COVID-19: U.S. EMPLOYER CHECKLIST

REOPENING STRATEGIES AND RETURN-TO-WORK POLICIES AFTER COVID-19 PANDEMIC

Date: 12 May 2021

U.S. Labor, Employment, and Workplace Safety Alert

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The following is a list of suggested practices for businesses to consider during the reopening process as they return employees to in-person work after an extended period of working remotely. The following are suggested practices for employers across all industries and are generally applicable to office settings. Prior to implementation, all practices and policies should be evaluated to ensure that they are compliant with federal law and guidance,[1] as well as state and local law. Employers considering a hybrid return-to-work model should consult Addendum A – Specific Considerations for Hybrid In-Person/Remote Employees.

Please note that state and local laws and ordinances may have additional or differing requirements.

COMMUNICATE WITH EMPLOYEES BEFORE FORMULATING A PLAN TO RETURN EMPLOYEES TO IN PERSON WORK

- Deputize an internal point of contact to communicate with employees about the possibility of returning to in-person work, well before employees are expected to be working in-person.
- Consider sending out a survey or informally collecting information from employees regarding their opinions on returning to work in-person.
- Expect employees to be hesitant about returning to in-person work and develop talking points to address common concerns, such as:
  - Concerns about a potential increase in COVID-19 cases after returning the entire workforce back into the office;
  - Childcare concerns when certain schools and summer care options have not reopened;
  - Concerns for employees who are or who live with or care for individuals who are at a higher risk for suffering from a severe illness from COVID-19; and
  - Concerns by employees about exposing their unvaccinated children to COVID-19
- Emphasize positive aspects of returning to in-person work, such as increased collaboration and connection with co-workers, in communications with employees.

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COMPLY WITH STATE AND LOCAL ORDERS REGARDING RETURN TO WORK AND CAPACITY LIMITS

- Ensure that any contemplated return-to-work plan complies with any state executive orders and local laws specifying which industry sectors may return to in person operations and requirements for capacity limits.
- Review state and local public health guidance related to returning employees to in-person work in your state and area of operations.
- Consult with local counsel regarding legal and public health requirements the company's return-to-work plan should consider before formulating a complete return-to-work plan.

FORMULATE A RETURN-TO-WORK PLAN BASED ON EMPLOYEE COMMUNICATION AND BUSINESS NEEDS

- After ensuring compliance with state and local orders and communicating with employees to gauge the overall attitude of the workforce regarding return to in office work, assess business needs to determine a viable return-to-work plan.
- Possible return-to-work plans include:
  - *Traditional*: returning all employees to in-office work during all work hours on the same date (with COVID safety protocols and social distancing measures in place).
  - *Incremental*: returning a small numbers of employees to in-office work at a time, depending on employee's willingness and desire to work in office, until all employees have returned to the office during all working hours (with COVID safety protocols and social distancing measures in place).
  - *Hybrid Option 1*: staggering weeks or days where certain employees May 12, 2021 home indefinitely (e.g., each employee would be physically present in office two to three days per week or every other week).[2]
  - *Hybrid Option 2*: transitioning certain positions or employees to working remotely on a permanent basis, while returning other positions to in-office work.[3]
  - *Remote*: transitioning the entire workforce to working remotely on a permanent basis.
- Consider office facilities and determine if all employees can be accommodated safely if present in the existing workspace at the same time.
  - Communal or shared workspaces may need to be converted into separated cubicles and workstations.
  - Employers may have downsized facilities during the pandemic given that the majority of the workforce was working remotely and alternative real estate may need to be arranged.
- Consult with corporate peers or industry groups to understand market trends regarding returning employees to in-person work in specific industry sectors.

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- Develop and communicate a re-exit strategy in the event employees must return to a fully remote model.

