



During the COVID-19 global pandemic, businesses needed to react quickly to shutdown orders, quarantines and new safety requirements. Now, with the continued rollout of vaccines, employers again need to adapt to a continuously changing landscape when bringing employees back to work and resuming operations. Here are some important considerations for employers preparing to return to work in our new normal.

## DEVELOPING HEALTH AND SAFETY PROTOCOLS

### Workplace Safety Protocols

Federal law requires employers to provide employees with a safe work environment. The Occupational Safety and Health Administration (OSHA) has issued updated comprehensive guidance for employers to help them meet their obligations to provide a safe work environment in response to the COVID-19 pandemic. To comply with OSHA's requirements for a safe workplace, employers should develop a written COVID-19 Safety and Health Program that focuses on:

- ▶ Identifying where and how workers may be exposed to COVID-19 at work (a hazard and risk assessment)
- ▶ Identifying the hierarchy of workplace controls available to mitigate these risks (hazard elimination, engineering and administrative controls and PPE)
- ▶ Selecting a combination of controls that includes the most effective feasible controls, such as eliminating the hazard by keeping infected/potentially infected people from the workplace, implementing physical distancing, erecting barriers where distancing is not possible, improving ventilation and using proper face coverings. Documenting, distributing and communicating to employees the employer's COVID-19 safety plan and protocols

COVID-19 Safety and Health Programs should also address the specific requirements of state and local laws and executive orders, as well as any industry-specific requirements.

OSHA's COVID-19 guidance also encourages employers to do the following to foster a safe workplace:

- ▶ Make COVID-19 vaccines available at no cost to employees;
- ▶ Provide information and training about the benefits of vaccinations;
- ▶ Consider reasonable accommodations for employees who are 65 and over.

OSHA's guidance states that employers generally should provide face coverings to all employees at no cost. OSHA has adopted the CDC's recommendations for face coverings. Employers should be mindful that the CDC's guidance regarding face coverings may change over time.

### Protocols to Screen for Illness

Employers may be required by state or local law or choose to implement protocols to screen employees and visitors for COVID-19 before permitting access to the worksite, including temperature testing or testing for the virus itself. Employers must implement screening protocols in a nondiscriminatory, safe and legally compliant manner.

Important considerations for screening or testing for COVID-19 include:

- ▶ Designating a specific authorized individual(s) to screen for COVID-19;
- ▶ Training the designated individual(s);
- ▶ Providing personal protective equipment (PPE);
- ▶ Protecting sensitive medical information;
- ▶ Implementing a screening procedure that addresses privacy issues of those screened and compensation for time spent being screened or waiting for screening; and
- ▶ Planning the response if screening finds the employee or visitor has symptoms of COVID-19.

### Guidance for Managers

Employers should create a protocol for managers to use during the workday to determine how to handle certain situations involving COVID-19, including:

- ▶ Detection of COVID-19 symptoms or disclosure of a COVID-19 diagnosis;
- ▶ Upholding social distancing requirement and preventing close contact;
- ▶ Responding to an employee's request to voluntarily self-quarantine or isolate, or quarantine or isolate pursuant to a federal, state or local order; and
- ▶ Responding to an employee awaiting COVID-19 test results.

## IMPLEMENTING LEAVE AND REMOTE WORK

### Leave Requirements

Employers may be required to offer employees paid or unpaid leave benefits under state and local laws or ordinances, as well as their own leave policies. In addition, some covered employers may choose to voluntarily offer leave under the Families First Coronavirus Response Act (FFCRA) through September 30, 2021 and, in doing so, avail themselves of the available tax credits permitted under the American Rescue Plan Act of 2021.

Employers should establish policies for documenting leave and ensuring compliance with laws and policies.

### Remote Work

The COVID-19 pandemic forced many employers quickly to permit and enable employees to work remotely. Even as businesses reopen, teleworking for some portion of the workforce may be here to stay. To the extent employers continue teleworking arrangements, employers should ensure compliance with wage-and-hour laws, including rest and meal break requirements and overtime pay, to reduce the risk of Fair Labor Standards Act (FLSA) or state wage-and-hour claims.

## COVID-19 VACCINE POLICIES

### Deciding on a COVID-19 Vaccine Policy

As COVID-19 vaccines become more widely available, employers should carefully consider whether to require a COVID-19 vaccination for in-person work or require employees to provide confirmation of their vaccination status. While employers may legally implement a mandatory COVID-19 vaccine policy, doing so brings additional legal requirements, including a requirement to provide accommodations for medical and religious reasons. Employers may also wish to consider accommodations for pregnancy. Even employers who do not implement a mandatory vaccine policy should consider developing a policy so employees are aware of the company's position on vaccines.

