review their human resources policies and practices to ensure they're consistent with public health recommendations and with existing state and federal laws. In addition, employers should consider:

- Whether spatial changes to the workplace to ensure social distancing are appropriate.
- Whether to limit the number of employees returning to the workplace at any time, e.g., via shift-work, so that social distancing is feasible.
- Whether partitions are appropriate.
- What PPE to provide employees.
- Where to install hand sanitizer dispensers.
- Whether access to certain portions of the workplace should be limited.

4. Implement Safety Protocols Objectively

When implementing new safety protocols and policies, it is critical for all employers to do so *impartially*. Otherwise, employees could perceive these safety protocols and policies to be discriminatory, which could expose employers to unnecessary legal risks.

The Occupational Safety and Health Administration has recommended various new safety protocols and policies that employers can implement once employees physically return to the workplace, including, but not limited to:

1. Actively encouraging sick employees to stay home.
2. Adjusting sick leave policies so they're flexible and consistent with public health guidelines.
3. Providing employees with PPE, such as masks, gloves or respirators, needed to keep them safe while performing their jobs.

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The importance of employer adherence to available guidelines on workplace protocols and policies cannot be overstated, and could ultimately reduce unnecessary legal risks.

5. Implement Procedures for Monitoring Employee Health

All employers should have procedures in place to monitor employee health. The CDC recommends the following safeguards:

- Encourage employees to stay home if they are sick or are experiencing symptoms.
- Establish routine employee health checks, which may include temperature checks or testing.
- Put a plan in place to address situations where an employee contracts COVID-19.

6. Create a Plan for Addressing Situations Where an Employee Tests Positive for COVID-19

Employers should prepare a response plan in the event an employee tests positive for COVID-19. To start, a sick employee should stay home, and should only return to work once their primary physician clears them to return to work. Employers should also:

1. Contact trace, i.e., ask the employee to identify all individuals they may have worked in close proximity or come in contact with.
2. Notify these individuals, but do so without revealing any confidential medical information, such as the name of the infected employee.
3. Thoroughly disinfect workplace areas that the employee frequented.

7. Maintain Employee Privacy

The CDC has warned against the stigmatization of individuals who have tested positive for COVID-19. Employers should protect employees from potential discrimination and retaliation by other employees if an employee has or is suspected of having COVID-19, and should remind employees that such conduct is against the law. In New Jersey, on March 20, 2020, Gov. Phil Murphy signed into law Assembly Bill No. 3848, which provides protections and remedies for individuals who take time off because they are, or are suspected to be, infected with COVID-19.

By the same token, employers should keep all information regarding employee medical information confidential in accordance with the federal Americans With Disabilities Act and other applicable privacy laws. CDC guidelines encourage employers to contact trace any employees who may have been exposed to COVID-19, but employers must do so in accordance with employee confidentiality. For example, an employer may properly relate that an employee in a given department tested positive without identifying the individual.

8. Consider Testing Employees

Pursuant to the Equal Employment Opportunity Commission, an employer may permissibly test employees before they enter the workplace to determine whether they have COVID-19. But if employers choose to test their employees, they must ensure the tests are accurate and reliable. Employers should also ensure that any testing is done discreetly, and that any test results are kept confidential. According to the EEOC, employers may also validly continue to take the temperatures of employees without violating applicable laws regarding medical exams, but again, these results must be kept confidential.



9. Prepare for Increased Liability Risk

There are two primary areas where employers can expect litigation to increase — leave of absence discrimination, and safety actions. In March, Congress passed the Families First Coronavirus Response Act (FFCRA). The FFCRA requires employers with fewer than 500 employees to provide up to 12 weeks of medical leave, paying employees at least two-thirds of their regular income to care for an ill family member. Most employers also are required to provide 14 days of paid sick leave to employees who:

1. Test positive for the coronavirus.
2. Demonstrate symptoms of the coronavirus.
3. Are subject to quarantine.

Employers should pay particular attention to these requirements and should not unreasonably deny employees' requests for time off. Otherwise, employers could face lawsuits, including claims that allege retaliation against workers who requested leave. Many of these types of suits have already been filed.

In addition, employers could face lawsuits alleging that the workplace is unsafe and actually caused employees to contract COVID-19 on-site. While that may be hard to prove, certain states have recently eased this burden by presuming that employees who caught COVID-19 on the job are covered by applicable workers compensation laws. Employers can reduce the likelihood of these types of lawsuits by adopting written safety protocols and procedures that are consistent with local, state and federal guidelines, and enforcing these guidelines strictly.

10. Consider Personnel Decisions in View of PPP Compliance

As discussed in our prior Alert, the Paycheck Protection Program (PPP) provides a direct incentive for small businesses to retain employees on their payroll. The program provides guaranteed, virtually interest-free loans to small businesses and other eligible organizations that employ 500 or fewer employees and require financial assistance to pay employees and maintain business operations between February 15, 2020, and June 30, 2020.

Loan forgiveness, though, is contingent upon businesses spending 75% of the loan on payroll. Thus, employers planning to reopen their businesses should also consider bringing back employees who have been furloughed or laid off to ensure that their PPP loan will ultimately be forgiven. As a result, employers should implement objective criteria (e.g., seniority, productivity, etc.) in making personnel decisions to avoid the perception that these personnel decisions are discriminatory.

In Sum

Although employers may be eager to reopen their businesses, they should do so thoughtfully and carefully consider how to reopen the workplace safely. Employee safety, compliance with law, and uniform safety protocols and procedures are of utmost importance as employers begin to prepare for the reopening of their businesses. ▲

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