ANNOUNCE RETURN-TO-WORK PLAN TO EMPLOYEES AND ENCOURAGE FEEDBACK AND COMMUNICATION

- Provide details regarding the return-to-work plan to employees as soon as finalized, and at least one month in advance of the effective date of reopening.
- Inform employees of the COVID-19 safety precautions and protocols the company will have in place at the workplace.
- Provide instructions for returning company equipment employees were using to work from home upon return to in-office work.
- Encourage employees to speak with Human Resources or other management level employees about legitimate, individual concerns for returning to in-person work.[4]

END ANY FURLOUGHS OR TEMPORARY LEAVES OF ABSENCES FOR EMPLOYEES

- Assess workforce and determine (1) which employees will be recalled at the end of the furlough or temporary leave of absence and which employees (if any) may need to be terminated, and (2) what positions and salaries recalled employees will have. Consider any state or local predictive scheduling laws.
- If some or all furloughed employees may not be recalled due to changing business conditions, work with counsel to perform a disparate impact analysis, assess whether additional obligations may be triggered (such as Worker Adjustment and Retraining Notification Act notifications, termination payments, etc.), and decide whether to provide severance to separating employees in exchange for a release of claims.
- Document objective decision-making criteria for recalling or terminating employees to protect the company from potential discrimination claims. Decisions to recall certain employees cannot be based on apparent higher risk of COVID-19 complications (i.e., older or pregnant employees).
- Provide a Furlough Recall Letter to furloughed employees to whom re-employment will be offered. The Furlough Recall Letter should include the following:
  - Employment offer;
  - Return-to-work date;
  - Terms of employment, such as position, supervisor, salary, hours, and exempt/non-exempt status;
  - Identification of anything that has changed in the employee's offered position, as compared to the employee's pre-furlough position;

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- Benefits status, including how the recall from furlough affects benefits, accrued paid time off, and sick leave (being mindful of existing company policy and applicable law);
- Information regarding the company's accommodation request process should an employee need a reasonable accommodation upon the employee's return to work;
- Any new policies and procedures relating to re-opening, such as staggered shifts, work from home, social distancing, regular cleanings, personal hygiene, reduced customer capacity, and any industry-specific or government-mandated requirements;
- Appreciation for the employee's commitment to the company and his or her understanding and flexibility during this trying time; and
- Contact information for follow-up questions.

- Update payroll provider about changes to active status of employees that accept offer to return.
- Re-train employees who are recalled on proper safety guidelines.

RETURN EMPLOYEES TO IN-OFFICE WORK

- Encourage management and other senior level employees to be present in the workplace when employees return to in-person work. Consider offering a welcome message or sharing a small token of appreciation with employees.
- If an employee requests a reasonable accommodation for a physical or mental disability under the Americans with Disabilities Act (ADA), engage in the interactive process with the employee to determine whether a reasonable accommodation can be made without undue hardship.
  - After receiving this request, an employer can ask follow up questions or seek medical documentation to determine if the employee's physical or mental health condition constitutes a “disability” for the purposes of the ADA and if there is a reasonable accommodation that can be provided.
  - Common examples of reasonable accommodations for high-risk employees may include: providing additional protective measures or equipment; temporarily modifying the employee's work schedule; moving the location of where one performs work or increasing the space between an employee with a disability or others; eliminating less critical job duties of the employee; transferring employee to a lower-exposure work assignments; or allowing the employee to continue teleworking. The EEOC encourages employers and employees to be creative and flexible in identifying reasonable accommodations during this pandemic.[5]
  - If an employee had teleworked successfully for an extended period due to COVID-19, the employer may have difficulty demonstrating that a telework accommodation poses an “undue hardship” to the company.
- Do *not* automatically prevent an employee that is considered higher-risk for severe illness from COVID-19 from returning to work if the employee does not request an accommodation.[6]

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- Carry out the procedure for employees to return company property used during teleworking upon returning to in-office work. Implement consequences for employees who are delinquent in returning company property.
- Remind employees of all company policies and protocols that may not have been pertinent while employees were working from home, including but not limited to:
  - Physical security policies;
  - Company dress code; and
  - Commuter benefit policies.
- Train employees on all COVID-19 health and safety protocols or updated standard operating procedures relating to the health and safety of employees and office visitors and keep a record of trainings and safety information provided to employees.