### Providing Incentives to Encourage Vaccination

Outside of implementing a mandatory vaccine policy, employers may wish to incentivize employees to receive a vaccine. Such incentives may include paid time off or bonuses. Prior to implementing such an incentive program, employers should create a policy with clearly defined terms and should also consider state and local requirements to provide pay for the period of time needed to receive a COVID-19 vaccination. States such as New York have recently enacted laws requiring job-protected leave for such purposes.

## RECALLING EMPLOYEES FROM FURLOUGHS AND LAYOFFS

### Recalling Employees from Furlough or Layoff

Employers should prepare a notification for recalling employees, which should include:

- ▶ The return time and date;
- ▶ Any changes to work schedule, duties or reporting relationship;
- ▶ Any impact on benefits;
- ▶ Any changes in compensation;
- ▶ Confirmation of the employee's at-will status;
- ▶ COVID-19 self-monitoring and reporting requirements;
- ▶ Information regarding workplace safety and health; and
- ▶ Any other term or condition of employment originally addressed in the furlough notice.

Employers should conduct a nondiscriminatory analysis when recalls are done selectively (similar as they would in a reduction in force) and (if applicable) review the CBA.

## CHECKLISTS

When reopening worksites, important steps and considerations to keep in mind include but are not limited to:

### Employee Benefits and Executive Compensation

Ensure compliance with the new COBRA subsidy, which requires employers to provide a 100% subsidy for premiums otherwise due for COBRA coverage from April 1, 2021 through September 30, 2021. Employers will be repaid for these premium payments through refundable Medicare tax credits. Employers should ensure that they do the following:

- ▶ Identify "assistance eligible individuals": qualified beneficiaries whose COBRA qualifying event was an involuntary termination of employment or reduction of hours and who are not otherwise eligible for Medicare or other group health plan coverage. In addition to including individuals who first become eligible for COBRA on or after April 1, 2021, the subsidy also applies to individuals that had a COBRA qualifying event before April 1, 2021, and whose maximum COBRA coverage period includes all (or some portion) of the period between April 1, 2021 and September 30, 2021. Individuals who previously did not elect COBRA – or who elected COBRA but have let it expire – will be given the opportunity to make a second election to receive the COBRA subsidy beginning April 1, 2021.

- ▶ Ensure several new notice requirements are satisfied; including: (1) plans must provide COBRA subsidy information to individuals who first became entitled to elect COBRA on or after April 1, 2021 (this can be done through the amendment of existing COBRA election notices); (2) assistance eligible individuals who became entitled to elect COBRA prior to April 1, 2021 and whose maximum COBRA period has not expired, must receive a notice detailing their new election rights; and (3) plans must notify individuals when their COBRA subsidy will expire. Where applicable, employers are encouraged to consult with their third-party COBRA administrator to ensure that these notices are properly prepared and delivered.
- ▶ Employers should consider the adoption of certain flexible spending account (FSA) changes – specifically new rules allowing participants to carryover unused FSA account balances from 2020 to 2021 or extending an existing grace period through the remainder of 2021. In addition, for 2021, the non-taxable dependent care FSA limit has been increased from \$5,000 to \$10,500. Employers should consider whether the adoption of this increase would be beneficial to their employees.

## Immigration

- ▶ Updating all I-9 forms for new hires during the closure period (where all employees are working remotely), if COVID-19 entered in Section 2 regarding delay of physical inspection of required documents in order to confirm that documents were physically examined with the date of inspection within 3 business days of reopening;
- ▶ Allowing employees with E-Verify Tentative Nonconfirmations back to work until SSA and USCIS offices reopen;
- ▶ Determine whether worksites have been altered for H-1B workers;
- ▶ Prepare for potential site visits from USCIS;
- ▶ Determine under what circumstances remote work/international work policies will continue, noting that this may affect both I-9s and work visas;
- ▶ Determine obligations when entering into a government contract; and
- ▶ Maintaining continuity of immigration status of foreign national employees.

## ABOUT DUANE MORRIS

Duane Morris is ready to help you adapt your workplace to the ever-changing COVID-19 landscape. As employees return to in-person work, employers need to balance business interests, legal requirements and the health of their employees. Duane Morris has developed checklists, policies and forms that employers can use to navigate the complex issues and challenges presented by the pandemic. Whether an employer needs advice on issues relating to employment, benefits, immigration, labor or all of the above, Duane Morris attorneys are carefully monitoring and analyzing the latest COVID-19 developments.

### FOR MORE INFORMATION, PLEASE CONTACT:

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