CONTINUE ENCOURAGING EMPLOYEE HYGIENE AND SOCIAL DISTANCING MEASURES

- Implement or continue a temperature testing procedure[7] for employees to ensure that no one is coming into the workplace with a fever (temperature of 100.4 or higher). Refer to Model Temperature Testing Policy.
  - Ensure that the employee administering the temperature tests is protected. For example, depending on how the test is administered, the employee may need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator (e.g., an N95 filtering facepiece).
  - Consult with counsel to determine requirements of applicable state privacy notification laws, which may entitle employees to notice at the time of collection describing what information is being collected (body temperature) and the purpose(s) for which the information will be used (to maintain a safe work environment).
  - Provide a private setting for screening and ensure that all communications between screener and employee are confidential. Consider having employees who do not pass the screening test move to a safe and private location to review next steps, including return-to-office criteria.
  - Consider implications of storing information that is collected during the screening process and minimize the information that is collected (i.e., consider when information should be recorded and, if recordation is necessary, limit to factual health-related information, and treat information as a confidential medical record).
- If necessary, choose to administer COVID-19 testing to unvaccinated[8] employees before they enter the workplace to determine if the employee has the virus.[9]
- In the event that reliable COVID-19 antibody testing becomes widely available, consult with counsel and applicable federal, state, and local guidelines regarding the company's ability to request, require, disseminate, or use employee antibody test results in the workplace.[10]

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- Provide tissues and no-touch disposal receptacles.
- Place hand sanitizers in multiple locations to encourage hand hygiene.
- Discourage handshaking and encourage the use of other noncontact methods of greeting.
- Provide, require, or permit employees to wear face coverings or masks as recommended or required by the CDC, state, and local health officials.
- Routinely clean and disinfect all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs.
- Provide disposable wipes so that commonly used surfaces can be wiped down by employees before each use.
- Consider adapting the workspace as much as practicable to facilitate social distancing and allow employees to remain six-feet apart from one another.
- Allow employees to meet face-to-face in small, one-on-one meetings, as long as employees are wearing face coverings. Discourage large group meetings in person and continue conducting these meetings via teleconference or web conference.
- Implement a visitor's policy that requires visitors to certify that they are not experiencing symptoms of COVID-19, regardless of vaccination status, and will wear a face covering when present at the worksite.
- Continue to follow government travel guidelines.
- Open all doors, where feasible, to reduce points of contact.

CONTINUE ENFORCING PERSONNEL POLICIES REGARDING EMPLOYEES WHO ARE SYMPTOMATIC OF COVID-19 OR RECENTLY HAVE BEEN DIAGNOSED WITH OR EXPOSED TO COVID-19

- Require any employee who is symptomatic of COVID-19 or has been diagnosed with COVID-19 in the past 14 days to continue to work from home or take leave until the employee qualifies to return to work. Refer to Response to a Confirmed Case of COVID-19 in the Workplace.
- Require any employee who becomes sick or displays COVID-19 symptoms during the employee's work shift to go home immediately. If it is not possible for the employee to go home immediately, the employee must self-isolate until able to leave work. The surfaces of the workplace should be cleaned immediately.
- If an employee has been exposed to COVID-19[11] and is asymptomatic, determine if the employee is (i) fully vaccinated[12] or (ii) a critical infrastructure worker.[13]
    - *If employee is NOT fully vaccinated or a critical infrastructure worker*: Instruct employee to not report to work and self-quarantine at home for a 14-day period.[14]

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- *If employee is fully vaccinated and remains asymptomatic*: Employee may report to work but must continue to monitor symptoms for 14 days post-exposure. If symptoms develop, employee must be directed to not report to work and follow CDC guidelines.
- *If employee is a critical infrastructure worker*: The company has the discretion, if business needs warrant or require, to follow CDC guidance for safety practices for critical infrastructure workers who are asymptomatic but have been exposed to COVID-19. These CDC guidelines should be confirmed against any state or local orders related to quarantines, workplace operations, stay-at-home, shelter-in-place, and other isolation related requirements.[15]

EVALUATE WHETHER TO ADOPT A VACCINATION[16] PROGRAM

- Determine if a mandatory or voluntary program is appropriate for the workplace.
  - Current EEOC guidance[17] suggests that mandatory COVID-19 vaccination programs are not prohibited under federal employment laws so long as employees are permitted to seek valid disability-based or religious exemptions under the ADA and Title VII of the Civil Rights Act of 1964 (Title VII), respectively.
  - Both unionized and non-unionized employers must consider the implications of the National Labor Relations Act with respect to any mandatory vaccination programs.
  - Review state laws that may extend additional protections to employees or may prohibit requiring vaccines as a condition of employment.
- If adopting a mandatory or voluntary program, be aware that any COVID-19 vaccination program will have to allow for accommodations based upon religious beliefs and disabilities.
  - Review current accommodation policies and procedures to ensure compliance with current EEOC guidance.
  - Ensure exemption or accommodation procedures are standardized and provide flexibility to avoid discrimination claims.
  - Engage in interactive process for accommodations by considering which potential accommodations are appropriate for a specific workplace, department, or position.
- If implementing a vaccination program, evaluate if employees must be paid for or provided paid leave in order to obtain or recover from the vaccine.
  - Under state minimum wage laws and the federal Fair Labor Standards Act, if an employer requires employees to get vaccinated, the time the employee spends obtaining the vaccine is likely compensable, even if it is non-working time.
  - Review applicable federal and state laws regarding time off for obtaining or recovering from a vaccine, including the voluntary extension of the Families First Coronavirus Response Act and applicable state and local laws.

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- If requesting proof of vaccination, ensure employees only provide proof of vaccination (i.e., a CDC Vaccination Card) and not additional medical information. Warn employees not to provide any medical information when submitting proof of vaccination in order to avoid violating the ADA.
- If considering offering a form of incentive to employees, monitor EEOC developments on legality of incentive programs and any limits on the type of incentive offered.
    - If administering an incentive program, employers must accommodate religious and disability exemptions under Title VII and the ADA.

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ADDENDUM A – SPECIFIC CONSIDERATIONS FOR HYBRID IN-PERSON/REMOTE EMPLOYEES

Determine the Scope of Hybrid Model to be Used (i.e., Will the Company Employ a Remote-Friendly or Remote-First Model) and Develop a Clear Policy for Employees

- Consider which employees will be eligible under the policy. Consider basing eligibility on employee tenure, job function, or another non-discriminatory factor.
- Consider the amount of time eligible employees will be required, if any, to be in-person compared to remote.
- Ensure the policy is neutral in its application and does not adversely impact a group of employees protected under Title VII of the Civil Rights Act of 1964 or under similar state or local law. Consider conducting an adverse impact analysis after deciding eligibility requirements. Remember that a policy that is facially neutral may nonetheless have an adverse impact on protected classes and therefore violate anti-discrimination laws.
- Communicate clear expectations to employees consistent with the written terms of the policy.

Configure Office Space Consistent with the Flexible In-Person/Remote Policy

- Consider whether office real estate should be re-configured to better support a flexible workforce. Consider redesigning office space to optimize for individual workspaces used by multiple employees on varying schedules.
- Communicate expectations for communal and shared office spaces consistent with current CDC guidelines and OSHA requirements.

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- Consider whether upgrades to existing conferencing technology will be required or whether upgrades implemented during the pandemic will be maintained.

Review and Revise Existing Employment Policies

- Review and revise existing employment policies to conform with a permanent shift to a flexible workforce. Policies which may need to be revised include:
  - Expense reimbursement policies;
  - Time-keeping policies for non-exempt employees;
  - Rest period and meal break policies;
  - Policies governing the protection of confidential information and data security;
  - Internet security policies;
  - Diversity, equity, and inclusion policies; and
  - Complaint/grievance procedure policies.

Determine a Strategy for Maintaining Office Culture and Communicate Expectations to Employees

- Ensure open channels of communication exist between employees and management regardless of location.
- Ensure all employees have adequate and uniform access to regular performance feedback.
- Ensure performance review criteria can be applied across employee populations regardless of any “face-time” requirements.
- Develop a uniform system of documentation so that key information between employees is written down regardless of physical location.
- Ensure “water cooler” conversations can be maintained indiscriminate of location. Unlike a fully remote team, information can be inadvertently isolated to in-person employees, creating an unintended two-tiered workforce. Consult with Information Technology personnel in order to leverage technology solutions so that communication remains streamlined between in-person and remote employees on any given day.

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FOOTNOTES

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Per guidance from the federal government, states can safely proceed to re-open businesses when: (1) there is a downward trajectory of influenza-like illnesses reported within a 14-day period and a downward trajectory of COVID-like syndromic cases reported within a 14-day period; (2) there is a downward trajectory of documented cases within a 14-day period or downward trajectory of positives tests as a percent of total tests within a 14-day period (flat or increasing volume of tests); and (3) hospitals can treat all patients without crisis care and a robust testing program is in place for at-risk healthcare workers, including emerging antibody testing. State and local officials may need to tailor the application of these criteria to local circumstances.

[1] Among guidance issued by federal, state, and local governments as well as several agencies, the Occupational Safety and Health Administration (OSHA) has issued "Guidance on Preparing Workplaces for COVID-19" and the Equal Employment Opportunity Commission (EEOC) has issued employer guidance regarding return to work.

[2] For additional considerations specific to this return-to-work plan, consult Addendum A – Specific Considerations for Hybrid In-Person/Remote Employees.

[3] For additional considerations specific to this return-to-work plan, consult Addendum A – Specific Considerations for Hybrid In-Person/Remote Employees.

[4] Through Memorandum GC 21-03, the National Labor Relations Board has emphasized that employee discussions concerning health and safety related to the COVID-19 pandemic may constitute protected conduct under Section 7 of the National Labor Relations Act.

[5] Examples provided by EEOC guidance. Consult with counsel to determine other reasonable accommodations and other obligations to your employees under the ADA and state and local anti-discrimination laws.

[6] Per EEOC guidance, an employer concerned about an employee's health being jeopardized upon returning to the workplace may only exclude an employee from the workplace after conducting an individualized direct threat assessment and engaging in the interactive process and determining that there is no reasonable accommodation that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions.

[7] For unionized companies, prior to implementing a temperature testing procedure, consult the collective bargaining agreement or the union as applicable.

[8] Pursuant to the 27 April 2021 guidance published by the Centers for Disease Control and Prevention (CDC), fully vaccinated employees may be exempted from COVID-19 screening test requirements if feasible.

[9] EEOC guidance provides that an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus; however, employers should ensure that the tests are accurate and reliable. Consult with counsel and with guidance from the U.S. Food and Drug Administration to determine what may be considered safe and accurate testing.

[10] EEOC currently does not provide guidance on COVID-19 antibody testing for employees but it may issue guidance for employers as this testing becomes more widely available.

[11] A potential exposure means being a household contact or having close contact within six-feet of an individual with confirmed or suspected COVID-19. The timeframe for having contact with an individual includes the period of time of 48 hours before the individual became symptomatic.

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[12] In general, people are considered fully vaccinated:

- Two weeks after their second dose in a two-dose series, such as the Pfizer or Moderna vaccines, or
- Two weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

[13] The sectors deemed critical infrastructure by the Cybersecurity and Infrastructure Security Agency (CISA) include (1) healthcare/public health; (2) law enforcement, public safety, and other first responders; (3) food and agriculture; (4) energy; (5) water and wastewater; (6) transportation and logistics; (7) public works and infrastructure support services; (8) communications and information technology; (9) other community or government-based operations and essential functions; (10) critical manufacturing; (11) hazardous materials; (12) financial services; (13) chemical; (14) defense industrial base; (15) commercial facilities; (16) residential/shelter facilities and services; and (17) hygiene products and services. For additional information, please consult the Department of Homeland Security CISA guidance and any applicable local orders.

[14] This practice is not required by federal public health mandate, but it is a highly suggested best practice in order to slow the community spread of the virus, which is a primary health priority of the CDC.

[15] Note that some states are not following the CDC guidance and are requiring critical infrastructure employees with known exposure to someone with COVID-19 to self-quarantine.

[16] As of 28 April 2021, there are three COVID-19 vaccines approved for use in the United States (Pfizer, Moderna, and Johnson & Johnson). Currently all three COVID-19 vaccines are only approved for Emergency Use Authorization under the Food and Drug Control Act and have not received full Food and Drug Administration approval.

[17] EEOC What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, WHAT YOU SHOULD KNOW, (Dec. 16, 2020) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

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